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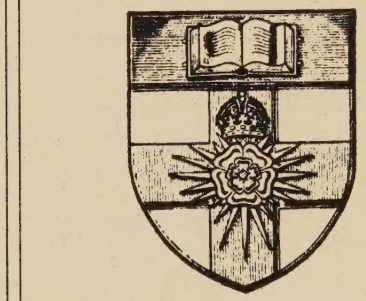

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SCOTT AND ANOTHER *v.* SCOTT

[House of Lords (Viscount Haldane, L.C., Earl of Halsbury, Earl Loreburn, Lord Atkinson and Lord Shaw), March 3, 4, 7, 11, May 5, 1913]

[Reported [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 29 T.L.R. 520; 57 Sol. Jo. 498]

Open Court—Need for trial to be in—Security for impartial and efficient administration of justice—Consideration of public decency and morality—Exceptions to general rule.

As a broad principle courts of justice have no power to hear cases in camera even by consent of the parties except in special cases in which a hearing in open court might defeat the ends of justice. The hearing of a case in public may be, and often is, painful, humiliating, or deterrent, both to parties and witnesses, and in many cases the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured because it is felt that in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, and the best means of winning for it public confidence and respect. Therefore, the power of a court to hear a case in private cannot rest merely on the discretion of the judge or on his individual view that a private hearing is desirable or expedient for the sake of public decency or morality. Any exception to this broad principle that the administration of justice must take place in open court must be based on a yet more fundamental principle—that the chief object of courts of justice must be to secure that justice be done. There is an exception, for instance, in cases relating to processes of manufacture where the secrecy of the process if of the essence of the cause and the subject-matter of the action would be destroyed by a hearing in open court. The party who wishes a case to be heard in camera on the ground that the paramount object of securing that justice is done would be rendered doubtful of attainment if the order were not made must make out the ground for his application strictly. Tumult or disorder in the court, or the just apprehension of it, would justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general; and witnesses may be

ordered to withdraw lest they trim their evidence by hearing the evidence of others. The hearing in camera of cases dealing with the affairs of infants and lunatics is really not an exception to the general rule, for these matters do not form part of the public administration of justice at all, but are an exercise of the parental jurisdiction of the court.

Nullity—Petition—Hearing—Need to be in open court.

The Divorce Court set up by the Matrimonial Causes Act, 1857, did not inherit in any class of cause within its jurisdiction, and not merely in suits for divorce strictly so called, the power of the ecclesiastical courts to hear in camera proceedings connected with matrimonial cases, and, therefore, an order made by a judge of the Divorce Division that an ordinary petition for nullity of marriage should be heard in camera was made in excess of jurisdiction and was bad. In any case, even if the order had been good, it would not have been effective to enjoin perpetual silence on all persons with regard to everything that took place at the hearing, except, perhaps the result of it.

Contempt of Court—Order for hearing of proceedings in camera—Publication of evidence after hearing—Party publishing held to be in contempt—Appeal to Court of Appeal—Competency—"Criminal cause or matter."

Where a judge of the Divorce Court made an order that a petition for a decree of nullity of marriage should be heard in camera and after the conclusion of the proceedings one of the parties published to third parties a transcript of the evidence given at the hearing of the suit,

Held: assuming that the order for the hearing in camera was valid, (i) it was not effective to enjoin perpetual silence on all persons with regard to what took place at the hearing of the suit, and, therefore, the party publishing the evidence was not guilty of contempt of court; (ii) a breach of the order would be punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction, and, consequently, a punitive order made with reference to the breach would fall outside the provision in s. 47 of the Supreme Court of Judicature Act, 1873 [see now s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925], that no appeal should lie from a judgment of the High Court in any criminal cause or matter.

Notes. Distinguished: *Ex parte Norman* (1915), 85 L.J.K.B. 203. Followed: *R.* v. *Lewes Prison, Ex parte Doyle*, [1917] 2 K.B. 254. Considered: *Re A. B.'s Petition* (1927), 97 L.J.P. 104; *McPherson* v. *McPherson*, [1936] A.C. 177. Referred to: *Cleland* v. *Cleland*, *Cleland* v. *Cleland and McLeod* (1913), 109 L.T. 744; *Moosbrugger* v. *Moosbrugger and Martin* (1913), 29 T.L.R. 658; *Norman* v. *Mathews*, [1916–17] All E.R. Rep. 696; *Re Stevenson*, [1918–19] B. & C.R. 106; *R.* v. *Manchester Local Profiteering Committee, Ex parte Lancashire and Yorkshire Rail. Co.* (1920), 89 L.J.K.B. 1089; *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1920), 36 T.L.R. 412; *Greenway* v. *A.-G.* (1927), 44 T.L.R. 124; *Hearts of Oak Assurance Co.* v. *A.-G.* (1931), 47 T.L.R. 579; *Re De Beaujeu*, [1949] 1 All E.R. 439; *Re Agricultural Industries, Ltd.*, [1952] 1 All E.R. 1188; *Alliance Perpetual Building Society* v. *Belrum Investments, Ltd.*, [1957] 1 All E.R. 635.

As to admission of public to courts, see 9 Halsbury's Laws (3rd Edn.) 345, 346, and (in the Divorce Division) ibid., vol. 12, pp. 219, 220. As to contempt of court see ibid., vol. 8, pp. 6 et seq. For cases see 16 Digest (Repl.) 145–149; 28 Digest (Repl.) 706; 16 Digest (Repl.) 40, 41.

Cases referred to:

(1) *Barnett* v. *Barnett* (1859), Sea. & Sm. 20; 29 L.J.P. & M. 28; 16 Digest (Repl.) 146, *286*.

(2) *H— (falsely called C—)* v. *C—* (1859), 1 Sw. & Tr. 605; 29 L.J.P. & M. 29; 1 L.T. 489; 164 E.R. 880; sub nom. *Hall (falsely called Castleden)* v. *Castleden*, Sea. & Sm. 29; on appeal sub nom. *Castleden* v. *Castleden* (1861), 9 H.L. Cas. 186, H.L.; 16 Digest (Repl.) 145, *275*.

A (3) *A.* v. *A.* (1875), L.R. 3 P. & D. 230; 44 L.J.P. & M. 15; 23 W.R. 386; sub nom. *Anstey* v. *Anstey*, 31 L.T. 801; 16 Digest (Repl.) 146, *289.*

(4) *M.* (*falsely called H.*) v. *H.* (1864), 3 Sw. & Tr. 517; 33 L.J.P.M. & A. 159; 10 L.T. 787; 13 W.R. 108; 164 E.R. 1376; sub nom. *Marshall* (*falsely called Hamilton*) v. *Hamilton*, 10 Jur. N.S. 853; 22 Digest (Repl.) 475, *5231.*

B (5) *C.* v. *C.* (1869), L.R. 1 P. & D. 640; 38 L.J.P. & M. 37; 20 L.T. 280; 16 Digest (Repl.) 146, *288.*

(6) *D.* v. *D.*, *D.* v. *D. and G.*, [1903] P. 144; sub nom. *Druce* v. *Druce*, *Druce* v. *Druce and Gibb*, 72 L.J.P. 51; 88 L.T. 573; 19 T.L.R. 387; 47 Sol. Jo. 419; 16 Digest (Repl.) 147, *292.*

(7) *Andrew* v. *Raeburn* (1874), 9 Ch. App. 522; 31 L.T. 73; 22 W.R. 564, L.C. &
C L.JJ.; 16 Digest (Repl.) 147, *298.*

(8) *Re Martindale*, [1894] 3 Ch. 193; 64 L.J.Ch. 9; 71 L.T. 468; 43 W.R. 53; 10 T.L.R. 670; 8 R. 729; 16 Digest (Repl.) 148, *300.*

(9) *Nagle-Gillman* v. *Christopher* (1876), 4 Ch.D. 173; 46 L.J.Ch. 60; 16 Digest (Repl.) 146, *290.*

(10) *R.* v. *Clement* (1821), 4 B. & Ald. 218; 106 E.R. 918; 16 Digest (Repl.) 11,
D *28.*

(11) *Re Lord Portsmouth* (1815), Coop. G. 106; 35 E.R. 495, L.C.; 16 Digest (Repl.) 146, *277.*

(12) *Malan* v. *Young* (1889), 53 J.P. 822; 6 T.L.R. 38; 16 Digest (Repl.) 146, *283.*

(13) *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. 156; 52 L.J.Ch. 704; 48 L.T. 822; 31 W.R. 913; 16 Digest 148, *308.*

E (14) *Mellor* v. *Thompson* (1885), 31 Ch.D. 55; 55 L.J.Ch. 942; 54 L.T. 219, C.A.; 16 Digest (Repl.) 148, *303.*

(15) *Re Read and Huggonson* (1742), 2 Atk. 469; 26 E.R. 683; sub nom. *Roach* v. *Garvan*, *Dick*, 794, L.C.; 16 Digest (Repl.) 6, *1.*

(16) *Re Ludlow Charities*, *Lechmere Charlton's Case* (1837), 2 My. & Cr. 316; 6 L.J.Ch. 185; 40 E.R. 661, L.C.; 16 Digest (Repl.) 8, *14.*

F (17) *Skipworth's Case* (1873), L.R. 9 Q.B. 230; 28 L.T. 227; sub nom. *R.* v. *Skipworth*, *R.* v. *De Castro*, 12 Cox, C.C. 371; 37 J.P. Jo. 85, D.C.; 16 Digest (Repl.) 23, *171.*

(18) *McLeod* v. *St. Aubyn*, [1899] A.C. 549; 68 L.J.P.C. 137; 81 L.T. 158; 48 W.R. 173; 15 T.L.R. 487, P.C.; 16 Digest (Repl.) 196, *856.*

G (19) *R.* v. *Gray*, [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 48 W.R. 474; 16 T.L.R. 305; 44 Sol. Jo. 362, D.C.; 16 Digest (Repl.) 23, *176.*

(20) *O'Shea* v. *O'Shea and Parnell* (1890), 15 P.D. 59; 59 L.J.P. 47; 62 L.T. 713; 38 W.R. 374; 6 T.L.R. 221; 17 Cox, C.C. 107, C.A.; 16 Digest (Repl.) 8, *11.*

H (21) *Lord Wellesley* v. *Earl of Mornington* (1848), 11 Beav. 181; 11 L.T.O.S. 286; 50 E.R. 786; 16 Digest (Repl.) 45, *403.*

(22) *Seaward* v. *Paterson*, [1897] 1 Ch. 545; 66 L.J.Ch. 267; 76 L.T. 215; 45 W.R. 610; 13 T.L.R. 211, C.A.; 16 Digest (Repl.) 10, *22.*

(23) *Avery* v. *Andrews* (1882), 51 L.J.Ch. 414; sub nom. *Avory* v. *Andrews*, 46 L.T. 279; 30 W.R. 564; 16 Digest (Repl.) 45, *405.*

I (24) *Re Freston* (1883), 11 Q.B.D. 545; 52 L.J.Q.B. 545; 49 L.T. 290; 31 W.R. 804, C.A.; 16 Digest (Repl.) 9, *15.*

(25) *Re M'Williams* (1803), 1 Sch. & Lef. 174; 16 Digest (Repl.) 10, **16.*

(26) *R.* v. *Ferrall* (1850), 2 Den. 51; T. & M. 390; 4 New Sess. Cas. 393; 20 L.J.M.C. 39; 16 L.T.O.S. 539; 15 J.P. 20; 15 Jur. 42; 4 Cox, C.C. 431, C.C.R.; 15 Digest (Repl.) 847, *8122.*

(27) *R.* v. *Robinson* (1759), 2 Burr. 799; 2 Keny. 513; 97 E.R. 568; 15 Digest (Repl.) 845, *8106.*

(28) *R.* v. *Bristow* (1795), 6 Term Rep. 168; 101 E.R. 492; 15 Digest (Repl.) 845, *8109.*

(29) *R.* v. *Johnson* (1816), 4 M. & S. 515; 105 E.R. 925; 15 Digest (Repl.) 846, *8110.*

(30) *R.* v. *Jeyes* (1835), 3 Ad. & El. 416; 1 Har. & W. 325; 5 Nev. & M.K.B. 101; 111 E.R. 471; 15 Digest (Repl.) 845, *8102.*

Also referred to in argument:

Lawrence v. *Ambery* (1891), 91 L.T. Jo. 230; 16 Digest (Repl.) 40, *338.*

Cox v. *Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 16 Digest (Repl.) 283, *534.*

R. v. *Steel* (1876), 2 Q.B.D. 37; 46 L.J.M.C. 1; 35 L.T. 534; 41 J.P. 245; 25 W.R. 34, C.A.; 14 Digest (Repl.) 608, *6030.*

R. v. *Fletcher* (1876), 2 Q.B.D. 43; 46 L.J.M.C. 4; 35 L.T. 538; 41 J.P. 310; 25 W.R. 149; 13 Cox, C.C. 358, C.A.; 14 Digest (Repl.) 609, *6033.*

Witt v. *Corcoran* (1876), 2 Ch.D. 69; 45 L.J.Ch. 603; 34 L.T. 550; 24 W.R. 501; 2 Char. Pr. Cas. 115, C.A.; 16 Digest (Repl.) 96, *1072.*

Stevens v. *Metropolitan District Rail. Co.* (1885), 29 Ch.D. 60; 54 L.J.Ch. 737; 52 L.T. 832; 33 W.R. 531; 1 T.L.R. 282, C.A.; 16 Digest (Repl.) 96, *1073.*

Mellor v. *Denham* (1880), 5 Q.B.D. 467; 49 L.J.M.C. 89; 42 L.T. 493; 44 J.P. 472, C.A.; 14 Digest (Repl.) 28, *9.*

Bristow v. *Smyth* (1885), 2 T.L.R. 36, C.A.; 16 Digest (Repl.) 96, *1068.*

R. v. *Whitchurch* (1881), 7 Q.B.D. 534; sub nom. *Re Nottingham Justices, Ex parte Whitchurch*, 50 L.J.M.C. 99; sub nom. *Ex parte Whitchurch*, 45 L.T. 379; 46 J.P. 134; 29 W.R. 922; sub nom. *Re Whitchurch, Ex parte Nottingham Justices*, 45 J.P. 617, C.A.; 14 Digest (Repl.) 29, *11.*

A.-G. v. *Bradlaugh* (1885), 14 Q.B.D. 667; 54 L.J.Q.B. 205; 52 L.T. 589; 49 J.P. 500; 33 W.R. 673, C.A.; 14 Digest (Repl.) 29, *16.*

R. v. *Foote* (1883), 10 Q.B.D. 378; 52 L.J.Q.B. 528; 48 L.T. 394; 48 J.P. 36; 31 W.R. 490; 15 Cox, C.C. 240, C.A.; 14 Digest (Repl.) 183, *1502.*

Re Dudley (1883), 12 Q.B.D. 44; 49 L.T. 737; sub nom. *Re Dudley, Ex parte Monet*, 53 L.J.Q.B. 16; 32 W.R. 264; 28 Sol. Jo. 71, C.A.; 42 Digest 360, *4107.*

Re Hardwick (1883), 12 Q.B.D. 148; 53 L.J.Q.B. 64; 49 L.T. 584; 32 W.R. 191, C.A.; 42 Digest 408, *4661.*

Seldon v. *Wilde*, [1911] 1 K.B. 701; 80 L.J.K.B. 282; 104 L.T. 194, C.A.; 16 Digest (Repl.) 91, *1008.*

Harvey v. *Harvey* (1884), 26 Ch.D. 644; 51 L.T. 508; 48 J.P. 468; 33 W.R. 76; 16 Digest (Repl.) 58, *546.*

Helmore v. *Smith (2)* (1886), 35 Ch.D. 449; 56 L.J.Ch. 145; 56 L.T. 72; 35 W.R. 157; 3 T.L.R. 139, C.A.; 36 Digest (Repl.) 598, *1581.*

Re Johnson (1887), 20 Q.B.D. 68; 57 L.J.Q.B. 1; 58 L.T. 160; 52 J.P. 230; 36 W.R. 51; 4 T.L.R. 40, C.A.; 16 Digest (Repl.) 17, *102.*

Crowther v. *Elgood* (1887), 34 Ch.D. 691; 56 L.J.Ch. 416; 56 L.T. 415; 35 W.R. 369; 3 T.L.R. 355, C.A.; 3 Digest (Repl.) 30, *225.*

Preston v. *Etherington*, *Etherington* v. *Preston* (1887), 37 Ch. 104; 57 L.J.Ch. 176; 58 L.T. 318; 36 W.R. 49; 4 T.L.R. 47, C.A.; 42 Digest 123, *1191.*

Re Wray (1887), 36 Ch.D. 138; 56 L.J.Ch. 1106; 57 L.T. 605; 36 W.R. 67; 3 T.L.R. 708, C.A.; 16 Digest (Repl.) 96, *1069.*

R. v. *Stafford County Court Judge* (1888), 57 L.J.Q.B. 483; sub nom. *R.* v. *Jordan*, 36 W.R. 797, C.A.; 16 Digest (Repl.) 95, *1059.*

Ex parte Woodhall (1888), 20 Q.B.D. 832; 57 L.J.M.C. 71; 59 L.T. 841; 52 J.P. 581; 36 W.R. 655; 4 T.L.R. 515, C.A.; 16 Digest (Repl.) 307, *839.*

R. v. *Barnardo* (1889), 23 Q.B.D. 305; 58 L.J.Q.B. 553; 61 L.T. 547; 54 J.P. 132; 37 W.R. 789; 5 T.L.R. 673, C.A.; 16 Digest (Repl.) 304, *799.*

Hunt v. *Clarke* (1889), 58 L.J.Q.B. 490; sub nom. *Re O'Malley, Hunt* v. *Clarke*, 61 L.T. 343; 37 W.R. 724; 5 T.L.R. 650, C.A.; 16 Digest (Repl.) 29, *224*.

R. v. *Tibbits*, [1902] 1 K.B. 77; 71 L.J.K.B. 4; 85 L.T. 521; 66 J.P. 5; 50 W.R. 125; 18 T.L.R. 49; 46 Sol. Jo. 51; 20 Cox, C.C. 70, C.C.R.; 16 Digest (Repl.) 25, *191*.

Re Ashwin, ex parte Ashwin (1890), 25 Q.B.D. 271; 59 L.J.Q.B. 417; 7 Morr. 175, C.A.; 5 Digest (Repl.) 1120, *9035*.

Re Edye (1891), 63 L.T. 762; 39 W.R. 198; sub nom. *Re a Solicitor*, 7 T.L.R. 183; 5 Digest (Repl.) 1103, *8902*.

Ex parte Pulbrook, [1892] 1 Q.B. 86; 61 L.J.M.C. 91; 66 L.T. 159; 56 J.P. 293; 40 W.R.1 75; 36 Sol. Jo. 79; 17 Cox, C.C. 464; 14 Digest (Repl.) 608, *6039*.

Re Armstrong, Ex parte Lindsay, [1892] 1 Q.B. 327; 65 L.T. 464; 40 W.R. 159; 7 T.L.R. 749; 17 Cox, C.C. 349; 8 Morr. 271; 16 Digest (Repl.) 94, *1048*.

Re Evans, Evans v. *Noton*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; 41 W.R. 230; 9 T.L.R. 108; 37 Sol. Jo. 101; 2 R. 216, C.A.; 16 Digest (Repl.) 10, *21*.

A.-G. v. *Kissane* (1893), 32 L.R. Ir. 220; 16 Digest (Repl.) 95, **388*.

Miller v. *Knox* (1838), 4 Bing. N.C. 574; 6 Scott, 1; 132 E.R. 910, H.L.; 16 Digest (Repl.) 6, *3*.

Seaman v. *Burley*, [1896] 2 Q.B. 344; 65 L.J.M.C. 208; 75 L.T. 91; 60 J.P. 772; 45 W.R. 1; 12 T.L.R. 599; 40 Sol. Jo. 684; 18 Cox, C.C. 403, C.A.; 14 Digest (Repl.) 609, *6037*.

Southwark and Vauxhall Water Co. v. *Hampton U.D.C.*, [1899] 1 Q.B. 273; 68 L.J.Q.B. 207; 80 L.T. 1; 63 J.P. 100; 47 W.R. 177; 15 T.L.R. 95; 43 Sol. Jo. 124, C.A.; affirmed sub nom. *Hampton U.D.C.* v. *Southwark and Vauxhall Water Co.*, [1900] A.C. 3, H.L.; 14 Digest (Repl.) 610, *6043*.

Re Edgcome, Ex parte Edgcombe, [1902] 2 K.B. 403; 71 L.J.K.B. 722; 87 L.T. 108; 50 W.R. 678; 18 T.L.R. 734; 46 Sol. Jo. 649; 9 Mans. 227, C.A.; 5 Digest (Repl.) 1109, *8960*.

Robson v. *Biggar*, [1908] 1 K.B. 672; 77 L.J.K.B. 203; 97 L.T. 859; 24 T.L.R. 125; 52 Sol. Jo. 76, C.A.; 14 Digest (Repl.) 609, *6038*.

Ex parte Fernandez (1861), 10 C.B.N.S. 3; 30 L.J.C.P. 321; 4 L.T. 324; 7 Jur. N.S. 571; 9 W.R. 832; 142 E.R. 349; 16 Digest (Repl.) 87, *956*.

Cobbett v. *Slowman* (1850), 4 Exch. 747; 8 State Tr. N.S. 1075; 19 L.J.Ex. 270; 14 L.T.O.S. 378; 14 J.P. 226; 154 E.R. 1417; subsequent proceedings (1852), 19 L.T.O.S. 233; (1854), 9 Exch. 633, Ex.Ch.; 16 Digest (Repl.) 311, *877*.

Ogle v. *Brandling* (1831), 2 Russ & M. 688; 39 E.R. 557, L.C.; 16 Digest (Repl.) 146, *278*.

Re Pollard (1868), L.R. 2 P.C. 106; 5 Moo. P.C.C.S. 111; 6 E.R. 457, P.C.; 16 Digest (Repl.) 60, *576*.

Stark v. *Stark and Hitchins*, [1910] P. 190; sub nom. *Mozley Stark* v. *Mozley Stark and Hitchins*, 79 L.J.P. 98; 101 L.T. 770; 26 T.L.R. 194, C.A.; 27 Digest (Repl.) 554, *5048*.

Anon. (1820), 2 Hag. Con. at p. 332.

Lady Herbert v. *Lord Herbert* (1819), 2 Hag. Con. 263; 3 Phillim. 34, 58; 161 E.R. 737, 1250, 1257; 22 Digest (Repl.) 583, *6679*.

Lewis v. *Levy* (1858), E.B. & E. 537; 27 L.J.Q.B. 282; 31 L.T.O.S. 194; 4 Jur. N.S. 970; 6 W.R. 629; 120 E.R. 610; 32 Digest 136, *1667*.

MacDougall v. *Knight* (1889), 14 App. Cas. 194; 58 L.J.Q.B. 537; 60 L.T. 762; 53 J.P. 691; 38 W.R. 44; 5 T.L.R. 390, H.L.; 32 Digest 138, *1698*.

Popham v. *Pickburn* (1862), 31 L.J.Ex. 133.

R. v. *Rudge* (1886), 16 Q.B.D. 459; 55 L.J.M.C. 112; 53 L.T. 851; 50 J.P. 755; 34 W.R. 207; 2 T.L.R. 243, C.A.; 16 Digest (Repl.) 509, *3410*.

R. v. *Brixton Prison (Governor), Ex parte Savarkar*, [1910] 2 K.B. 1056; 80 L.J.K.B. 57; 103 L.T. 473; 26 T.L.R. 561; 54 Sol. Jo. 635, C.A.; 16 Digest (Repl.) 209, *990*. A

Appeal by Mrs. Scott and her solicitor, Mr. Braby, from a decision of the full Court of Appeal, reported [1912] P. 241, dismissing an appeal by them from an order of BARGRAVE DEANE, J.

The order of BARGRAVE DEAN, J., was made on a motion by the present respondent, Mr. Scott, that the appellants should be committed for contempt of court for publishing to three persons a transcript of the shorthand notes taken at the hearing of a suit for nullity of marriage instituted by Mrs. Scott against her husband, which suit was heard in camera, and resulted in a decree in favour of the petitioner. Upon an appeal from this order it was decided that the matter, being of considerable importance, should be argued before the full Court of Appeal, and, after argument, the majority of the court, consisting of COZENS-HARDY, M.R., FARWELL, BUCKLEY and KENNEDY, L.JJ., gave effect to a preliminary objection taken on behalf of Mr. Scott, that it was a "criminal cause or matter" within s. 47 of the Supreme Court of Judicature Act, 1873 [see now s. 31 (1) (a) of Supreme Court of Judicature (Consolidation) Act, 1925], and that no appeal lay to the Court of Appeal. VAUGHAN WILLIAMS and FLETCHER MOULTON, L.JJ., dissented. B C D

Sir R. Finlay, K.C., Barnard, K.C., and *W. O. Willis*, for the appellants.

The Solicitor-General (Sir John Simon, K.C.), Danckwerts, K.C., and *Bayford* for the respondent.

Their Lordships took time for consideration.

May 5, 1913. The following opinions were read. E

VISCOUNT HALDANE, L.C.—The facts in this case are not in controversy, but questions of law of considerable public importance are raised. The appellant, Mrs. Scott, filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on Jan. 15, 1912, made absolute. In August, 1911, the appellant, Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case and of what really took place. In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by BARGRAVE DEANE, J., who decided that the two appellants had been guilty of contempt of court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of BARGRAVE DEANE, J., amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873. The Court of Appeal, consisting of COZENS-HARDY, M.R., FLETCHER MOULTON and KENNEDY, L.JJ., ordered the case to be re-argued before the full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. COZENS-HARDY, M.R., and F G H I

A Farwell, Buckley and Kennedy, L.JJ., were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton, L.JJ., took a different view.

The question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains B the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in C the courts below.

I think that it is established that the ecclesiastical courts, in the exercise of their jurisdiction in nullity suits prior to the Matrimonial Causes Act, 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these courts was very different from that of D the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence viva voce in open court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interroga- E tories delivered by the other side, but there was no cross-examination or, for that matter, examination-in-chief of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work what was called publication took place. This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage F was that arguments were heard by the judge of the court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open court. But G sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open court. As regards the arguments the court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the ecclesiastical court in matrimonial proceedings was terminated by the statute of that year, and a new court was established with H the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce a mensa et thoro, and a wholly new power was given to entertain petitions for dissolution of marriage. Section 22 provided that in all suits and proceedings other than proceedings for dissolution, the court should proceed and act and give relief on principles and rules which in its opinion should be as nearly as might be comformable to the principles I and rules on which the ecclesiastical courts acted, but this was to be done subject to the provisions of the statute itself and of the rules and orders made under it. By s. 36 the court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the court were, when their attendance could be had, to be sworn and examined orally in open court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open court, if the opposite party so desired. By s. 53 power was given

to the court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament. I think that the effect of s. 46 of the Act of 1857 was substantially to put an end to the old procedure, and to enact that the new court was to conduct its business on the general principles as regards publicity which regulated the other courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must, so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary courts of justice might have power to make it.

This appears to have been the view taken in *Barnett* v. *Barnett* (1) and *H— (falsely called C—)* v. *C—* (2), both decided in 1859, shortly after the Act of 1857 had come into operation. The second case came before the full court, which included BRAMWELL, B. In giving his judgment he observes that the Divorce Court,

> "being a new court, it was constituted with the ordinary incidents of other English courts of justice, and therefore that its proceedings should be conducted in public."

It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by BRAMWELL, B., and for some time this interpretation appears to have been adhered to. In a note to *A.* v. *A.* (3), the reporter observes that down to July, 1864, nullity cases were always heard in open court, but that in *M. (falsely called H.* v. *H.* (4) the evidence was of such a character that SIR J. WILDE signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A.* v. *A.* (3), however, SIR JAMES HANNEN held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on the dictum in *C.* v. *C.* (5), to the effect that the court had power, under s. 22 of the Act of 1857, to follow the old practice, and partly on a new practice which had begun to grow up. I think that SIR JAMES HANNEN laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the ecclesiastical courts, the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

It was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old ecclesiastical courts possessed of hearing in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that SIR JAMES HANNEN's judgment was followed by SIR FRANCIS JEUNE in *D.* v. *D.* (6). But while that learned judge held, somewhat hesitatingly I think, that the Divorce Court had in a suit for judicial separation inherited the power of the ecclesiastical courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. This second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the ecclesiastical court, I am of opinion that since the Act of 1857 it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am

in accord with the reasoning of BRAMWELL, B., in the case to which I have already referred, which led him to the conclusion that the court which the statute constituted is a new court governed by the same principles, so far as publicity is concerned, as govern other courts. In cases in other courts, where all that is at stake are the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the matrimonial court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But SIR FRANCIS JEUNE does not appear to have thought that it could. He proceeds in the final reasons for his judgment on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all courts.

Provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew* v. *Raeburn* (7) LORD CAIRNS and JAMES and MELLISH, L.JJ., appear to express themselves in its favour, but in carefully guarded terms. In interpreting their decision I think that NORTH, J., in *Re Martindale* (8), which was cited to us, went much too far; and while I agree generally with the judgment of JESSEL, M.R., in *Nagle-Gillman* v. *Christopher* (9), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the ecclesiastical courts, I cannot concur in it. The case of wards of court and lunatics stands on a different footing. There the judge who is administering their affairs in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it, therefore, yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that, if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *R.* v. *Clement* (10), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold applications, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is a contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to show that the evidence can be effectively brought before the court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open court. In either case he must satisfy the court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

It may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English courts of justice. A mere desire to consider feelings of delicacy, or to exclude from publicity details which it would be desirable not to publish, is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question, not for a court of justice, but for the legislature. I observe that in the Incest Act, 1908, the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case. In my opinion, the facts before Bargrave Deane, J., fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class which I have indicated, to take place in open court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open court. In my opinion, there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was, therefore, made under a mistaken impression as to the law, and if that be the substance of the matter it disposes of the appeal. The order was wrong and it would not affect the abrogation of the prima facie right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

A Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction, and a punitive order made with reference to the breach falls, in such cases, outside the B language of s. 47 of the Supreme Court of Judicature Act, 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in camera is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it. I am, therefore, of opinion that the judgment of the Court or Appeal should be reversed C and the order of BARGRAVE DEANE, J., discharged. I move accordingly.

EARL OF HALSBURY.—The facts out of which this question arises have been sufficiently explained by the LORD CHANCELLOR, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them. I am of the opinion that D every court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think that it is a mistake in some of the so-called exceptions thus to describe them, but I want, in the first instance, to emphasise the broad rule which I believe to be the law. I believe that this has been the rule, at all events for some centuries, but, as I will attempt to show presently, it has been the unquestioned rule since 1857, E unquestioned by anything which I can recognise as an authority. If this were merely an antiquarian investigation I might point to the treatise of MR. EMLYN in 1730 as a preface to the second edition of the STATE TRIALS. He says (p. iv):

> "In other countries the courts of justice are held in secret: with us publicly and in open view."

F He is there speaking of criminal trials, but he certainly has no good word to say of the ecclesiastical courts of his time, and if he could have added that they claimed a right to sit in secret, he certainly would not have omitted to do so. MR. DAINES BARRINGTON, writing in 1766 (OBSERVATIONS ON THE STATUTES), says, in the modern sense of an open court, that the legislature would never have allowed any fees to be taken for admittance. He says:

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> "I do not recollect to have met with any injunction that all courts should be held ostiis apertis except in the Republic of Lucca."

At all events, both MR. DAINES BARRINGTON and MR. EMLYN, both learned lawyers, were under the impression that the law required in their days that courts should be open. This may be a matter for legal research, but the law, as it now stands, requires no such investigation. It has been settled by statute, and the exception H supposed to have been introduced as to the ecclesiastical courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those courts by FLETCHER MOULTON, L.J., in his judgment in the Court of Appeal, and by the instructive judgment of LORD SHAW, which I have had the privilege of reading.

I There are three different considerations of which, as I have said, I would treat, as they have been called exceptions, though, in my judgment, two of them are no exceptions at all. The first is wardship, the relation between guardian and ward, and the second is the care and treatment of lunatics. Neither of them, for reasons which hardly require to be stated, forms part of the public administration of justice at all. Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful LORD ELDON L.C., was when intervening in such a case—*Re Lord Portsmouth* (11)—to point

out that it was only by consent of the parties on both sides that he consented so to hear it, and in the Sherborne School case—*Malan* v. *Young* (12)—it was clearly recognised that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

While I agree with the Lord Chancellor in the result at which he has arrived in this case, and generally in the principles which he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category; but I should require to have brought before me the concrete case before I could express an opinion on it. Probably, as has been said, a mere desire to consider feelings of delicacy, or to exclude from public hearing details which it would not be desirable to publish, is not enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the procedure in English courts of justice. The difficulty which I have in accepting this as a sufficient exposition of the law is that the words in which the rule has been laid down are of such wide application that individual judges may apply them in a way which, in my opinion, the law does not warrant. The paramount object, that justice cannot be done unless a secret hearing is ordered, is doubtful of attainment. I am not venturing to criticise the LORD CHANCELLOR'S language, which as he and, I venture to say, I myself understand it, is probably enough to secure the observance of the rule of public hearing; but what I venture to point out is that it is not so definite in its application but that an individual judge might think that in his view the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension. I confess that I am amazed to find three such learned judges as SIR CRESSWELL CRESSWELL, WILLIAMS, J., and BRAMWELL, B., in *H—, (falsely called C—)* v. *C—* (2), overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation with the Judge Ordinary upon this very point, determining that the court had no power "to sit otherwise than with open doors": *Barnett* v. *Barnett* (1). From that judgment there was no appeal, and I should have thought that until it was brought before this House it would have been accepted as the law; but considering that SIR FRANCIS JEUNE'S judgment in *D.* v. *D.* (6) has never been challenged, I do not wonder that the order was made in this case apparently as a matter of course.

As to the injunction of perpetual secrecy, there is not a fragment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all. In the one case the trade secret is being protected as a species of property, and indeed the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law intended to protect either to be made the instrument of destroying the very thing which it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which those words are used in the Act, and I think that they ought to have heard the appeal. I entirely agree in the motion which the Lord Chancellor has proposed.

EARL LOREBURN.—I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test of their jurisdiction under s. 47 of the Supreme Court of Judicature Act, 1873, is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction

for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming that BARGRAVE DEANE, J., had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed his decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I should prefer to take leave of this litigation altogether, for the function of a court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the courts below, I feel constrained to say something, as little as possible. In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has anyone, and, if so, who and to whom and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old ecclesiastical courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open court. I do not speak of the parental jurisdiction regarding lunatics or wards of court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed. It has been held that when the subject-matter of the action would be destroyed by a hearing in open court, as in a case of some secret process of manufacture, the doors may be closed. I think that this may be justified upon wider ground. FARWELL, L.J., aptly cites LORD ELDON as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties

> "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts."

An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice. Again, the court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination

is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of FLETCHER MOULTON, L.J., in very exceptional cases, such as *D.* v. *D.* (6), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety, the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or because the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court.

Applying this principle to proceedings for nullity, if the court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect inherited from the old ecclesiastical courts. I do not think so. Sect. 46 of the Matrimonial Causes Act, 1857, requires evidence to be given in open court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the ecclesiastical courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857 as prohibiting a trial in camera where such considerations may require it—as in other courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open court. Such rules would, in my opinion, be valid if they did not go beyond the limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exceptions. I incline to the opinion that the High Court also may make such rules, but this was not argued.

In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorising such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to protect public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is: What power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over. It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to

A be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully goes. The authority of the court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the court. But what is the degree and duration of secrecy which the B court can impose? Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the court available for the enforcement of right so the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think that we are C driven to say that there is jurisdiction to treat as a contempt of court any wilful and malicious publication of such kind as that, if it were known to be allowed, ordinary sensible people would not come to the court at all. This conclusion appears to me the inevitable corollary if once you admit that a case of trade secret can be heard in camera, and I think that it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that D justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and everyone can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a court ought to refrain from exercising its power in such a way. It is that the court does not possess E such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration, the right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious F communication it could not prevail. There is no more difficulty in deciding whether a particular case comes within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or anyone else, it cannot be either prohibited or punished.

G I have felt very strongly in this case the duty so admirably expressed by FLETCHER MOULTON, L.J., that courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publicity shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a H principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is alway possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on I the one hand, and, on the other hand, no administration of justice in such cases at all. That is not to be considered here as a matter of policy, but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

LORD ATKINSON.—I concur. The argument in this case has ranged over a very wide field; many topics have been discussed, principles of vast importance have been laid down—principles which in their application might, I think, involve

a serious encroachment on the liberty of the subject; but the fundamental proposition on which the respondent's case in the ultimate result rests is, in my view, this—that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound, then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor has been guilty of any contempt of court, has disobeyed any order of the court, has committed any crime, and the order of BARGRAVE DEANE, J., was not, and could not have been, made in any criminal cause or matter. In my view the proposition is not sustained by authority, and is in itself unsound.

Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is based on a false analogy, and the second involves a fallacy. Such cases as *Badische Anilin und Soda Fabrik* v. *Levinstein* (13), *Andrew* v. *Raeburn* (7), and *Mellor* v. *Thompson* (14) were cited, and it was sought to apply the principles upon which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. A secret process was involved in it. The whole value of the property in the process in most, if not in all, of such cases depends on the details of the process being kept secret. If the secret be disclosed, the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property. Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which it was sought to obtain the relief desired. *Andrew* v. *Raeburn* (7) was a suit for an injunction to restrain the publication of certain letters which had passed between one or other of the plaintiffs in the suit and a third party. The application with which LORD CAIRNS dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one in which publicity would cause an entire destruction of the matter in dispute. LORD CAIRNS in giving judgment said (9 Ch. App. at p. 523):

> "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the court to hear it in private even without the consent of the parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing."

This is the very principle upon which the cases dealing with secret processes were decided. *Mellor* v. *Thompson* (14) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit, even after the cause has ended, may no doubt cause pain, but it cannot render property valueless, or cause a destruction of the whole matter in dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, and subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively. Even, therefore, if it should be held to be the law that in the former class of suits all persons should for the special reasons indicated be enjoined to perpetual silence touching everything disclosed at a hearing in camera, it would, in my view, be quite illegitimate to extend a practice springing in these cases from the very necessity

A of things, and adopted for a special and peculiar object, to suits of the latter kind in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs against which the practice was designed to guard.

The authorities therefore, in my opinion, afford no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect. It is said that it would be futile to order a nullity B suit to be heard in camera if everyone were free after the hearing to publish an account of the proceedings. The answer to that is this—that it is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to SIR FRANCIS JEUNE, justice cannot be done—namely, that the parties concerned, especially the woman, should be examined in private; and, secondly, because, if anything which took place in C camera were published, it must be published without the privilege which protects the publication of a full and fair report of proceedings in public, open, courts of justice, and would subject the publisher to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel the person defamed could sue for damages, or possibly prosecute for criminal libel. If the printed matter were in D addition indecent, the public authority might prosecute for the publication of an obscene libel. To say, therefore, that an order to hear a case in camera would be futile if people were left free to publish what took place at the hearing after the case had ended, involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is "free" to libel or slander his E neighbour. An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition, and what makes the lack of direct authority all the more strange if the proposition be sound is this—that the records of the old ecclesiastical courts have F been searched; passages from several old books in the practice of those courts have been quoted; a Parliamentary report, dealing, among other things, with the practice of the ecclesiastical courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to show that not only had those courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has G been found to convey even the slightest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention were sound some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency. Speaking for myself, I must, there- H fore, decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity. I think that this order, in its true interpretation, means what it says plainly on its face, and nothing more—namely, this—that the place where the case is to be heard shall be a private chamber, and not a public court. All the I consequenecs which I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date.

One of the strangest things in this strange case is that *R.* v. *Clement* (10) should be cited as an authority for the proposition that a court of assize or one of the divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceedings which took place at that trial. That case is a weighty authority, having regard to the eminence of the learned judges who

decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded Not Guilty. The issue joined in that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any of them, and which of them, were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together if they had joined in their challenges. However, they severed in their challenges, with the consequence that of necessity the single issue was split up into several branches, and they were tried seriatim, but, to use the language of BAYLEY, J., these several trials constituted one entire proceeding. ABBOTT, C.J., knowing that the evidence in each trial would be very much the same, and fearing that, if a report of each trial were published in the Press as it took place, an opportunity would be given to the witnesses to trim their evidence to the sacrifice perhaps of truth, and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials were concluded. A report of the trials of Thistlewood and of another, who had been convicted, was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of court "in having acted contrary to the order of the court, and to the obstruction of public justice," not merely for the first offence. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings which had taken place in a public court of justice after those proceedings had terminated, and it was successfully defended on the ground that all the trials together formed one entire proceeding, and that Clement's newspaper was published in the middle and not at the end of that proceeding. BAYLEY, J., is reported to have expressed himself thus (4 B. & Ald. at p. 230):

> "But it is argued that, if the court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that it does not follow. All that was done in this case was very different, for the prohibition was only till the whole trial was completed."

And HOLROYD, J., the only other judge who gave reasons for his decision at length, is reported to have said (ibid. at pp. 232, 233):

> "The object for which the order was made was clearly, as it appears to me, one within the jurisdiction, namely, the furtherance of justice in the proceedings then pending before the court, and it was only to remain in force so long, and so long as those proceedings should be pending before them. . . . It appears to me that the arguments as to continuing such orders in force for a longer period do not apply. It is sufficient for the present case that the court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is, as I understand it, this, that if a superior court, or the judge of such a court, should make a valid order in a civil suit prohibiting the doing of a particular act not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of the court. Even if the first proposition put forward by the respondent should, contrary to my view, be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner in sending, at the time when she did send, copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears that it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of court does

not appear to me, however, to fall within any of the classes of criminal contempt of court mentioned by Lord Hardwicke in *Roach* v. *Garvan* (15), or by Lord Cottenham in *Lechmere Charlton's Case* (16), or by Blackburn, J., in *Skipworth's Case* (17). It did not involve the scandalising of a judge such as was dealt with in *McLeod* v. *St. Aubyn* (18), or in *R.* v. *Gray* (19). It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit such as was attempted in *O'Shea* v. *O'Shea and Parnell* (20). Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of court that men and women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong which nullity suits are designed to redress, rather than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the cuplrit's guilt. But if it be the law that disobedience to the order in itself constitutes a crime, then this result seems necessarily to follow, that no orders of court punishing persons in any way for disobedience of this kind can be reviewed in the Court of Appeal, inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873. The following cases (in addition to those dealing with orders of justices made at sessions, to be referred to presently) may be taken as fair specimens of those cited on behalf of the respondent in support of this his second proposition: *Lord Wellesley* v. *Earl of Mornington* (21), *Seaward* v. *Paterson* (22), *Avery* v. *Andrews* (23), and *Re Freston* (24). It was contended that these cases show that disobedience to an order of court constitutes in itself a crime, a criminal contempt of court. Unfortunately for this contention, however, they do something more than that; they show, I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this—that a principal who does an act which he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of court, while a person not expressly or at all prohibited, who aids and abets the principal in doing that very act, should be held guilty of a crime, a criminal contempt of court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal in the commission of the forbidden act. The disrespect to the court which made the order which was disobeyed and the defiance of its authority would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice, if that resulted, would probably be the same in both. It can hardly be that the fact that the principal was named in the order which he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated?

In the first of the above-mentioned cases one Batty, the unnamed aider and abettor of the named principal, who disobeyed the order of the court, submitted when brought before the court to answer for his contempt. The plaintiff in the

suit did not press for punishment, but the Master of the Rolls said that, had he been pressed, it would have been his duty to commit Batty, but he does not say for what form of contempt of court, whether for the civil contempt of court of which the principal was found to have been guilty, or for a criminal contempt of court. The case is, therefore, rather a blind one on the point as to the nature of the contempt.

In *Seaward* v. *Paterson* (22), a case much relied on by the respondent, the principal Paterson, his agents and servants, were restrained by injunction from, among other things, holding, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held, there such an exhibition in breach of this injunction. One Murray, who was neither his agent nor his servant, was present at the exhibition aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before NORTH, J., was as to whether Murray could be committed, as he was not a party to the suit, and was not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of court in aiding and abetting Paterson in doing an act which the latter was, by the injunction, prohibited from doing, and he committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from was upheld, but neither at the hearing before NORTH, J., nor in the Court of Appeal was it ever suggested that Murray's contempt of court was a criminal contempt of court. Section 47 of the Supreme Court of Judicature Act, 1873, was not referred to. The points discussed were those raised in the court below. LINDLEY, L.J., is reported as having expressed himself thus ([1897] 1 Ch. at p. 555):

> "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing, and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other the court will not allow its process to be set at naught and treated with contempt. In the one case the person who is enforcing the order is enforcing it for his own benefit; in the other, if the order of the court has been contumaciously set at naught, the offender cannot square it with the person who has obtained the order and save himself from the consequences of his own act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line the case falls."

The motive and object of the person who brings the offender before the court may be different in the one case and in the other. That, however, one would think, would not change the character of the offence. LINDLEY, L.J., did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not becoming a criminal. It is difficult to conceive that a judge of LINDLEY, L.J.'s, well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either or both of the kinds of contempt of court with which he was dealing was necessarily criminal, if he had so regarded it.

In *Avery* v. *Andrews* (23) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned and new trustees were appointed in their stead. These latter did the

prohibited act. Kay, J., held that they were guilty of contempt of court because, though not named in the injunction, they stepped into the place of those who were named, and did what the latter were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the former, though not the latter, were guilty of a criminal offence.

In *Re Freston* (24), Freston, a solicitor, was by an order of the court, of which he was an officer, required to deliver up certain documents, and also to pay to a person named a sum of £10 and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of £10 or the costs. Thereupon Denman, J., made an order that an attachment should isssue against him, and he was arrested while returning home from the police court in which he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench refused this application. Thereupon he appealed to the Court of Appeal. In this case, as in that of *Seaward* v. *Paterson* (22), the appeal was entertained. It was not suggested that under s. 47 of the Supreme Court of Judicature Act, 1873, the court had no power to hear the appeal. Lord Esher, M.R., lays down that where an attachment is issued for a breach of the law, or as a remedy for something which is a breach of the law and in the nature of an offence, no claim of privilege can be sustained, but where it is issued for the purpose of enforcing a judgment in a civil dispute, and the breach of the order cannot be said to be an offence, privilege can be claimed. He apparently relied much on s. 4 (4) of the Debtors Act, 1869, and s. 1 of the Debtors Act, 1878, and came to the conclusion that Freston's contempt was in the nature of an offence; but whether or not this was because of the disciplinary jurisdiction which courts exercise over solicitors as their own officers it is rather difficult to discover. He says (11 Q.B.D. at p. 554):

> "The rights of those employing solicitors are not merely of a civil nature, and the courts deal with defaulting solicitors on the ground that they have been guilty of breaches of duty and breaches of the law."

Lindley, L.J., says (ibid. at p. 566):

> "Is this attachment in the nature of civil process? If it is, the solicitor ought to be discharged. In *Re M'Williams* (25), Lord Redesdale, L.C., has pointed out that all contempts are not the same. They are of different kinds. Some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents; in these cases there is no privilege from arrest. In this case the attachment was granted for something more than mere theoretical contempt, and therefore it was something more than mere civil process; there was, therefore, no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4 (4). It assumes that the solicitor who fails to pay a sum of money when ordered by the court is guilty of misconduct, and also of an offence for which he may be punished by imprisonment, and this tends to show that the attachment was not upon civil process."

Fry, L.J., says (ibid. at p. 557):

> "The attachment was something more than process; it was punitive or disciplinary, for the court was proceeding against its own officer."

The appeal was dismissed. There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of court. Nothing would have been easier for the members of the court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether

or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se to an order of the court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary.

Some reliance was placed in argument upon authorities not cited in the Court of Appeal, such as *R.* v. *Ferrall* (26), to show that disobedience to an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in RUSSELL ON CRIMES (7th Edn.), vol. 1, p. 543, and CHITTY'S CRIMINAL LAW (2nd Edn.), vol. 2, p. 279, and are all collected in ARCHBOLD'S CRIMINAL PLEADING AND EVIDENCE (23rd Edn.), p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *R.* v. *Robinson* (27) LORD MANSFIELD, C.J., lays it down broadly that disobedience to an order of sessions is an indictable offence at common law. *R.* v. *Bristow* (28) is to the same effect. In *R.* v. *Johnson* (29) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held that this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *R.* v. *Jeyes* (30).

The observations of POLLOCK, C.B., in giving judgment in *R.* v. *Ferrall* (26) are very significant. He says (2 Den. at p. 56):

> "The authorities are clear upon the point that an indictment will lie for a refusal to comply with an order of justices for the payment of money, and although individually I should not be disposed to hold for the first time that such a refusal was indictable since a like refusal to comply with an order of a superior court is not so, yet I feel bound by the authorities to concur with the rest of the court in this view of the law."

This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available for that end. But these orders were not orders made inter partes in civil suits, such as orders to hear a civil cause in camera, and do not, in my view, support in any way the respondent's second proposition. In my opinion, that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. FLETCHER MOULTON, L.J., in his able and elaborate judgment in the Court of Appeal in this case lays down in the following passage what, in my opinion, is the true and sound principle of the law:

> "It is only the legislature which can render criminal an act which is not so by the common law of the land. An order of the court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be, and generally will be, punished by the court, and in proper cases such punishment may include imprisonment. But it does no more; it does not make such disobedience a criminal act, and, therefore, it is that the Court of Appeal has consistently, and without any exception, held that orders punishing persons for disobedience to an order of the court are subject to appeal."

This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these

A cases act as the representatives of the Sovereign as parens patriæ, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for their benefit. Even if it be assumed that the ecclesiastical courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the court for divorce and matrimonial causes according to the provisions of s. 22 of the Matrimonial Causes Act, 1857, subject B to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations," not "rules and orders," are used in ss. 46 and 67; I think that these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of s. 46 operate directly on suits of this character with their full force and effect, and it certainly appears to me that the hearing of these suits in camera is not only opposed to the policy of this statute, C but is prohibited by the express and positive enactments of s. 46. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

It is not necessary in the present case to determine whether the broad proposition laid down by SIR FRANCIS JEUNE in *D.* v. *D.* (6) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent D both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured because it is felt that in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved, and in that E case inaugurated, would restrict this wholesome publicity more than is warranted by authority; and I desire to point out that if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon everyone touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions F on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that the party should consent to become a criminal, and render himself liable to be fined and imprisoned for criminal contempt of court, a serious invasion of the rights of the subject. Even if the party aggrieved might be able to obtain from the court which made the order permission to violate it to the extent necessary to prosecute the appeal, G the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and possibly from that court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of s. 47 of the Supreme Court of Judicature Act, 1873. If a certain act may be viewed in either of two aspects, H the one criminal and the other simply tortious, it is, I think, essential in order to bring a judgment or order dealing with it within this section, that it should appear clearly on the face of the judgment or order that the act is dealt with in its criminal and not in its civil aspect. Were it otherwise a judgment for damages in the case of a deliberate and wilful assault could not be reviewed by I a Court of Appeal, since wilful assault is a crime. Now LINDLEY, L.J., in *O'Shea* v. *O'Shea and Parnell* (20) is reported as having expressed himself thus (15 P.D. at p. 64):

> "There are obviously contempts and contempts. There is ambiguity in the word, and an attachment may sometimes be regarded as a civil proceeding; for instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order except by attachment. We must not therefore be misled by the words 'contempt' and 'attachment,'

but must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies."

To accuse one, therefore, of being guilty of a contempt of court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of the court. In this case the order alleged to have been disobeyed was simply an order "that the cause should be heard in camera"—nothing more. If one turns to the notice of motion of Nov. 23, 1911, upon which motion the order appealed from was made, it is obvious that the person who framed it never thought that he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea* v. *O'Shea and Parnell* (20) in order to show that it dealt, to use the words of LOPES, L.J., with something outside the cause, and was not a mere step in the cause. On the contrary, it is entitled just as any notice of a motion which was a step in this cause would be entitled. The charge made was that the petitioner, a party to the suit and bound by the orders made in it, and her solicitor, over whom as an officer of the court the judge has disciplinary powers, had been guilty of contempt of court in publishing a transcript of the shorthand writer's note of the medical evidence, in contravention of the order of Feb. 11, 1911, directing the cause to be heard in camera. The relief prayed for is in substance this: First, that the petitioner and her solicitor should be committed to prison; secondly, that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; thirdly, that they should be restrained from molesting, in this or in any other way, the respondent, and friends, doctors, patients, or others (the others not being identified in any way); and, fourthly, that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications. All these different kinds of relief might possibly be right and rationally asked for—I express no opinion upon that point—if what was complained of was a civil contempt of court, such as the mere breach of an injunction; but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Whoever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though similar crime, and still less of a criminal ever having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognisances to be of the peace and good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that BARGRAVE DEANE, J., would have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no reference to the absurdities of the notice of motion. His order runs thus:

"The judge found that the petitioner and her solicitor had been guilty of contempt of court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the cost of this application."

But of what kind of contempt, civil or criminal, he has found them to be guilty the order does not disclose. In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit that it might have been competent for the learned

judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have entitled his own order in the same way as the amended notice, but he did not do so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, of ambiguous meaning according to LINDLEY, L.J. It runs thus:

> "It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of court when the court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in that private room. It must be understood in future that anything done in chambers is private. Even summonses are not reported without leave of the court when there is something important."

It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence will be enjoined in the one class of cases as well as in the other. I concur, therefore, with VAUGHAN WILLIAMS, L.J., in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873; and for this, as well as for other reasons which I have mentioned, I am of opinion that this appeal should be allowed with costs. I am further of opinion that the decision of BARGRAVE DEANE, J., was erroneous, and that as your Lordships have before you now all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion that the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal—namely, an order that the order appealed from to the Court of Appeal be set aside and vacated.

LORD SHAW.—The appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On Jan. 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On Feb. 14 an order was made, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera." Thereafter the respondent withdrew an answer which he had put in to the case, and it accordingly proceeded undefended. The evidence was given and the hearing took place in camera and on June 13, 1911, BARGRAVE DEAN, J., pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed. Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with the view of vindicating herself in the eyes of these persons, and to prevent them from being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, and that the report of the proceedings was true. The respondent founds upon this action by the appellant as a contempt of court, and in his notice of motion for Dec. 4, 1911, he asks that the appellant, and her solicitor, Mr. Percy Braby, and his partner Mr. Waller, who had on her instructions obtained the copies of the proceedings, should be committed to prison for their contempt of court; secondly, that they should be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause"; thirdly, "from otherwise molesting the respondent, his relatives, and friends, doctors, patients, and others"; and, fourthly, he moves that the appellant "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for committal in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place it was for an injunction against molestation, and, lastly, it was for a discovery, and a discovery sought from the alleged criminals by their stating on oath names, addresses, and the particulars of their criminal contempt. These, and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to your Lordships' House is brought. But the argument before your Lordships was not confined to this point of competency—of civil or criminal. It ranged over the whole merits of the case, and was full and elaborate. It included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard in camera? In the second place, was that order itself properly and legitimately pronounced? Both of these matters appear to me to be deserving of grave and serious consideration; and I observe of both, but particularly of the latter, that I think them to be closely connected with the questions of the deepest import affecting the powers of courts of justice and the liberty of the subjects of the Crown. After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any courts of justice, with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Supreme Court of Judicature Act, 1873, nor even to the matrimonial court set up by the statute of 1857, for I think it right to make some examination, in the first place, of the power of the old ecclesiastical courts as to which I think that much misapprehension has prevailed. The forms of the old ecclesiastical courts were manifestly derived from those in use under the general body of canon law, which, as STAIR expresses it,

> "extended to all persons and things belonging to the Roman Church and separate from the laity: to all things relating to pious uses: to the guardianship of orphans: wills of defuncts: and matters of marriage and divorce, all of which were exempted from the civil authority of the Sovereigns who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which, because of their weighty matter and their having been received, may more fitly have been retained than rejected."

In the early stages of the suit the ecclesiastical courts, charging themselves with the interests of both parties, took upon themselves the inquiry into the facts, not in foro contentioso nor in foro aperto, but by way of obtaining, first from the one side, and then, if there was a denial or a counter-case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in retentis until, according to modern ideas, the real trial of the case should begin. The true meaning of these preliminary inquiries was substantially this:

A that the story of each side was told without either the fear or the presence of the other, and without the knowledge, or the desire to evade or mitigate the force, of opposing evidence. They constituted an official precognition; I think that they are preferred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the B documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge.

The true question to be determined as to the procedure of the ecclesiastical courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the ecclesiastical courts conducted their proceedings openly, C and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret. These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, D not as observations made in judicio, but rather in testimonio. It was said that when LORD PENZANCE, SIR JAMES HANNEN, and SIR FRANCIS JEUNE made references to the old practice of the ecclesiastical courts, they may have felt justified in their language by their own recollections. There is force in this view; although of course it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they E have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the ecclesiastical courts. Their procedure is detailed with the utmost minuteness in OUGHTON'S ORDO JUDICIORUM published in London in 1728; and it will be found that no support can be obtained from such a text-book for the view that subsequent to the stage of "publication," to which I have referred, the ecclesiastical courts, either as F a matter of practice or in the exercise of a power, acted as secret tribunals. But it is in truth unnecessary to go through the text-books—CONSET and the others—because testimony of the greatest weight on this topic is obtained from the report of the commissioners appointed to inquire into the practice and jurisdiction of the ecclesiastical courts in 1832. The personnel of the commission gives this unanimous report the highest authority. For, in addition to the Archbishop of G Canterbury and several members of the Episcopal Bench, the commission included LORD TENTERDEN, LORD WYNFORD, and TYNDAL, C.J., together with other men of great accomplishments and learning, including MR. STEPHEN LUSHINGTON. The course of proceeding of the ecclesiastical courts is dealt with in detail, including the mode of taking evidence by deposition and the examination and cross-examination of witnesses by the examiners of the court, who were employed for H that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows:

> "The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories, and depositions are delivered to the judge, who, having them in his possession for some days before the I cause is opened, has a full opportunity of perusing and carefully considering the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly in open court, and on the day appointed for the hearing the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the

counsel. The judgment of the court is then pronounced upon the law and facts of the case, and in discharging this very responsible duty the judge publicly, in open court, assigns the reasons for his decision, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact, and thus the matter in controversy between the parties becomes adjudged. Reports of the decisions in the ecclesiastical courts were not in former times laid before the public, like those of the courts of Westminster Hall, but for the last twenty years and upwards the judgments of these courts have been regularly reported. These reports are not only useful in the jurisdiction itself and the inferior courts, but they also serve to explain to the temporal courts the principles of ecclesiastical decisions, so as to enable them to form a more correct judgment of the proceedings when they may have occasion to refer to them."

Accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the ecclesiastical courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact. This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of the last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the Constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges on any occasion where the point of power to exclude the public was argued pro and contra. So far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of court continued to instruct the world. I am aware that the view which I now put forward as to the old practice and power of the ecclesiastical courts is not shared to the full by the judges of the court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think that the state of matters when the Matrimonial Causes Act, 1857, became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all probability sometimes by the feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law. By s. 22 of the statute of 1857 it was provided:

"In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions hereinafter contained, and to the rules and orders under this Act."

There is nothing in that section which sanctions the idea that the ecclesiastical courts had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners

representing the court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal. The new court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect:

> "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the court, where their attendance can be had, shall be sworn and examined orally in open court: provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every affidavit shall, on the application of the opposite party, or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally in open court, and after such cross-examination be re-examined orally in open court as aforesaid, by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by statute declared to be in open court throughout. I may observe that although the law and practice of Scotland are far less dependent on statute than those of England, yet in the particular point under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution settlement, and to secure against the judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rape, adultery, and the like."

In my humble opinion the sections of the Act of 1857 which I have mentioned were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other cases whatsoever. It is to this point accordingly that the discussion must come. The historical examination clears the ground; so that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests. As to the Act of 1857, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For, if the view which I have taken be correct—namely, that all was open in the ecclesiastical courts except the examination of witnesses—then these two sections put together mean this—that all was to be open in future in the ecclesiastical courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of litis contestation is entered into, in short, upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred these two things must be taken together. So taken, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private

security. The Court of Appeal has by a majority declared a review of this judgment by it to be incompetent. I, therefore, make no apology for treating the situation thus reached as most serious for the citizens of this country. Consider for a moment the position of the appellants. *Scott* v. *Scott* was heard in camera. All interruption or impedient either to the elucidation of truth or the dignity or decorum of the proceedings—conceived to be possible by the presence of the public—had been avoided. The court had passed judgment in private and the case was at an end; and now judgment has been passed upon the appellants in respect of disclosing what occurred in court by exhibiting an accurate transcript of what had actually transpired, and the appellants are enjoined to perpetual silence. Against this, which is a declaration that the proceedings in an English court of justice shall remain forever shrouded in impenetrable secrecy, there is, it is said, no appeal. I candidly confess that the whole proceeding shocks me. I admit the embarrassment caused to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions, but those decisions, in my humble judgment, or rather—for it is in nearly all the instances only so—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the courts below to have been legitimately reached under a free constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism. What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves BENTHAM over and over again.

> "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial."

"The security of securities is publicity." But among historians the grave and enlightened verdict of HALLAM, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten :

> "The civil liberty in this kingdom has two direct guarantees, the open administration of justice according to known laws truly interpreted, and the fair construction of evidence, and the right of Parliament without let or interruption to inquire into and obtain redress of public grievances. Of these the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom where this condition is not found both in its judicial institution and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me to still demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think that these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision, most

sensibly to impair the rights, safety, and freedom of the citizen and the open administration of the law. To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed *Barnett* v. *Barnett* (1) and of *H*— (*falsely called C*—) v. *C*— (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The motion came on for hearing before the full court—namely, Sir Cresswell Cresswell (the Judge Ordinary), Williams, J., and Bramwell, B. The judgment of Bramwell, B., was conclusive—none the less so that he indicates that he knew that the practice which he was condemning as illegal was already creeping in. He said:

> "If this had been the first application of the kind I also should have thought it perfectly clear that this, being a new court, was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should not be conducted in private. Upon that question I should not have felt the slightest doubt; and the only doubt which I now entertain is in consequence of this court, since it was established, having on two occasions sat in private; but in those cases I understand that the course was adopted with the consent of both parties, and no discussion took place. In my opinion the court possesses no such power."

I think that it would have been better had those attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell, B., been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C.* v. *C.* (5) in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation:

> "The only cases which have been heard in private are suits for nullity of marriage, and in doing so the court has followed the practice of the ecclesiastical courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict., c. 85."

That point was not a point of decision. I do not see that any argument upon the subject was present to the court. I cannot take the learned judge as having laid down that the practice of the ecclesiastical courts was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen in *A.* v. *A.* (3). It is clear that that learned judge was much exercised upon the subject, for, having cited the judgments of Sir Cresswell Cresswell and Williams, J., and Bramwell, B., to which I have just referred, "that the court had no power to sit otherwise than with open doors," the learned judge adds:

> "It would, seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think that it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned."

I must say that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already referred—namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative right of Parliament, whittled away

by the practice of the judiciary. It was no wonder that in the later case of *Nagle-Gillman* v. *Christopher* (9), in 1876, even JESSEL, M.R., made an exception to the rule of open courts of justice of "those cases where the practice of the old ecclesiastical courts in this respect is continued." But it is perfectly manifest that the practice of the old ecclesiastical courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by JESSEL, M.R., obiter in that case, his judgment upon the main question was one which must command respect. He

> "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of court, or where a public trial would defeat the object of the action."

These constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little while refer. But in the year 1903, in *D.* v. *D.* (6), SIR FRANCIS JEUNE brought these dicta to this culmination:

> "I believe that the reason why the ecclesiastical courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because in the exercise of the general powers which those courts possessed they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private."

I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan* v. *Young* (12). By this time undoubtedly the occasional usurpation—for I call it no less—by the courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice, and DENMAN, J., held that he had power to hear that case in camera. Mr. Gould, a member of the Bar, objected to leave the court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel, which is described in the judgment of VAUGHAN WILLIAMS, L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the ANNUAL PRACTICE of 1912:

> "The following subsequent occurrence is, however, unreported: The trial proceeded in camera on the 11th, 12th, and 13th Nov., 1889, and was adjourned to the 15th Jan., 1890, when the judge stated that in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done"

(extracted from the associate's recorded note of the case). The other case referred to was that of *Andrew* v. *Raeburn* (7). But there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment EARL CAIRNS said:

> "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute [a matter, not of the rule, but of an exception to the rule, as I shall afterwards explain], I should have taken time to consider whether it was consistent with the practice of the court to hear it in private, even without the consent of both

parties, in order to prevent entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing."

Thus far for the decision, but in a concluding sentence the learned earl said:

"In these circumstances I do not think that it would be right to deviate from what has undoubtedly been the practice of the court, not to hear a case in private except with the consent of both parties."

To infer from this sentence, not adopted or concurred in by either JAMES, L.J., or MELLISH, L.J., that it was open to the judges of England to turn their courts into secret tribunals, if both parties to any suit asked or consented to that being done, is to make an inference from which I feel certain that the noble earl would himself have shrunk, and, indeed, my belief is that he would have strongly protested against it. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

It is very necessary, indeed, to make, in the matter of contempts of court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. *O'Shea* v. *O'Shea and Parnell* (20) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a court of justice being duly or decorously conducted. In both of these cases a court can protect its administration and all those who share or are convened to its labours, and in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt; and a court of justice can protect itself against these things both by suppression and by punishment. But here the question affects not such a power—namely, to see to it that justice shall be conducted in order and without interruption or fear—but a power (for that is what is really claimed) to make the proceedings of an English court of justice secret because of something in the nature of the case before it. Upon this head it is true that to the application of the general rule of publicity there are three well-recognised exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of courts of justice are—first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these classes depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are truly transactions intra familiam; and it has long been recognised that an appeal for the protection of the court in the cases of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: That the rights of the subject are bound up with the preservation of the secret. To divulge it to the world, under the excuse of a report of proceedings in a court of law, would be to destroy that very protection which the subject seeks at the court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secrecy which the court may judicially determine to be of patrimonial value and to maintain. But I desire to add this further observation with regard to all of these cases—that, when respect has thus been paid to the

object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity; and even in the last case—namely, that of trade secrets—I should be surprised to learn that any proceedings for contempt of court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the facts had become public property. The present case is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

For the reasons which I have given, I am of opinion that the judgment of BARGRAVE DEANE, J., cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors in a case after that case has come to an end seems to me to have really nothing to do with the administration of justice. Justice has been done and its task ended, and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge to the point of restraining or forbidding a narrative of the proceedings within by speech or by writing seems to me to be an unwarrantable stretch of judicial authority. I may be allowed to add that I should most deeply regret if the law were other than that which I have stated it to be. If the judgments (first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt) were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think that it has any warrant in our law. Had this occurred in France, I suppose that Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cashet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interests and property, such as those affecting trade secrets or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. This ground is very dangerous ground. One's experience shows that the reluctance to intrude one's private affairs upon public notice induces many citizens to forego their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general and to society at large against which publicity tends to keep us secure; and it must further

be remembered that in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to individual cause. The cases of positive indecency remain; but they remain exactly where statute has put them. Rules and regulations can be framed under s. 47 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interfere, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, "nothing in this section shall authorise the exclusion of bonâ fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a court administering the existing law. Upon the basis of that law, I am humbly of opinion that the judgments of the courts below cannot stand. I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane, J., was not pronounced in a criminal cause or matter, for, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in reply to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say that it was indictable. The breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day, but I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter; and in the course of that trial it is open to the person accused of breach to establish upon the fact that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was only an order that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper court to try that was undoubtedly the court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what in the case of the infringement of a patent, or the like, would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present. I will only add that if the respondent's argument and the judgment of the majority of the Court of Appeal were right this singular result would follow. In the year 1907 Parliament interposed to give a right of appeal in criminal cases. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane, J., because the decision of the learned judge was in a criminal cause or matter. Grant, accordingly, that this is so; yet nevertheless the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants. Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost. I concur in the motion proposed.

Appeal allowed.

THE EARL OF HALSBURY said that, as this was a question in which the whole public was interested, and the Attorney-General had acted properly in intervening in the matter, their Lordships were of opinion that the costs ought not to fall upon private parties, because the judgment established a most important principle, of interest to the public at large, but that the Treasury ought to pay all the costs both in their Lordships' House and in the courts below.

Solicitors: *Braby & Waller; Treasury Solicitor.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

BOARD OF EDUCATION *v.* RICE

[HOUSE OF LORDS (Lord Loreburn, L.C., Earl of Halsbury, Lord Atkinson, Lord Shaw and Lord Mersey), February 23, 24, March 3, April 6, 1911]

[Reported [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652]

Constitutional Law—Government department—Quasi-judicial functions—Need to act in good faith and listen fairly to both sides—Right to obtain information as is thought best—Board of Education—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7 (3).

Where statutes have imposed on Government Departments or officers of State the duty of deciding or determining questions arising under those statutes the question will usually be of an administrative kind, but sometimes it will involve matter of law as well as matter of fact or even depend on matter of law alone. In such cases the authority will have to ascertain the law and also to ascertain the facts. In doing either they must act in good faith and listen fairly to both sides, but they are not bound to treat the decision of such a question as though it were a trial. In the case of the Board [now Ministry] of Education the Board had no power to administer an oath, and they need not examine witnesses. They could obtain information in any way they thought best, always giving a fair opportunity to those who were parties to the controversy—of correcting or contradicting any relevant statement prejudicial to their view. They had no power to decide abstract questions of law, but only to determine actual concrete differences as they arose.

Observations as to duties of local education authorities under Education Act, 1902.

Notes. Referred: *West Suffolk County Council* v. *Olerenshaw* (1918), 82 J.P. 292.

As to the quasi-judicial functions of public authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 716–719; and for cases see 38 DIGEST (Repl.) 100–106. As to the duties and powers of the Minister of Education, see 13 HALSBURY'S LAWS (3rd Edn.) 570–574, and for cases see 19 DIGEST 560, 561. For Education Act, 1944, see 8 HALSBURY'S STATUTES (2nd Edn.) 145.

Case referred to in argument:

Wilford v. *West Riding of Yorkshire County Council*, [1908] 1 K.B. 685; 77 L.J.K.B. 436; 98 L.T. 670; 72 J.P. 107; 24 T.L.R. 286; 6 L.G.R. 244; sub nom. *Walford* v. *West Riding of Yorkshire County Council*, 52 Sol. Jo. 263; 19 Digest 558, *29*.

Appeal from two orders of the Court of Appeal (COZENS-HARDY, M.R., FARWELL and BUCKLEY, L.JJ.), reported [1910] 2 K.B. 165, affirming a judgment of the

A Divisional Court (LORD ALVERSTONE, C.J., DARLING and A. T. LAWRENCE, JJ.), reported [1909] 2 K.B. 1045.

By the first of the two orders it was ordered that a writ of certiorari should be directed to the appellants, the Board of Education [now the Ministry of Education], to remove into the High Court, for the purpose of quashing, a decision by the Board of questions which had arisen between the respondents and the Swansea B local education authority. By the second it was ordered that a writ of mandamus should issue, directed to the appellants, to hear and determine the questions according to law.

The Attorney-General (Sir Rufus Isaacs, K.C.), the Solicitor-General (Sir John Simon, K.C.) and *Rowlatt* for the appellants.

Sir Robert Finlay, K.C., C. A. Russell, K.C., A. T. Lawrence and *R. P. Hills* C for the respondents.

Their Lordships took time for consideration.

April 6, 1911. The following opinions were read.

D **LORD LOREBURN, L.C.**—I believe that your Lordships were all of opinion at the conclusion of the Attorney-General's argument that this was a proper case for a mandamus and a certiorari. It is unnecessary to enter in detail upon the protracted dispute between the Swansea local education authority and the managers of the Oxford Street voluntary schools, technically termed "non-provided" schools. Certain salaries were paid to teachers by the local education authority in the "provided" schools within the area. Smaller salaries had been paid to the E teachers in the voluntary schools prior to the Education Act, 1902, and after that Act passed the same system of paying smaller salaries was continued. Then some of the teachers gave notice upon the ground that their salaries were inadequate and below those paid to their comrades in the provided schools, and the managers of the Oxford Street schools pressed upon the local education authority the fact that they were able to keep their teachers only by finding out of their own pockets, F or by the assistance of well-wishers, the difference between the two scales of salary. They alleged that by refusing to bring up those salaries to the same scale the local education authority had failed to discharge its statutory duty of maintaining and keeping efficient the Oxford Street schools. Mr. Hamilton, K.C., who was sent down to inquire and report to the Board of Education in London, reported that there had been such a failure, and upon all the evidence before the House there can be no manner of doubt that he was right. Such is the outline of this controversy G between the local authority and the managers in Swansea, sufficient for my present purpose, though it was spread over a great mass of correspondence, argument, and evidence, and lasted for a long time. At length the questions in issue came up for decision by the Board of Education in London, and it is their action which is the subject of the order made by the Divisional Court, confirmed by the Court of Appeal, and now ripe for final adjudication by this House.

H The statutory duties laid upon the Board of Education in regard to disputes of this kind are twofold. In the first place they are required by s. 7 (3) of the Act of 1902 [see now Education Act, 1944, s. 67] to determine a certain class of questions. The words of the sub-section run as follows:

> "If any question arises under this section [which requires the local education I authority to maintain all necessary schools in their area] between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

The Attorney-General argued, as I understood him, that the questions here pointed at are only such as arise from the statutory relations between a local education authority and managers, and are not such as arise from the duty of one or other towards the public. He contended that the duty of maintaining and keeping efficient a non-provided school, though it is in terms imposed by s. 7 of the Act,

is not a matter which can be a "question" between the local education authority and the managers, so as to come within the jurisdiction of the Board. I cannot accept this view. The managers are directly interested in the proper maintenance. They are the persons primarily to call upon the local education authority for such proper maintenance, and I do not understand how it can be held that, if they do so call upon the local education authority and the latter disputes the point, it is not a question arising between them. Equally, I fail to understand how it can be held that such a question is not one arising under s. 7, for it is only under s. 7 that the duty is created, and all questions arising under s. 7 are to be determined by the Board of Education by virtue of the third sub-section.

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon Departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes up for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way that they think best, always giving a fair opportunity to those who are parties to the controversy of correcting or contradicting any relevant statement prejudicial to their view. Provided that this is done, there is no appeal from the determination of the Board under s. 7 (3) of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from their determination, either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way which I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In the second place the board are authorised, by s. 16 of the Act of 1902, to make such order as they think necessary or proper for the purpose of compelling the local education authority to fulfil its duty, if, after holding a public inquiry, they think that it has failed to fulfil any of its duties under the Act of 1902. This is a perfectly distinct thing from what is prescribed by s. 7 (3) [see now s. 68 of Act of 1944]. It is designed to enable the Board of Education, if they think it right, to make an order and to enforce by application to the courts of law obedience to such order as they may make. It does not deal with the determination of disputes between a local education authority and managers, though if such dispute is decided one way and the local education authority refuses to act in accordance with the decision, its refusal may be followed by an order under s. 16 and by an application to the court to enforce it. In the coil in which this quarrel, simple as it is in itself, has been entangled, this distinction may have been somewhat overlooked. In some of the judgments in the courts below it is affirmed as matter of law that under this Act a local authority is not entitled to differentiate between schools in regard to the scale of salaries or the standard of efficiency in the absence of special circumstances appropriate to the differentiation. If a local authority does discriminate without such circumstances, it would be cogent evidence of an intention to starve the less-favoured schools. But it would be no more than evidence of such an intention, all the more cogent if the discrimination were due to political or sectarian prepossessions. I do not find anything, however, in the statute itself which prohibits the local authority from doing for some schools

more than it does for others, even if the circumstances are indistinguishable. Suppose, for example, that the managers of a school were to say to the local authority: "We admit you are keeping our school efficient, yet you are giving to other school benefits which you do not give to us," that would not be, in my opinion, a ground of complaint under the Act. I say nothing as to any remedy which ratepayers might have against the local authority upon the ground that it was misapplying public money in giving to the preferred school more than was justifiable. On that I express no opinion. But the managers have no right to claim more for their school than the Act requires merely because the local authority spends on other schools more than the Act requires. And I can see that, if each school, though already maintained in efficiency, were entitled to claim as a matter of right that it should in all points be put on a level with any other school, it might lead to much wasteful rivalry. At the same time, I must observe that such treatment is a strong circumstance which the Board of Education are bound to scrutinise, in order to satisfy themselves that the discrimination does not involve any lowering of the proper standard of efficiency in the schools for which less is done. More than this I do not think that the Act of 1902 prescribes. There is no canon that the Board must regard discrimination, even if the circumstances are the same, as conclusive proof of a failure to maintain and keep efficient the less-favoured schools.

Such being the duties of the Board of Education, I next inquire what it is that they have done. They have purported to determine a question under s. 7 (3) of the Act, which I think was not really that which arose between the parties. I have carefully considered the correspondence, the resolutions, the statements on either side, and the findings of Mr. Hamilton. To my mind it is clear that from beginning to end the managers said in slightly varying words the selfsame thing, namely: "The local authority is bound to maintain and keep efficient our schools; they are failing to do so in that they will not pay the teachers' salaries which we have found it necessary to pay." In the course of the controversy they urge that the local authority is in the matter of teachers' salaries discriminating, and that it is not entitled to discriminate, between provided and non-provided schools, that the salaries which alone the local authority will sanction are below the market rate, that the object of the Education Act, 1902, was to put all schools of both classes upon an equality. These are arguments or reasons on their side in support of their view that the local education authority shall pay them the necessary money, and have wrongfully refused to do so. On the other side the local authority deny that they have failed to maintain and keep efficient these schools, and refuse to pay the teachers' salaries which the managers have found it necessary to pay. They, too, advance their reasons and arguments—that they are the sole judges of what should be paid, that they have paid enough to keep the schools efficient if only the managers made the most of it, and that they are entitled to discriminate. I need not elaborate further the contentions on either side. In my opinion, the questions which the Board of Education were required by s. 7 (3) of the Act of 1902 to determine in this case are accurately stated on behalf of the managers in the following terms: (i) Whether the local education authority have, in fixing and paying the salaries of the teachers, fulfilled their duty under sub-s. (1) of s. 7 of the Act. (ii) Whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay. I am of opinion that the Board of Education have not really determined these questions in the document of 1908, which purports to be their decision. I think that there has been a confusion between the points that were to be decided and the arguments of either side, and perhaps also a confusion between the Board's duty under s. 7 (3) and their duty under s. 16. The managers were entitled to an explicit determination of the questions which they raised. This they have not obtained, and, though in the mass of mixed argument and assertion which lasted over years and was complicated by other disputes which

have now been settled there may have been room for misunderstanding, the true questions were those which I have already mentioned. That suffices to dispose of the case, and I move your Lordships to dismiss this appeal with costs.

EARL OF HALSBURY.—I am of opinion that the judgment ought to be affirmed. The duty of the education authority was to keep the schools efficient; that duty they neglected and did not keep the schools efficient. The local education authority assumed to itself an absolute autocratic authority for itself as to what schools they would keep efficient, and I cannot doubt that they thought that they were entitled to starve the Church schools and give advantages to the provided schools which they would not grant to the Church schools. It is impossible to resist the conclusion that this was done from hostility to the Church schools. I do not think it worth while to review the somewhat circuitous path by which this question has been brought before your Lordships' House. It is enough to say that it has been so brought quite rightly. The substance of the dispute is what I have stated, and it is clear that the local education authority ought to be as impartial as the rate collector who demands the rate without reference to the peculiar views of the ratepayer. I quite agree with the Lord Chancellor that it would be absurd to cavil at some differences between one school and another, and upon a mere difference between what was provided for one and another. We are far removed from such a question here. As I have said, here is a question of difference traced simply to the fact that one is provided and the other is not. No question has been raised that would justify such a difference as was here made. The local authority gave no evidence or argument, but relied upon their absolute authority. The Master of the Rolls has, I think, put the question very plainly and given the answer with which I entirely concur. The question was not, he says, whether the Oxford Street school was efficient in the sense of being able to ensure a government grant, but whether there were any circumstances in the case of the Oxford Street school such as to justify the different treatment. There is nothing in the Board's decision to indicate that the right to discriminate about which the whole battle raged had ever been challenged. Still less is there anything to indicate the view of the Board as to the existence of such a right. I have no doubt that no such right exists, and, as the decision of your Lordships' House is unanimous, I cannot doubt that the local authority will now acquiesce willingly in that unanimous view and perform the duty which, under a misapprehension of these rights, they have hitherto neglected. The Board ought to have answered the questions asked and no others.

LORD ATKINSON.—I concur in both the opinions which have been delivered.

LORD SHAW.—I concur in the opinion of the Lord Chancellor, and I desire to add two statements in the light of which this concurrence will, I trust, be read. With regard to the local education authority, that authority is not before us, and we have not had the advantage of hearing their views presented at your Lordships' Bar. Speaking, therefore, for myself, I am not satisfied that any observation reflecting upon their conduct would be justified from me. On the point of discrimination I desire to say this, that where the circumstances are the same, discrimination primarily requires justification. But, on the other hand, this state of circumstances, that is to say, a state of complete similarity—in the varying conditions as to schools, staffs, localities, and otherwise—may be most infrequent, and to apply the same standard to dissimilar circumstances is, in my humble judgment, itself such a discrimination as would also require justification. The point really underlying these two questions which are now remitted to be answered is whether in the individual case, and apart altogether from reference to other cases, or to a general standard, efficient education has or has not been provided in the particular school. To that as the ultimate issue the attention of the parties

must be directed. I do not doubt that the local education authority must act impartially, but upon the whole I desire to interpose these observations to my assent to the judgment proposed from the Woolsack.

LORD MERSEY.—I entirely concur.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Crawley, Arnold & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

LURCOTT *v.* WAKELEY AND OTHERS

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 16, 17, 1911]

[Reported [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 55 Sol. Jo. 290]

Landlord and Tenant—Repair—Replacement of part of house—Covenant by tenant to "well and substantially repair and keep in thorough repair and in good condition"—Wall found to be dangerous—Liability of tenant to take down and re-build—"Old house"—Condition in which house must be kept.

"Repair," in a covenant to repair a house and keep it in repair, can include the replacement or renewal of a part of the house. It will not cover the re-building of a house which has tumbled down, but, so long as the house exists as a structure, "repair" imports an obligation to replace part of it which has deteriorated.

In the case of an old house its age can qualify the meaning of the covenant in the sense that it must be kept in good condition as an old house, which will be different from keeping a new house in good condition as a new house, but the age of the house will not relieve the covenantor from his obligation. If the house is so old that to keep it in good condition requires replacement of part after part until the whole is replaced the covenantor has taken the burden of doing so.

Accordingly, where the lease of a house, which was two or three hundred years old, contained a covenant by the lessee to "well and substantially repair and keep in thorough repair and in good condition all the said premises" and the local authority required an external wall to be taken down and re-built as being dangerous in its present state,

Held: the lessee was not entitled to set up the defence that the wall had become defective by reason of its age and the effect of the elements, and so he was liable for the cost of re-building it.

Notes. Considered: *Howe* v. *Botwood*, post; *Miller* v. *Burt* (1918), 63 Sol. Jo. 117; *Anstruther-Gough-Calthorpe* v. *McOscar*, [1923] All E.R. Rep. 198; *Pembery* v. *Lamdin*, [1940] 2 All E.R. 434; *Shayler* v. *Woolf*, [1943] 1 All E.R. 464; *Morcom* v. *Campbell-Johnson*, [1955] 3 All E.R. 264. Referred to: *Hewitt* v. *Rowlands*, [1924] All E.R. Rep. 344; *Haskell* v. *Marlow*, [1928] 2 K.B. 45; *O'Grady* v. *Bullcroft Main Collieries, Ltd., Bullcroft Main Collieries, Ltd.* v. *O'Grady, O'Grady* v. *Markham Main Colliery Co.* (1932), 17 Tax Cas. 93; *Margrett* v. *Lowestoft Water and Gas Co.* (1935), 19 Tax Cas. 481.

As to repair and covenants to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 562 et seq., and for cases see 31 DIGEST (Repl.) 124, 338 et seq.

Cases referred to: A

(1) *Gutteridge* v. *Munyard* (1834), 7 C. & P. 129; 1 Mood. & R. 334; 31 Digest (Repl.) 358, *4892*.

(2) *Torrens* v. *Walker*, [1906] 2 Ch. 166; 75 L.J.Ch. 645; 95 L.T. 409; 54 W.R. 584; 31 Digest (Repl.) 344, *4752*.

(3) *Lister* v. *Lane and Nesham*, [1893] 2 Q.B. 212; 62 L.J.Q.B. 583; 69 L.T. 176; 57 J.P. 725; 41 W.R. 626; 9 T.L.R. 503; 37 Sol. Jo. 558; 4 R. 474, C.A.; 31 Digest (Repl.) 358, *4893*. B

(4) *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 38 W.R. 730; 6 T.L.R. 305, C.A.; 31 Digest (Repl.) 359, *4900*.

(5) *Wright* v. *Lawson* (1903), 68 J.P. 34; 19 T.L.R. 510, C.A.; 31 Digest (Repl.) 360, *4906*.

Also referred to in argument: C

Soward v. *Leggatt* (1836), 7 C. & P. 613, N.P.; 31 Digest (Repl.) 361, *4926*.

Payne v. *Haine* (1847), 16 M. & W. 541; 16 L.J.Ex. 130; 8 L.T.O.S. 414; 153 E.R. 1304; sub nom. *Paine* v. *Hayne*, 11 J.P. 462; 31 Digest (Repl.) 359, *4895*.

Appeal by the defendants, tenants under a lease dated Mar. 25, 1881, for 28 years, of a house in Hatton Garden, London, from a decision of a King's Bench Divisional Court (Darling & Bucknill, JJ.). D

The facts appear in the judgment of the learned Master of the Rolls.

Pollock, K.C., and *A. M. Latter* for the tenants.

English Harrison, K.C., and *C. E. Dyer* for the landlord, plaintiff in the action. E

COZENS-HARDY, M.R.—After having listened with all the attention I can to the very able arguments which have been addressed to us. I feel no doubt that the decision of the Divisional Court was right. The plaintiff is the reversioner and the defendants are the lessees, or the assignees, of a house in Hatton Garden. The lease was for 28 years from Lady Day 1881. It was a lease of a very old house, some two or three hundred years old, which originally had a garden at the back of it, which garden has been practically wholly covered over by a factory, with a covered glass passage leading to the house at the back. It is a lease which contained covenants by the lessee, his executors, administrators, and assigns, which, so far as they are material, are in these words: F

> "From time to time during the said term at his and their own proper costs and charges well and substantially repair . . . and keep in thorough repair and in good condition all the said premises hereby demised with all fixtures and appurtenances thereto belonging, and all buildings, improvements, and additions which during the said term shall be built on the site." G

Then followed a covenant with reference to the painting of the inside and outside of the premises, and the lease continued: H

> "And the said premises with all buildings, improvements, and additions that shall at any time during the said term be built or made on the site of the same or any part thereof, being so repaired, and kept, together with the fixtures, matters, and things that shall at any time be fixed or fastened to the freehold of the said premises or any buildings thereon shall and will at the end or sooner determination of the said term hereby granted peaceably yield up unto the said lessors, their heirs and assigns." I

The lessees did certain repairs to the property as to which no question now arises. Notice to do certain repairs was given to the defendants by the plaintiff on July 22, 1908. On Feb. 11, 1909, before the lease expired, the county council gave a notice requiring the eastern external wall to be taken down, it being in such a condition that it could not be patched up so as really to answer the purpose of a wall. It was an extremely old wall which, no doubt, had been exposed to the elements.

A The mortar, I think, had become mere dust, and the wall, I take it, had become a loose mass of bricks which were probably held together by some plaster or pointing on the outside. That notice served by the county council was challenged, but ultimately the work had to be done. It was done after the lease expired, and this is an action by the freeholder, who is seeking to recover from the defendants by way of damages the costs which the freeholder has had to incur in rebuilding or renew-
B ing this outside wall.

The question is whether the lessees are entitled to say that "the effect of time and the elements and the natural effect of old age has destroyed this wall, and it is not due to any negligence on our part. We cannot help it. We are not liable to make it good." On the other hand, it is said: "You have entered into this very wide covenant to repair. Repair necessarily involves in many cases not repair
C strictly so called, but actual renewal." I think FLETCHER MOULTON, L.J., gave an illustration during the argument that if an earthenware pipe breaks, you can only repair it by renewing it, and there must be many instances of this sort of thing. If window frames become rotten and destroyed, you cannot repair except by renewing. We have had our attention called to a number of authorities which contain expressions some of which seem to me, taken apart from the context and for the
D purposes of the case, to be far too wide. I refer specially to the judgment of TINDAL, C.J., in *Gutteridge* v. *Munyard* (1), and I pass it by with this remark, that it is a nisi prius case, and there are two reports of what he said, or of a portion of what he said, in the summing up to the jury, and those two reports differ materially. I think it is not fair to the memory of that very learned and very able judge to hold him bound, or to suggest that his successors are in any way bound, by the literal
E meaning of every word which he used in one of the reports of his judgment. I certainly am not prepared to assent to the view that (3 Mood. & R. 334).

> "what the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord."

F That is obviously wrong. If he only meant that, given an old house which in the course of the term gets worse, but still is a habitable house, rendered rather worse by mere lapse of time, and the effect of wind and weather, I should not object to the statement, but if use is to be made of that sentence in the manner in which counsel for the lessees sought to make use of it, that the tenant is not liable for anything which can be said to be due to lapse of time and the elements, I respect-
G fully do not assent thereto, and it seems to me to be plainly, in the widest sense of the term, inconsistent with the subsequent authorities.

It has been urged upon us that there have been cases, of which the case before WARRINGTON, J., of *Torrens* v. *Walker* (2) is, perhaps, the leading case, which showed that under a covenant to repair there may be such a change of circumstances that the lessee is not liable, on the ground that what he is required to do
H cannot fairly be called repairs at all, but involves making an entirely new subject-matter. When I look at the facts in *Torrens* v. *Walker* (2) and see that there was there a covenant by a landlord simply to repair the outside of the premises, and when I see those outside walls, which were two sides of a triangle, were in such a condition that they could not be repaired, and had to be pulled down from top to
I bottom, I think that that decision was, if I may respectfully say so, right on the facts, that the change of circumstances could not be taken to have been in the contemplation of the parties when the covenant was entered into, and the covenant must be construed with reference to that limitation. Just as in *Lister* v. *Lane and Nesham* (3) there was rather an old house, which was built on a timber platform called a "mud cill," and really had no foundation. The timber was put on top of 17 ft. of mud. That timber had rotted. You could not repair that. Nothing could be done but to remove the house, to pull it down, or to underpin it to a depth of 17 ft., and to build some brick or other structure

from the gravel or chalk up to the house. It was held there, and I see no reason to quarrel with it, by the Court of Appeal that the circumstances had so changed, and such a state of circumstances had arisen, that it could not have been within the contemplation of the parties and it could not be reasonable to construe the covenant as rendering the tenants liable to do the necessary work as "repairs." But when I come to what I should have thought was everyday experience in cases of this kind, when I come to consider what is to happen when by reason of the elements acting upon an old building, say, a chimney stack being blown down, can it be possibly said by a tenant: "I am not liable to put that up at all, because it is only due to age and the elements." I am astonished to hear such a contention raised. If a tenant under a repairing lease of this kind finds a floor has become so rotten that it cannot be patched up, that it is in such a condition that it cannot bear the weight of human beings and of furniture upon it, can it be possibly said that the tenant is exempt from replacing that floor and repairing it in the only way it can be done in order to make the house habitable, merely because the state of the floor is due to the influence of time and the elements? I am entirely unable to follow that argument. *Proudfoot* v. *Hart* (4) seems to lay down a perfectly sound and intelligible proposition on this point—that in such a case it is the duty of the tenant, if he cannot patch up the floor so as to make it usable as a floor, to replace that which is no longer a floor by something which is a floor.

That being so, it seems to me that we are driven to ask in the present case, and in every case of this kind: Is what has happened of such a nature that it could be fairly said that the character of the subject-matter of the demise, or part of the demise, in question has been changed, or is it simply injury to a portion, a subsidiary portion, to use the words of BUCKLEY, L.J., of the demised property, or is it something that amounts to the whole, or substantially the whole? In my opinion, in this case it is plain—and this is the view taken by the official referee and by the Divisional Court—that this portion of the wall was merely a subsidiary portion of the demised premises, the restoration of this part leaving the rest of the building, going back 104 ft., untouched. The restoration of this wall will not change the character or nature of the building, and I am entirely unable to say that it differs in any way from the case we should have had to consider if by reason of the elements and the lapse of time, say, some rafters in the roof had become rotten and a corner of the roof had given way, so that the water came in. It seems to me that we should be narrowing in a most dangerous way the limit and extent of these covenants if we did not hold that the tenants were liable under covenants framed as this is to make good the cost of repairing in the only sense in which this wall can be repaired—namely, by re-building it according to the requirements of the county council. In my opinion, this appeal fails, and must be dismissed with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion. This case has raised a question of general public interest, and has entailed reference to a large number of authorities. But I do not think it offers any difficulty if we observe closely the nature of the obligations which the tenants took on themselves, and then consider whether or not they have performed those obligations. The obligations are in a lease, and it is needless to say that the law requires a man who has entered into a covenant to keep it, but he has only to keep it when properly construed, and there can be no doubt that the proper rule of construction is for the court to give to the words of the covenant their due legal significance as applied to the subject-matter to which it refers.

The covenant here, so far as it is necessary for us to deal with it, in my judgment, may be said to be triple. It is that the tenants will repair and keep in thorough repair and good condition, and there is also the subsequent covenant that they will render up in that state the premises demised. Speaking for myself, I think that it is our duty to give the full meaning to each word of the covenant.

A It is quite true that there may be covenants in which the words used are so nearly synonymous in meaning that the scope of the two covenants will greatly overlap. It is possible that there may be words so absolutely identical in meaning that they may make two covenants identical. To my mind, the speculation as to the extent to which two covenants would overlap, as to whether there is anything covered by the one which is not covered by the other, is an idle speculation likely B to mislead the court. What the court has to do is to give proper and full effect to each word used. I, therefore, look upon this as three separate covenants; there is a covenant to repair, there is a covenant to keep in thorough repair, and there is a covenant to keep in good condition. All these three relate to the demised premises, and we must construe them, not in an abstract sense, but as applied to the subject-matter. I will take the one which, to my mind, is the most important C in this case, as enabling us to decide it with the greatest certainty and with the least difficulty. That is the covenant to keep the demised premises in good condition. In 1881 these premises were old. Nearly thirty years have passed since then, and there is no doubt they were not in a condition in which they had suffered from age as much as at the time of the termination of the lease, but still they were old premises.

D What is the meaning of keeping old premises in good condition? I can see no difficulty in deciding the meaning of that. It means that considering that they are old premises they must be in good condition as such premises. Just let me take a parallel case. Supposing it is a case of a ship. A man who covenants to keep the *Mauretania* in good condition must, of course, keep her in a perfection of condition by reason of the fact that she is a vessel of her class and new. Supposing E a man covenants for a year to keep a tramp that has been at sea for fifteen years in good condition, he must do it just as much as the man who covenanted to keep the *Mauretania* in good condition. But the keeping in good condition in the second case will mean something very different from what it did in the former case; it will be in good condition for a vessel that is of that age and nature. I desire to state that for my own part I feel no reluctance to give the full effect to this con- F sideration in interpreting these covenants. I think we have to consider what they oblige the tenant to do in the case of an old building. I wish to say that, while the age and the nature of the building can qualify the meaning of the covenant, they never relieve the tenant from his obligation. If he chooses to covenant to keep in good condition an old house, he must do it whatever be the means necessary for him to employ in so doing. He can never say: "The house G was old, so old that it relieved me from my covenant to keep it in good condition." If it was so old that to keep it in good condition would require replacement of part after part until the whole was replaced, then by making a covenant that he would do it he took the burden of doing it on his own back. I have looked at the cases, and with the exception of one to which I shall presently refer and which I think can be explained on other grounds, I find no case which suggests that the H age and nature of a structure relieves the tenant from the duty of maintaining it if he has undertaken to maintain it. I have dealt with the covenant to keep in good condition, and I did that by preference, because it seems to me that that is entirely free from any consideration as to the means that have to be employed by the tenant to effect his work, in fact to effect his duty, and I say that supposing there is a house built on a plot of land which is let on a building lease for eighty I years and the person who takes the building lease undertakes to keep that house in good condition for the eighty years, he cannot say that it is a house which from the nature of the case would only live ordinarily for twenty years, and, therefore, he may let it die at the end of twenty years. He must do all that is necessary to keep that house in good condition for the period for which he has covenanted. As I have pointed out, the words "keep in good condition" will have a different meaning according to the nature and age of the house. But one thing one can be certain of: there is a breach of the covenant if the house

no longer remains a house. It is quite clear that, however you qualify the keeping of a house in good condition it implies that there is a house, and in this present case it seems to me that the case of the tenants is this: "We were justified in leaving it not as a house because we only covenanted to do repairs." I think the answer to that is: "You covenanted to keep it in good condition, and besides you covenanted to do repairs a point to which I will refer later on, and, therefore, you cannot plead that it was a performance of your contract if you allowed the house to get into such a condition that it was no longer habitable as a house."

I turn to the facts of the case to see whether the tenants maintained and left the house in good condition. It is perfectly obvious that they did not. If a house is in such a condition that it is dangerous to the public and a portion of it has to be pulled down and re-built at the demand of the local authority on the ground of public safety—which must be the safety of the people within as well as the people without—there is a plain breach of the covenant to keep in good condition, and I should be perfectly satisfied to decide this case on that alone, which I think would be adequate to support the case for the plaintiff.

I will now go to the second covenant, which is to keep in thorough repair. Here we get more into the realm of previous decisions by reason of the fact that it has by some of them been treated as a covenant which pointed to the mode in which the one who makes the covenant is to perform his duty. I confess that it is a matter on which one is free to express one's opinion. I think that to keep in thorough repair does not in any way confine the person who is liable under the agreement to the duty of doing what is ordinarily called repairs. You speak of a house being in thorough repair when it is a new house where no repairs have been done. But it is a description of a state and not of the mode by which that state has been arrived at, and, therefore, I draw no wide distinction between keeping in thorough repair and keeping in good condition; they both appear to me to describe the condition of the house. What a surveyor would call in good condition and what a surveyor would call in thorough repair may differ somewhat, but they would be something very like the one to the other. As I have said, the legal obligation is to keep the house in that state, and I confess I do not think that from the legal point of view there is much distinction between the nature of the two obligations.

I come now to the third covenant, which is to repair. There there is a duty to perform an operation. No doubt if you thoroughly repair it, will put the house in a good condition of repair. There is no doubt that that word refers to the operation to which the tenant binds himself to have recourse. For my own part, when you apply the word "repair" to a complex subject-matter like a house, I have no doubt that the repair includes the replacement of part. Of course if a house had tumbled down, or was down, you could not use the word "repair" to cover re-building. It would not be apt to describe that, but so long as the house exists as a structure the question whether repair means replacement, to use the phrase so common in marine cases, substituting new for old, does not seem to me to be at all material. Many, and in fact most, repairs imply that some portion of the total fabric is renewed; that new is put in place of old. Therefore, you have from time to time as things need repair to put new for old. If you properly repair as you go along, I think that the consequence will be that you will get, not a house that does not suffer from age, not a house which when old is the same as when it was new, but you will always get a house which will be in repair and usable as a house. I cannot think that there is any case which says that, if a person has undertaken throughout a term to repair a house, he can ever say that he has no longer any duties because, although he has properly repaired, the house no longer exists. But so far as the present case is concerned, that is a point that need not be decided. The two other covenants are quite sufficient to decide the case. If I am right, we need not go to the authorities, because there is a plain duty and a plain breach of it. It is not pretended that

this wall, which was part of the demised premises, was in good condition. It it not contended that it was in thorough repair and that it got into that state. It either was in that state before the demise of the premises or it got into that state during the term of the demise, and it is settled law that when you undertake to keep a thing in good condition, or in thorough repair, and it is not in that condition when the demise commences, the covenant implies that you are to put it in that state as well as to keep in that state.

I wish to deal very shortly with the cases to which we have been referred, and which no doubt deal with an exceedingly important question as to the duty of lessees under repairing leases. Let me take first *Proudfoot* v. *Hart* (4). That case came first before the Divisional Court, consisting of CAVE and MATHEW, JJ. There CAVE, J., laid down certain principles for the interpretation of a repairing covenant with which, I think, MATHEW, J., agreed. The covenant there was to keep the premises in good tenantable repair and to so leave the same at the expiration of the term. CAVE, J., says (25 Q.B.D. at p. 46):

> "It is quite impossible to read through what the learned official referee has said without seeing that he has not adopted that view of the law, because he says: 'I thought that if the paper or paint was thoroughly worn out he must re-paint or re-paper where done before.' That is exactly the thing which he is not bound to do."

There is no doubt that CAVE, J., gave his great authority to an interpretation to these covenants which would be entirely in conflict with the interpretation that I should give to them, and the case would be one on which great reliance might justly be placed by the tenants in the present case if it had not gone to appeal, and the law as laid down by CAVE, J., had not been formally overruled. If you read the judgments of LORD ESHER, M.R., and LOPES, L.J., who with him constituted the court when the case reached the Court of Appeal, you will find that both of those judges considered that the obligation was to keep the premises in a state described by the words "good tenantable repair," and that, whether it was by reconstruction or whether it was by doing things which would be ordinarily termed repair, the tenant was bound to keep them in that state. The court did what I most respectfully say was their duty. They said that the scope of the covenant was confined by the description of the state in which the house was to be kept. So far did they go in that line that LOPES, L.J., drafted, and LORD ESHER adopted, a definition of what tenantable repair was. LORD ESHER says (25 Q.B.D. at p. 52):

> "LOPES, L.J., has drawn up a definition of the term 'tenantable repair' with which I entirely agree. It is this: 'Good tenantable repair' is such repair as having regard to the age, character, and locality of the house would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it."

He contrasts what it would mean in Grosvenor Square with what it would mean in Spitalfields. The word "repair" there does not refer to the operation of repairing. That is proved by the fact that LORD ESHER takes the case of a floor being rotten, and says that, if it is rotten, the tenant must put a new one in. "Repair" is accepted there by the court as a description of the state, and the interpretation given to the covenant is that, however he does it, the covenantor must keep it in that state.

The next case, to which many references have been made, is *Lister* v. *Lane and Nesham* (3). That is a peculiar case, and I do not think sufficient attention has been paid by counsel for the tenants to what the facts of that case were, and what was the nature of the action. The statement of claim alleged that the defendant was bound to repair on notice, that notice had been given, and that the repairs claimed in the notice were not done. The defendant by his defence

said that the notice required work to be done which he was not bound to do by the terms of the covenant, and that the premises were repaired and were delivered up in repair in accordance with the said covenant. The learned judge at the trial found in favour of the defendant. In other words, he found that the repairs in the notice were repairs outside the covenant, and that the defendant had delivered up the premises repaired so far as his covenant required. That was what was the issue at the trial, and that was the decision upon it, and when you look at the excerpts of the evidence given at the trial, you find that the evidence given by the plaintiff was directed to show that the house as repaired was a house in a poor condition, because it was a house with very uncertain foundations, and that the notice had called upon him to support the house on foundations of a totally different type from that which it had at the time of the demise. The court said that the duty of the defendant was to repair the premises demised, and not to give back at the end of the demise a totally different structure, because the premises demised would be very poor in their stability, and quite likely very indifferent premises altogether. They were in that state when they were demised, and in that state they had to be given up. I do not think that there was any evidence that the premises would not stand in the condition in which they were delivered up, or that they were worse than when they had been demised originally, excepting, perhaps, that they had sunk somewhat more, which was due to the nature of the premises. The plaintiff sought to recover damages by evidence of this kind: "I think the cause of the bulging was the sinking of the foundation. I think the decay would be gradual, and it would get worse from 1890 to 1891. I do not think it would be profitable to repair it without pulling it down." That has nothing whatever to do with the defendant. He had not stipulated to do the best thing for his landlord. What he had stipulated was to repair, and the learned judges had found that he had repaired in accordance with the covenant. The question, therefore, was whether he should give up totally different premises from those that were demised or pay the costs of foundations which did not exist in the demised premises, and which he was not bound to put in the premises that he gave up. I do not think that *Lister* v. *Lane and Nesham* (3) has any bearing whatever on the present case. But certainly there is nothing there which says that a covenantor is any way relieved from the burden of his covenant, because it may be that in order to fulfil it he will have to re-build to a certain extent the premises.

Now we come to *Torrens* v. *Walker* (2). That is again a very peculiar case. The lessor had undertaken to keep the outside walls in repair, and the learned judge decided, in accordance with the authorities, that that was a question of repair on a notice. So far as I can see, no notice had been given by the lessee to his lessor to repair until after the London County Council had served a notice to pull down, or practically to pull down, certainly the outside wall and a portion of the party wall, or inside wall, which abutted on a neighbour's premises. At the time, therefore, when the notice was given I do not think that repair was possible. It seems to me, reading the facts of that case, that the house had practically been destroyed. When they came to examine it, the whole of the outside walls, all the inside wall above the second floor, and probably the inside wall below that, were in a state of ruin. The lessee's premises only went down, I think, to the first floor. Therefore, nearly the whole of the structure, so far as it was demised to the lessee, and probably the whole of it, was in a state of ruin, and that was when the notice was given. It may very well be that under those circumstances the lessee can say: "You have called on me to do this, but my duty did not begin till you called on me at a time when it is impossible for me to perform the operation which I undertook to do," because it was held by the learned judge that his duty did not begin till notice. I am not bound to say whether *Torrens* v. *Walker* (2) was rightly decided. I think that considerations arose in that case which do not arise here, and I think that to go out of my way

to decide whether I approve of it would not be useful. I reserve my opinion till the time comes when that case comes up before us. But certainly it differs so widely from the present case, and, in my opinion, the present case can be decided so clearly on the ordinary principles requiring a covenantor to perform his covenant if the language of it be clear as construed in relation to the subject-matter, that I do not think it is profitable for me to discuss whether *Torrens* v. *Walker* (2) was rightly decided.

For these reasons I think that the tenants were bound to renew this wall. If it were necessary to treat it as a question of degree, I should say that this was only the repair of an element in the whole of the demised premises, but from my point of view it is not necessary to undertake that question, and, therefore, I do not do so. I am of opinion that the appeal should be dismissed with costs.

BUCKLEY, L.J.—"Repair" and "renew" are not words expressive of a clear contrast. Repair always involves renewal—renewal of a part, renewal of a subordinate part. A skylight leaks; repair is effected by hacking out the putty, putting in new putty, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood, to replace the tiles or slates which are cracked or broken or lost by new tiles, to make good the flashing, and the like. Part of a garden wall falls down, and a repair is effected by building it up again with new mortar, and, so far as necessary, with new bricks and stone. Repair is restoration by renewal or replacement of subordinate parts of a whole. Renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily, but substantially, the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible, a covenant to repair does not carry an obligation to renew or replace. That has been decided in *Lister* v. *Lane and Nesham* (3) and *Wright* v. *Lawson* (5). But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole.

It is with such limitations as those that the language in the cases which have been cited to us must, I think, be read. For instance, in *Gutteridge* v. *Munyard* (1), TINDAL, C.J., is reported as saying this (1 Mood. & R. 334):

> "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord."

Every decay which is the subject of repair is effected by the operation of the lapse of time and the elements diminishing the value. Decay always results from time and nature. Of course, the Chief Justice did not mean his words to be understood as meaning that the cost of repairing decay is to be borne by the landlord. They are words which follow upon a sentence in which he was speaking of a building of a particular character—namely, a very old building—and so negativing the argument that the old building was under the operation of a covenant to repair to be converted into a new one. LORD ESHER in *Lister* v. *Lane and Nesham* (3) says ([1893] 2 Q.B. at p. 216):

> "If a tenant takes a house which is of such a kind that by its own inherent nature it will, in the course of time, fall into a particular condition, the effects of that result are not within the tenant's covenant to repair."

Every house is of such a kind that by its own inherent nature it will, in course of time, fall into a particular condition. Of course, LORD ESHER did not mean that decay is in every case not within the tenant's covenant to repair. The context shows that he did not mean that. He goes on to say this:

> "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant

took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing."

If repair be understood in the sense which I suggest, the authorities are not, I think, difficult. In *Gutteridge* v. *Munyard* (1) the building was a very old building, and the finding of the jury under the directions of TINDAL, C.J., only involved that the tenants had substantially kept the building, such as it was, in repair, though they had not improved it. *Lister* v. *Lane and Nesham* (3) and *Wright* v. *Lawson* (5) were cases in which the buildings could not by any repair be brought into their original condition. In *Lister* v. *Lane and Nesham* (3) the only thing that could be done was not to replace the old timber platform, but to support the house entirely anew by walls carried down 17 ft. into the subjacent ground. That would be not repairing such a house as was in question—namely, a house whose foundations were of timbers lying on the oozy soil—but providing a new house in the sense that it would be a house with foundations on the ground. In *Wright* v. *Lawson* (5) the bay window could not be replaced, supported as it must have been by cantilevers, but could be reproduced only by that which would be a new structure—namely, a bay window supported by vertical supports from the ground. *Proudfoot* v. *Hart* (4) contains, I think, no general principle. It was a question as to what was performance of a covenant to keep in good tenantable repair. All that LORD ESHER says is that if the floor became rotten the tenant must put in a new floor unless he can make the floor good by ordinary repair. The floor was a subsidiary part of the whole. The house could not be occupied if the floor were rotten, and the tenant, to comply with his covenant as to tenantable repair, must either make it good by repair or replace it, otherwise the house could not be tenantable. *Torrens* v. *Walker* (2) was a case in which the covenant was to keep the outside of the premises in repair. The house was triangular in form at the junction of two streets. The pulling down amounted to a demolition of substantially the whole subject-matter of the covenant, leaving only the floor, which had to be supported by a wall, newly erected. Under the circumstances the finding was justified that repairing the building, or, as I prefer to say repairing the subject-matter of the covenant—namely, the outside of the premises—was impossible, and nothing could be done but re-build. The learned judge found in that case that the act to be done was not one of renewal or replacement of a subsidiary part, but substantially a re-building of the whole subject-matter of the covenant.

All the cases, to my mind, come only to this, that the question is one of degree, and what we have to look to in the present case is to see whether the official referee in his findings of fact has treated the front wall of this house as being a subsidiary part of a larger structure, or has regarded the necessary operations as amounting to substantially a re-erection of the house. His findings of fact are these. First, he finds that the decay of the front wall is not due to any vibration superinduced by the tenant. He thinks it is caused by old age. That is in the tenants' favour. He then finds that the wall could not have been repaired without re-building. That, again, is in the tenants' favour. But then he goes on, after discussing *Proudfoot* v. *Hart* (4), *Lister* v. *Lane and Nesham* (3), *Wright* v. *Lawson* (5), and *Torrens* v. *Walker* (2), and says this:

"The circumstances of all these cases seem to me distinguishable from the one before me. The doing the work claimed by the landlord in those cases involved not a repair or re-building of a worn-out portion such as a wall or floor, but the re-building of the whole house, which would have given the landlord a new house different from that demised, or, as in *Wright* v. *Lawson* (5), of a new bay window of a totally different character. In this case it is clear that the whole building does not require re-building. The wall can be re-built, and has been re-built, and the old tie-plates and binders have been retained, and the case appears to me exactly like that of the new floor mentioned by LORD ESHER":

see *Proudfoot* v. *Hart* (4). That is a material finding of fact on the part of the referee. He finds that this is not the erection of a new house; it is only repair in the sense that it is restoring to stability and safety a subordinate part of the wall. He likens it to the case where the house requires a new floor; here it requires a new wall. When it has got its new wall it will not be a new house; it will be the old house put into repair in the sense that there has been renewed or replaced a worn-out subordinate part of the whole. On that finding of fact it appears to me that the tenants must fail, and I think the appeal must be dismissed.

Solicitors: *Letts Brothers; Wild & Collins.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

LLOYD *v.* GRACE, SMITH & CO.

[HOUSE OF LORDS (Earl Loreburn, L.C., Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Robson), February 28, 29, March 28, July 19, 1912]

[Reported [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723]

Agent—Fraud—Liability of principal for fraud of agent—Fraud of solicitor's managing clerk—Liability of solicitor—Solicitor innocent of fraud—Fraud not resulting in benefit to solicitor—Clerk acting within scope of authority.

If an agent commits a fraud while acting or purporting to act in the course of the business which he is authorised, or held out as authorised, to transact on account of his principal, the principal, although innocent of the fraud, is liable for the fraud of the agent whether the fraud results in a benefit to the principal or not.

Where, therefore, a solicitor's managing clerk was authorised by the solicitor to receive deeds and carry through sales and conveyances on the solicitor's behalf, and, while acting as the representative of the solicitor's firm, persuaded a client of the firm to sign documents (of the contents of which she was unaware) transfering to him a mortgage under which she was mortgagee and conveying to him a freehold property owned by her, and then called in the mortgage, sold the freehold property, and appropriated the proceeds, the solicitor throughout being innocent of any participation in the fraud, and, in an action by the client against the solicitor for detinue of the title deeds of the freehold property and £450 had and received in respect of the mortgage, the jury found that in receiving the deeds and taking instructions to call in the mortgage and sell the freehold property the managing clerk professed to act as conveyancing manager to the solicitor,

Held: as the fraud was committed in the course of the clerk's employment and not outside the scope of his authority the solicitor was liable to the client although he was innocent of the fraud and the fraud was committed, not for his benefit, but for the benefit of the clerk.

Barwick v. *English Joint Stock Bank* (1) (1867), L.R. 2 Exch. 259, explained.

Notes. Explained and distinguished: *Radley* v. *L.C.C.* (1913), 109 L.T. 162. Considered: *Janvier* v. *Sweeney* (1919), 35 T.L.R. 226; *Rand* v. *Craig*, [1919] 1 Ch. 1; *Mintz* v. *Silverton* (1920), 36 T.L.R. 399; Kreditbank Cassel G.m.b.H. v. *Schenkers, Ltd.*, [1927] All E.R. Rep. 421; *Britt* v. *Galmoye and Nevill* (1928), 44 T.L.R. 294; *Reckitt* v. *Barnett, Pembroke and Slater*, [1928] 2 K.B. 244. Considered and distinguished: *Slingsby* v. *District Bank, Ltd.*,

[1931] 2 K.B. 588. Considered: *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R. Rep. 143. Applied: *Kleinwort, Sons & Co.* v. *Associated Automatic Machine Corpn., Ltd.* (1932), 77 Sol. Jo. 12. Considered: *Algemeene Bankvereeniging* v. *Langton* (1935), 40 Com. Cas. 247. Applied: *Uxbridge Permanent Building Society* v. *Pickard*, [1939] 2 All E.R. 344. Considered: *Navarro* v. *Moregrand, Ltd.*, [1951] 2 T.L.R. 674. Applied: *United Africa Co.* v. *Saka Owoade*, [1955] A.C. 130. Referred to: *Mair* v. *Rio Grande Rubber Estates*, [1913] A.C. 853; *Armstrong* v. *Jackson*, [1916–17] All E.R. Rep. 1117; *Pratt* v. *British Medical Association*, [1918–19] All E.R. Rep. 104; *Percy* v. *Glasgow Corpn.*, [1922] 2 A.C. 299; *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, *Same* v. *Barclays Bank*, [1924] All E.R. Rep. 230; *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China*, [1928] All E.R. Rep. 285; *Sun Life Assurance Co. of Canada* v. *W. H. Smith & Son, Ltd.* (1934), 150 L.T. 211; *Aitchison* v. *Page Motors, Ltd.*, [1935] All E.R. Rep. 594; *Century Insurance Co.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; *Transvaal and Delagoa Bay Investment Co., Ltd.* v. *Atkinson*, [1944] 1 All E.R. 579; *Penmount Estates, Ltd.* v. *National Provincial Bank, Ltd.* (1945), 173 L.T. 344; *Armstrong* v. *Strain*, [1951] 1 T.L.R. 856; *Crook* v. *Derbyshire Stone Co.*, [1956] 2 All E.R. 447; *Staton* v. *National Coal Board*, [1957] 2 All E.R. 667.

As to the liability of a principal for the fraud and other unlawful acts of his agent, see 1 HALSBURY'S LAWS (3rd Edn.) 221–224, and as to the liability of a master for the acts of his servants see ibid., vol. 25, pp. 529–550. For cases see 1 DIGEST (Repl.) 653 et seq., 34 DIGEST 123 et seq.

Cases referred to:

(1) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J. Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425.*

(2) *Hern* v. *Nichols* (1701), Holt, K.B. 462; 1 Salk. 289; 90 E.R. 1154; 1 Digest (Repl.) 682, *2427.*

(3) *Udell* v. *Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur. N.S. 777; 1 Digest (Repl.) 683, *2433.*

(4) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, *2428.*

(5) *Swire* v. *Francis* (1877), 3 App. Cas. 106; 47 L.J.P.C. 18; 37 L.T. 554, P.C.; 1 Digest (Repl.) 692, *2474.*

(6) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl) 256, *1631.*

(7) *McGowan & Co., Ltd.* v. *Dyer* (1873), L.R. 8 Q.B. 141; 21 W.R. 560; 9 Digest (Repl.) 560, *3713.*

(8) *Weir* v. *Bell* (1878), 3 Ex. D. 238; 47 L.J.Q.B. 704; sub nom. *Weir* v. *Barnett, Bell, etc.*, 38 L.T. 929; 26 W.R. 746, C.A.; 9 Digest (Repl.) 129, *705.*

(9) *British Mutual Bank Co., Ltd.* v. *Charnwood Forest Rail Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590; sub nom. *Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, 3 T.L.R. 498, C.A.; 1 Digest (Repl.) 686, *2449.*

(10) *Ruben and Ladenburg* v. *Great Fingall Consolidated*, [1906] A.C. 439; 75 L.J.K.B. 843; 95 L.T. 214; 22 T.L.R. 712; 13 Mans. 248, H.L.; 1 Digest (Repl.) 686, *2450.*

(11) *Cheshire* v. *Bailey*, [1905] 1 K.B. 237; 74 L.J.K.B. 176; 92 L.T. 142; 53 W.R. 322; 21 T.L.R. 130; 49 Sol. Jo. 134, C.A.; 34 Digest 132, *1015.*

(12) *Hambro* v. *Burnand*, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C.A.; 1 Digest (Repl.) 662, *2316.*

(13) *Thorne* v. *Heard and Marsh*, [1895] A.C. 495; 64 L.J.Ch. 652; 73 L.J. 291; 44 W.R. 155; 11 T.L.R. 464; 11 R. 254, H.L., 1 Digest (Repl.) 685, *2443.*

(14) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, *2435*.

(15) *Western Bank of Scotland* v. *Addie*, [1867] L.R. 1 Sc. & Div. 145; 1 Digest (Repl.) 686, *2453*.

Also referred to in argument:

Bryant, Powis and Bryant v. *La Banque du Peuple, Same* v. *Quebec Bank*, [1893] A.C. 170; 62 L.J.P.C. 68; 68 L.T. 546; 41 W.R. 600; 9 T.L.R. 322; 1 R. 336, P.C.; 1 Digest (Repl.) 350, *297*.

Thompson (Thomson) v. *Bell* (1854), 10 Exch. 10; 23 L.J.Ex. 321; 23 L.T.O.S. 178; 2 W.R. 559; 2 C.L.R. 1212, 156 E.R. 334; 1 Digest (Repl.) 685, *2445*.

Trott v. *National Discount Co.* (1900), 17 T.L.R. 37; 1 Digest (Repl.) 693, *2485*.

Glasgow Corpn. v. *Lorimer*, post p. 131; [1911] A.C. 209; 80 L.J.P.C. 175; sub nom. *Glasgow Corpn.* v. *Riddell*, 104 L.T. 354, H.L.; 34 Digest 148, *1170*.

Limpus v. *London General Omnibus Co., Ltd.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 9 Jur. N.S. 333; 11 W.R. 149; 158 E.R. 993, Ex. Ch.; 1 Digest (Repl.) 690, *2469*.

Giblin v. *McMullen* (1868), L.R. 2 P.C. 317; 5 Moo. P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 64, *60*.

Sanderson v. *Collins*, [1904] 1 K.B. 628; 73 L.J.K.B. 358; 90 L.T. 243; 20 T.L.R. 249; sub nom. *Sanderson* v. *Collins*, 52 W.R. 354; 48 Sol. Jo. 259, C.A.; 34 Digest 140, *1100*.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (Farwell and Kennedy, L.JJ., Vaughan Williams, L.J., dissenting), reported [1911] 2 K.B. 489, reversing a decision of Scrutton, J., in favour of the appellant, the plaintiff in the action, after the trial of the action before him with a special jury at Liverpool Assizes.

The action was brought by the appellant for the detinue of title deeds which she alleged were held by the respondents, a firm of solicitors, and also for the sum of £450 which she claimed as had and received by the respondents to her use. The facts are fully set out in the opinion of Lord Macnaghten.

Tobin, K.C., and *J. A. Johnston* for the appellant.

Greer, K.C., and *F. Cuthbert Smith* for the respondents.

Their Lordships took time for consideration.

Mar. 28, 1912. The Lord Chancellor stated that their Lordships were unanimous in support of the appeal, and would give their reasons at a later date.

July 19, 1912. The following opinions were read.

EARL LOREBURN, L.C.—I think that the facts of this case, except in immaterial points, are quite clear and undisputed.

The appellant, Mrs. Lloyd, had bought some property, and thus had come to know of the respondents, solicitors. She had doubts about having got her money's worth, and went to the respondents' office to inquire. When there she saw one Sandles, the respondents' managing clerk, and was induced by him to give him instructions to sell or realise this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but they put into Sandles' possession her interest therein. She gave him the deeds as the respondents' representative. Having got them and the signed documents, he dishonestly disposed of this lady's property and pocketed the proceeds. That is the whole story as it is now either found or admitted, because it is incontestable.

It is clear, to my mind, upon these simple facts that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorised to receive deeds and carry through sales and conveyances and to give notices on the defendants' behalf. He was instructed by the plaintiff, as the representative of the defendants' firm—and she so treated him throughout—to realise her property. He took advantage of the opportunity so afforded him as the

defendants' representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion, there is an end of the case. It was a breach by the defendants' agent of a contract made by him as defendants' agent to apply diligence and honesty in carrying through a business within his delegated powers and intrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal. At the hearing the learned judge, no doubt with a view to avoiding the risk of a new trial in so small a case, appears to have been prevailed upon to put no less than six questions, with sub-divisions making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by WILLES, J., in *Barwick* v. *English Joint Stock Bank* (1) and admittedly of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which WILLES, J., means the word "benefit" is not true upon the admitted facts. WILLES, J., cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that. As to *Barwick* v. *English Joint Stock Bank* (1), I entirely concur in the opinion about to be delivered by LORD MACNAGHTEN, which I have had the advantage of reading. If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it, and if the whole judgment of WILLES, J., be looked at instead of one sentence alone, he does not say otherwise.

EARL OF HALSBURY.—I, in common, I believe, with all your Lordships, think that this appeal must be allowed and that judgment must be entered for the plaintiff, and but for what appears to me a singular misapprehension I should not have thought it necessary to add anything to SCRUTTON, J.'s, very careful and very accurate judgment; but I think that the judgment in *Barwick* v. *English Joint Stock Bank* (1) has been misunderstood. As it is certainly a judgment of very high authority it is desirable to examine it carefully and to see what it really did decide, since it has been several times referred to as deciding what it certainly did not decide.

It was a decision of the Exchequer Chamber delivered by WILLES, J., the court consisting of BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH and LUSH, JJ., as well as the learned judge who probably, though not certainly, wrote the judgment, with whom all the judges concurred—a judgment, therefore, of the very highest authority, and one which I think it would be impossible to suppose that we are saying anything to shake. The actual decision of the court was that MARTIN, B., was wrong in nonsuiting the plaintiff and ordering a new trial; and I think that one source of the misapprehension to which I have referred is the care with which the learned judges avoided deciding the question or assuming how it was to be decided by the jury in the new trial which was then ordered. So far from giving any authority for the proposition in favour of which it is quoted, the court went out of its way to disclaim the existence of any doubt about the principle that the principal is answerable for the act of his agent in the course of his master's business, and the words added, "and for his benefit," obviously mean that it is something in the master's business; and the judgment in question says that the question was settled as early as LORD HOLT'S time—a tolerably strong indication that the judges thought that there was not much doubt about what the law is now. LORD HOLT, who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history, and has been described as a perfect master of the common law, speaks in the case referred to—*Hern* v. *Nichols* (2)—with no uncertain voice upon the subject, and his view was confirmed and adopted by such a court as I have described after more than two centuries. The case

was this. An action on the case for a deceit was brought by one Hern against a merchant named Nichols. The reporter seems to have had some difficulty in making out what the particular kind of silk was, for he has left its description blank; but enough of the pleadings are given to indicate very clearly what the complaint was. The plaintiff found out that one kind of silk was represented as being sold and another, and an inferior, sort of silk was supplied. Upon trial, says the report, Not Guilty pleaded, it appeared there was no actual deceit by the defendant, but it was by his factor beyond sea, and the doubt was whether this should charge the merchant, and HOLT, C.J., was of opinion

> " that the merchant was answerable for the deceit of his factor, though not criminaliter yet civiliter; for, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust in and confidence in the deceiver should be a loser, than a stranger."

I should be very sorry to see a principle which appears to me of very great value shaken by any authority. No treatise on agency that I have ever come across has ever shaken it, and it would be strange indeed if it should be shaken by the decision in *Barwick* v. *English Joint Stock Bank* (1), since that case appears to me a strong authority confirming and strengthening the accuracy of that principle.

LORD MACNAGHTEN.—In the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long standing and good repute, the appellant, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much—a mortgage for £450 bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port which she bought herself without legal assistance for £540 after her husband's death. But it was all she had; and after the order of the Court of Appeal reversing a decision in her favour pronounced by SCRUTTON, J., who tried the case with a special jury, she was compelled to appeal to this House as a pauper.

At the date of the transaction which gave rise to this litigation, Mr. Frederick Smith was the sole member of the firm of Grace, Smith & Co. He was a gentleman "devoted," as he says, "to public work," meaning by that, I suppose, that his proper business as a solicitor was a matter of secondary consideration with him. There is no imputation or reflection on the honour of the firm or on the honesty or honour of Mr. Frederick Smith. The fraud of which Mrs. Lloyd complained was committed by his accredited representative, a clerk in the office—one Sandles—in the course of the business which Mrs. Lloyd had put into the hands of the firm, which was undoubtedly a solicitor's legitimate business. Mrs. Lloyd thought that Sandles was a member of the firm. He was really conveyancing manager and managing clerk. He conducted the conveyancing business of the firm without supervision. Mr. Smith admits that Sandles was "practically second in command." But in his own department he was in supreme command. He represented the firm to all intents and purposes just as much as if he had been a partner. Mr. Smith says that he never gave away his own authority. In proof of this statement, or in connection with it, Mr. Smith adds, "I was supposed to be told by Sandles." What he was told or supposed to be told does not appear from the learned judge's notes. The fraud was committed in January, 1910. It was not discovered until the following April, when Mr. Smith dismissed Sandles for some irregularity, and Mrs. Lloyd's deeds, for which she held a receipt in the name of the firm, were not to be found.

The story of the fraud is this. On Jan. 11, 1910, Mrs. Lloyd called at the office of Grace, Smith & Co. It was her second visit on the business about which she wanted the firm's advice. She had called in the preceding November to make some inquiries about her property; and once before that, when the purchase of the Ellesmere cottages was completed, she had been to the office to get her deeds from Grace, Smith & Co., who were the vendor's solicitors. That was all that she knew of the firm. On Jan. 11, 1910, she saw Sandles. She was dissatisfied with the return which she got from her property. Sandles advised her to call in the mortgage and to sell the Ellesmere

Port property. He asked her to come the next day and bring her deeds with her. On the 12th she brought her deeds, and gave the instructions which Sandles had suggested. After some conversation Sandles left the room, taking the deeds with him. He returned in about twenty minutes with one of the clerks and put before her two documents, which he told her to sign. He did not tell her what they were. She did not read them. She signed both without demur or question, believing them, she says, to be something which she "had to sign before the houses were sold." It turned out that one was a transfer of the mortgage to Sandles himself, expressed to be in consideration of £450 paid to Mrs. Lloyd. The other was an absolute conveyance to Sandles of the Ellesmere Port property with a receipt for the purchase money in the body of the deed. At the same time he gave her a receipt for her deeds in his own name. She showed the receipt to a friend, who said that it was in an odd form and that she ought to have a receipt in the name of the firm. On the 14th she wrote to say that she had changed her mind and wished to cancel her instructions. She went back to the office on the 17th and asked for a receipt for her deeds in the name of the firm. Sandles gave her the receipt which she asked for at once. Armed with the two deeds, executed by Mrs. Lloyd and witnessed by one of the clerks of the firms, Sandles promptly called in the mortgage, transferred it, and disposed of the proceeds in payment of a debt of his own. The conveyance of the Ellesmere property he pledged with a bank to which he was indebted. At the trial the learned judge put a series of questions to the jury. In answer to the first question the jury stated that "in receiving the deeds and taking instructions to sell the property and call in the mortgage debt Sandles professed to act as conveyancing manager to Messrs. Grace, Smith & Co." The other questions were framed to meet a view of the meaning and effect of the well-known decision in *Barwick* v. *English Joint Stock Bank* (1) which no doubt has obtained currency of late, but I think that it is erroneous. The answers to these questions are not of much assistance in deciding the real question at issue. The jury added a rider that they were of opinion that "throughout the whole history of the transaction Mrs. Lloyd believed that she was dealing with Messrs. Grace, Smith & Co." It was agreed by the parties that any supplementary finding of fact which it became necessary to decide should be made by the learned judge. Under that agreement the learned judge, as he says,

> "found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the plaintiff did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her."

That seems to me to be a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency. The learned judge thereupon, after consideration, gave judgment for the plaintiff. His decision was reversed by the Court of Appeal (Vaughan Williams, L.J., dissenting).

The first line of defence set up by Mr. Smith was that Mrs. Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between Mrs. Lloyd and Sandles. It is enough to say that there is no foundation for this defence. It was negatived by the jury in their answer to the first question and in the rider which they added to their special verdict. Sandles no doubt was playing a double game. To Mrs. Lloyd he was Grace, Smith & Co.; to the clerks in the office Mrs. Lloyd's visits were the private visits of a personal friend. The other line of defence, which found favour with the Court of Appeal, requires more consideration. It was rested on the fact that the fraud was committed, not for the benefit of the firm, but for the benefit of Sandles himself. It was contended

that *Barwick's Case* (1) is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal. *Barwick* v. *English Joint Stock Bank* (1) is no doubt a case of the highest authority. It was decided in the Exchequer Chamber, and the judgment was delivered by WILLES, J. But I agree with LORD HALSBURY that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the Court of Appeal. It decided two things. It decided that the learned trial judge was wrong in non-suiting the plaintiff. It also decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded; and I think it follows from the decision, and the ground on which it is based, that in the opinion of the court a principal must be liable for the fraud of his agent committed in the course of the agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

It must be remembered that in 1867, when that case was decided, there was some difference of judicial opinion on the question whether an innocent principal was liable for the fraud of his agent, even when he had received the benefit of the fraud. In *Barwick's Case* (1) the agent committed the alleged fraud, if he did commit it, for the benefit of his principals. It may be that he was indirectly acting for his own benefit. He may have wished to recommend himself to his principals by astuteness and zeal in their service, or he may have intended to make amends for over-confidence in an impecunious customer, but the direct pecuniary benefit was the benefit of the principals. It must also be remembered that in the then recent case of *Udall* v. *Atherton* (3), by an equal division of the members of the court, an innocent principal succeeded in retaining the benefit of a fraud committed by his agent. Possibly that case in some measure turned, as *Cornfoot* v. *Fowke* (14) is said to have turned, on a question of pleading; but certainly one of the learned judges, who was in favour of the defendant, though he held strongly that an innocent principal was not liable in an action of deceit for the fraud of his agent, even though he had profited by it, expressed an opinion that there was no form of action in which liability for vicarious fraud could be established against an innocent principal. It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that WILLES, J., expressed himself in the language which has been misunderstood. What he said was this (L.R. 2 Exch. at p. 265):

> "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. WILLES, J., does not, I think, say anything of the kind. In a sentence immediately preceding the sentence which I have quoted he observes that the question whether the principal is answerable for the act of an agent was settled as early as LORD HOLT's time—a general observation not confined to the case where the principal is a gainer by the fraud. The question as to the meaning and effect of the ruling of WILLES, J., may, I think, be best ascertained by reference to a few cases in which some of the learned judges who took part in the decision in *Barwick's Case* (1) delivered opinions. Of the judges who were concerned in *Barwick's Case* (1) none was more eminent than MONTAGUE SMITH and BLACKBURN, JJ. They were second only—if they were second—to WILLES, J., himself, and their views at least are on record.

The first important case in which the ruling in *Barwick's Case* was discussed was *Mackay* v. *Commercial Bank of New Brunswick* (4). In that case the Judicial Committee re-affirmed the ruling of WILLES, J. There the fraud was committed for the benefit of the principal. But it was argued by MR. BENJAMIN, Q.C., that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent, made within the scope of his authority, even though the principal had not profited thereby. The judgment was delivered by SIR MONTAGUE SMITH. He observed (L.R. 5 P.C. at p. 410) that their Lordships regarded it as

> "settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority."

He discussed at some length what meaning was to be attached to the expression, "the scope of the agent's authority." SIR MONTAGUE SMITH said (ibid. at pp. 410, 411):

> "There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine . . . it may be generally assumed that, in mercantile transactions, principals do not authorise their agents to act wrongfully, and consequently that frauds are beyond the 'scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorised the particular fraud complained of, or gave a general authority to commit frauds; at the same time it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their Lordships' judgment, is to be found in the case of *Barwick* v. *English Joint Stock Bank* (1)."

He quotes (ibid. at p. 412) the words of WILLES, J., who, after enumerating instances where the principle has been applied, proceeded as follows:

> "In all these cases it may be said, as it was said here, that the master had not authorised the act. It is true that he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

At the conclusion of the judgment, in reference to MR. BENJAMIN'S argument, his Lordship expresses himself as follows (ibid. at p. 416):

> "It is not necessary to determine whether or not the plaintiffs could have maintained their verdict if they had proved only that they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby."

It is difficult to imagine that SIR MONTAGUE SMITH would have expressed himself in this manner if he had supposed that the question which he reserves had been already determined in *Barwick* v. *English Joint Stock Bank* (1).

Mackay v. *Commercial Bank of New Brunswick* (4) was decided in 1874; it was followed in 1877 by *Swire* v. *Francis* (5)—also a case in the Privy Council. That was a case in which the principal was held liable for the fraud of his agent, though it was committed for the benefit of the agent himself and not for the benefit of the principal. The judgment was delivered by SIR ROBERT COLLIER, but SIR MONTAGUE SMITH was a party to the judgment.

The only other case with which I will venture to trouble your Lordships is *Houldsworth* v. *City of Glasgow Bank* (6), decided in 1880. In that case *Barwick*

v. *English Joint Stock Bank* (1), *Mackay* v. *Commercial Bank of New Brunswick* (4) and *Swire* v. *Francis* (5) are referred to at some length, both by LORD SELBORNE and by LORD BLACKBURN. LORD SELBORNE observes, as has been observed in other cases, that the principle on which those cases were decided was a principle not of the law of torts or of fraud or deceit, but of the law of agency. He said:

> "The decisions in all these cases proceeded not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by WILLES, J., in *Barwick's Case* (1)) 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.' "

Here I must ask your Lordships' particular attention to the fact that in the passage which LORD SELBORNE quotes from the judgment of WILLES, J., as explaining the true ground of decision in *Swire* v. *Francis* (5), as well as in *Barwick's Case* (1) and in *Mackay* v. *Commercial Bank of New Brunswick* (4), the words "and for his master's benefit" are omitted. In the original they follow the words "in the course of his master's business." Unfortunately in the report in 5 App. Cas., though the passage is printed as a quotation with inverted commas, the omission is not denoted in the usual way by asterisks, and it seems to have escaped observation. But it is most significant. No one who calls to mind LORD SELBORNE'S extreme accuracy in such matters can doubt that the omission was intentional. If the words omitted had been left standing the passage would not have been applicable to *Swire* v. *Francis* (5). In *Barwick's Case* (1) the words are appropriate. In a general statement of the law they are out of place. That this was LORD SELBORNE'S own opinion is evident. On the words as occurring in *Barwick's Case* (1) LORD SELBORNE makes no comment. When he comes across the same expression in LORD CRANWORTH'S judgment in *Western Bank of Scotland* v. *Addie* (15) he gives a note of warning. There it is made part of a general proposition; and LORD SELBORNE says that the words "may, perhaps, require some enlargement or explanation." That is quite enough to show that LORD SELBORNE was not prepared to accept them as an integral part of the proposition which he considered the true ground of decision in *Barwick's Case* (1) and the two cases which followed it without some qualification. LORD BLACKBURN'S view of the judgment in *Barwick's Case* (1) requires no explanation. It is clear enough. After referring to *Barwick's Case* (1) he expresses himself as follows (5 App. Cas. at p. 339):

> "I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question."

Then come these important words:

> "The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud."

That, I think, is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the frauds. I think, too, that the expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" (which STORY uses), as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as SIR MONTAGUE SMITH observed, the explanation given by WILLES, J., is the best that can be given. In *Udall* v. *Atherton* (8) WILDE, B., afterwards LORD PENZANCE, in his admirable judgment makes the following observation (7 H. & N. at p. 180):

"It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this as a general proposition I agree. All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal."

In the same case, in a passage which was approved apparently by the court in *Mackay* v. *Commercial Bank of New Brunswick* (4), MARTIN, B., stated the question to be (ibid. at p. 198):

"Was the agent's situation such as to bring the representation he made within the scope of his authority?"

In those passages the true principle is, I think, to be found.

The principle as stated by LORD BLACKBURN is in accordance with the opinion expressed by STORY, J. I venture to quote his opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of Queen's Bench consisting of COCKBURN, C.J., BLACKBURN, MELLOR and LUSH, JJ., by BLACKBURN, J., himself in a case which occurred in the interval between the date of *Barwick's Case* (1) and the decision in *Houldsworth* v. *City of Glasgow Bank* (6). The passage in the judgment of BLACKBURN, J., in *McGowan & Co., Ltd.* v. *Dyer* (7) is as follows (L.R. 8 Q.B. at p. 145):

"In STORY ON AGENCY, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit

'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them."

He then proceeds in s. 456:

'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit'."

I may observe in passing that, although LORD BRAMWELL held strongly the view that for the fraud of an agent committed for the principal's benefit the principal is not answerable, either in an action of deceit or in any other form of action, yet he seems to think that it follows (as indeed it must follow logically) that if liable in that case the principal must be liable in all cases. For he suggests in *Weir* v. *Bell* (8) (3 Ex.D. at p. 245) that, instead of imputing vicarious frauds to the principal, such cases as *Barwick* v. *English Joint Stock Bank* (1) might be decided on the ground that

"every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he made the contract."

With the most profound respect for LORD BOWEN and LORD DAVEY, I cannot think that the opinions expressed by LORD BOWEN in *British Mutual Bank Co., Ltd.* v. *Charnwood Forest Rail. Co.* (9), and by LORD DAVEY in *Ruben and Ladenburg* v. *Great Fingall Consolidated* (10), in reference to the question under

discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both. The only difference, in my opinion, between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

So much for the case as it stands upon the authorities. But, putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm, how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite safe in "our" hands. Naturally enough she signs the documents which he puts before her without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith who put this rogue in his place and clothed him with his authority? If Sandles had been a partner in fact, Mr. Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner, but that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty; but there are such things as fidelity policies. You can insure the honesty of the person whom you employ in a confidential situation, or you can make your confidential agent obtain a fidelity policy. With all respect to the learned judges of the Court of Appeal, I think that the decision appealed from is wrong. I thing that they are in error as regards the law, and I think that they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs. Lloyd out of her property as if it were an isolated transaction—as a thing standing by itself, whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter of course—a trifling incident in the business about which the firm was being employed. In the result I am of opinion that Mr. Frederick Smith was clearly liable for the fraud of his agent.

LORD ATKINSON.—I concur. I agree with every sentence in my noble and learned friend's exhaustive opinion.

LORD SHAW.—The defendants, against whom personally no suggestion of a dishonouring kind is made, plead that they are not responsible in law for the conduct of Sandles, which was nefarious, and that in the transactions Sandles acted for his own benefit. LORD MACNAGHTEN has, in the opinion just delivered, narrated the material facts in the suit, and it is quite unnecessary to resume them. With that opinion I entirely agree.

The case is in one aspect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine, as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud. Nor do I think it doubtful that it would be quite unsound in law if this result could be avoided by an investigation of the private motives—in the direction of his own, as distinguished from his master's, benefit—which animated an agent in entering into a particular transaction within the scope of his employment. The bulk of

mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers. When the authority is of a limited kind, the person dealing with such an agent is bound to assure himself that the limits are not exceeded—a familiar instance of which is the case of bills signed per procuration. But when the authority does ostensibly include within its scope transactions of a particular character, then, quoad a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.

It is not difficult to discover the legal source of much of the language employed in this case and appearing even in the questions put to the jury. It sprang from two sentences in the judgment of WILLES, J., in *Barwick* v. *London Joint Stock Bank* (1), a case in which it is too often forgotten that the bank was in the position of having had and received, and of maintaining its right to retain, money paid to it in consequence of a misrepresentation by its agent. For the purposes of the present question the outstanding fact is the very one which is apt to be forgotten—namely, that the misrepresentation was made, and was admitted to have been made, in the interests of the bank as well as by its agent. These two things were conjoined in fact. This being so, in the course of his judgment WILLES, J., used the words (L.R. 2 Exch. at p. 265):

> "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every wrong of the servant or agent which is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

The learned judge was not in this language setting up the necessity for a conjunction of these two things, but was dealing with a case in which admittedly the conjunction had occurred. I am aware of the approval given to this language in subsequent cases—as, for instance, in *Ruben and Ladenburg* v. *Great Fingall Consolidated* (10) by LORD DAVEY, and in *British Mutual Bank Co., Ltd.* v. *Charnwood Forest Rail. Co.* (9), by LORD BOWEN. If I may respectfully do so, I tender my entire concurrence with the opinion just delivered upon the dicta of LORD DAVEY and LORD BOWEN in these cases. But I do so subject to this—that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary, the principal is in such circumstances legally responsible for his agent's conduct. I incline to the view that in most, if not all, of the cases cited in argument, it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment. It was so in the instances cited, and a late and clear instance of this (much founded on at your Lordships' Bar) is *Cheshire* v. *Bailey* (11). I have referred to the analysis of the case in the judgment of SCRUTTON, J., and I add a reference to a somewhat similar analysis in *Hambro* v. *Burnand* (12) by LORD COLLINS, M.R. I respectfully give my adhesion, without a further statement on my own part, to the views expressed in these judgments.

There are two sentences in the judgment of LORD HERSCHELL, L.C., in *Thorne* v. *Heard* (13) which I venture to cite as, in my opinion, applicable to the present case—namely ([1895] A.C. at p. 502):

> "It appears to me to be perfectly clear that, in order to charge any person with a fraud which has not been personally committed by him, the agent who

A has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed B as agent, is not, in the transaction which is the wrongful act, acting for, or purporting to be acting for, the principal, it seems to me impossible to treat that as a fraud of the principal."

In the present case, as I have said, it has been clearly found that the fraud was committed in the course of, and within the scope of, the duties with which the respondents had intrusted Sandles as their managing clerk. In my opinion, they C must in these circumstances stand answerable in law for their agent's misconduct. I think that the appeal should be allowed and that the action should be disposed of in the same sense as in the judgment of SCRUTTON, J., where the treatment of the whole case, both in law and in fact, appears to me to have been correct, and with his opinion I also respectfully agree.

D **LORD ROBSON** assented to these opinions, but he was prevented by ill-health from giving his reasons.

Appeal allowed.

Solicitors: *Walter C. Broadbridge; G. Thatcher, for Grace, Smith & Co.*, Liverpool.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

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BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING CO., LTD. *v.* UNDERGROUND ELECTRIC RAILWAYS CO. OF LONDON, LTD.

G [HOUSE OF LORDS (Viscount Haldane, L.C., Lord Ashbourne, Lord Macnaghten and Lord Atkinson), June 21, 25, 27, 28, July 1, 19, 1912]

[Reported [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734]

Contract—Breach—Damages—Measure—Compensation for loss naturally flowing from breach—Duty to minimise loss—Obligation to take step which reasonable and prudent man would take—Need for transaction taken into account in mitigation to arise out of subject-matter of contract and consequences of breach.

H

The fundamental basis for the assessment of damages for breach of contract is to provide compensation for the pecuniary loss which naturally flows from the breach, but this first principle is qualified by a second which imposes on a I plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps. This second principle, however, does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. Furthermore, the transaction which, it is claimed, should be taken into account as mitigation must be one arising out of the subject-matter of the contract and the consequences of the breach and not be res inter alios acta.

Arbitration—Setting aside award—Error of law on its face.

Where an error of law appears on the face of an award by an arbitrator the court has power to set aside the award.

Hodgkinson v. *Fernie* (1) (1857), 3 C.B.N.S. 189, approved.

The appellants contracted to supply to the respondents certain machines in accordance with a specification, but supplied machines which did not comply with the contract. The respondents accepted the machines and used them, reserving their right to claim damages, but after a time, to avoid further loss which would have resulted from the use of the defective machines, replaced them by other machines of a superior type. In an arbitration in which the appellants claimed the unpaid balance of the price of the machines, and the respondents counterclaimed for damages, the arbitrator found that to purchase the other machines was a reasonable and prudent course to take, and that the effect of the superior efficiency of the new machines extinguished all loss caused to the respondents by the defects of the appellants' machines, and resulted in the respondents making a profit.

Held: the purchase of the new machines was not res inter alios acta, but was a transaction in which the respondents took a reasonable and prudent course arising naturally out of the circumstances in which they had been placed by the breach, and, therefore, that matter had to be taken into consideration in assessing the damages to which the appellants were entitled on a claim by them for the balance of the purchase price of the machines.

Decision of the Court of Appeal, [1912] 3 K.B. 128, reversed.

Notes. Considered: *William Bros.* v. *Ed. T. Agius, Ltd.*, [1914–15] All E.R. Rep. 97; *Re Wulff and Dreyfus* (1917), 117 L.T. 583. Applied: *Hill & Sons* v. *Edwin Showell & Sons, Ltd.* (1918), 87 L.J.K.B. 1106; *Payzu, Ltd.* v. *Saunders*, [1918–19] All E.R. Rep. 219. Considered: *Re Cogstad and Newsum*, [1921] 1 K.B. 87; *A.-G. for Manitoba* v. *Kelly*, [1922] All E.R. Rep. 69; *Kelantan Government* v. *Duff Development Co., Ltd.*, [1923] All E.R. Rep. 349; *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.*, [1923] All E.R. Rep. 235; *Northwood* v. *L.C.C.* (1927), 137 L.T. 49; *Roberts* v. *Anglo-Saxon Insurance Association* (1927), 96 L.J.K.B. 590; *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 47 T.L.R. 359; *F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society, Ltd.*, [1933] All E.R. Rep. 616; *Barton* v. *Blackburn* (1933), 150 L.T. 327; *Bedwas Navigation Colliery Co. (1921), Ltd.* v. *South Wales Coal Mines Scheme Executive Board* (1934), 151 L.T. 420; *Monarch Steamship Co.* v. *A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; *Philips* v. *Ward*, [1956] 1 All E.R. 874; *Interoffice Telephones, Ltd.* v. *Robert Freeman Co., Ltd.*, [1957] 3 All E.R. 479; *The Liverpool (No. 2)*, [1960] 1 All E.R. 465. Referred to: *Re King and Duveen*, [1913] 2 K.B. 32; *Parsons and Brixham Fishing Smack Insurance Co.* (1918), 62 Sol. Jo. 384; *Westacott* v. *Hahn* (1918), 87 L.J.K.B. 555; *Re Olympia Oil and Cake Co.* v. *MacAndrew Moreland & Co., Ltd.*, [1918] 2 K.B. 771; *Re Parsons and Brixham Fishing Smack Insurance Society* (1918), 62 Sol. Jo. 384; *Westacott* v. *Hahn*, [1918] 1 K.B. 495; *Taylor* v. *Bank of Athens, Pinnock* v. *Same* (1922), 91 L.J.K.B. 776; *Finlay* v. *N.V. Kwik Too Tong Handel Maatschappij*, [1928] 2 K.B. 604; *Ebbw Vale Steel Iron and Coal Co.* v. *Tew, Ebbw Vale Steel Iron and Coal Co.* v. *Lewis* (1935), 79 Sol. Jo. 593; *Meiklejohn* v. *Campbell* (1940), 162 L.T. 357; *Racecourse Betting Control Board* v. *Secretary for Air*, [1944] Ch. 114; *Biggin & Co.* v. *Permanite, Ltd.*, [1950] 2 All E.R. 859; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162; *Pilkington* v. *Wood*, [1953] 2 All E.R. 810; *W. L. Thompson, Ltd.* v. *R. Robinson (Gunmakers), Ltd.*, [1955] 1 All E.R. 154.

As to the duty of a plaintiff to mitigate damage, see 11 HALSBURY'S LAWS (3rd Edn.) 289–293, and as to setting aside an award of an arbitrator, see ibid., vol. 2, pp. 57–61 and s. 23 (2) of the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd.

Edn.) 89). For cases see 17 DIGEST (Repl.) 106 et seq., and 2 DIGEST (Repl.) 676 et seq.

Cases referred to:

(1) *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 6 W.R. 181; 140 E.R. 712; 2 Digest (Repl.) 656, *1762*.

(2) *Re Knight and Tabernacle Permanent Benefit Building Society*, [1892] 2 Q.B. 613; 62 L.J.Q.B. 33; 67 L.T. 403; 57 J.P. 229; 41 W.R. 35; 8 T.L.R. 783; 4 R. 67, C.A.; 2 Digest (Repl.) 583, *1139*.

(3) *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch. Ch. 20; 39 L.T. 239; 26 W.R. 841, C.A.

(4) *Staniforth* v. *Lyall* (1830), 7 Bing. 169; 4 Moo. & P. 829; 9 L.J.O.S.C.P. 23; 131 E.R. 65; 41 Digest 462, *2938*.

(5) *Erie County Natural Gas and Fuel Co., Ltd.* v. *Carroll*, [1911] A.C. 105; 80 L.J.P.C. 59; 103 L.T. 678, P.C.; 17 Digest (Repl.) 93, *109*.

(6) *Weitheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297, P.C.; 17 Digest (Repl.) 81, *36*.

(7) *Bradburn* v. *Great Western Rail. Co.* (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 23 W.R. 48; 17 Digest (Repl.) 108, *222*.

(8) *Jebson* v. *East and West India Dock Co.* (1875), L.R. 10 C.P. 300; 44 L.J.C.P. 181; 32 L.T. 321; 23 W.R. 624; 2 Asp. M.L.C. 505; 17 Digest (Repl.) 108, *223*.

(9) *Joyner* v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 39 W.R. 583; 7 T.L.R. 509, C.A.; 31 Digest (Repl.) 373, *5042*.

Also referred to in argument:

Wigsell v. *School for Indigent Blind* (1882), 8 Q.B.D. 357; 51 L.J.Q.B. 330; 46 L.T. 422; 30 W.R. 474; 17 Digest (Repl.) 93, *105*.

Oldershaw v. *Holt* (1840), 12 Ad. & El. 590; Arn. & H. 1; 4 Per. & Dav. 307; 10 L.J.Q.B. 221; 4 Jur. 1012; 113 E.R. 935; 30 Digest (Repl.) 446, *876*.

Brace v. *Calder*, [1895] 2 Q.B. 253; 64 L.J.Q.B. 582; 72 L.T. 829; 59 J.P. 693; 11 T.L.R. 450; 14 R. 473, C.A.; 17 Digest (Repl.) 110, *236*.

Le Blanche v. *London and North Western Rail. Co.* (1876), 1 C.P.D. 286; 45 L.J.Q.B. 521; 34 L.T. 667; 40 J.P. 580; 24 W.R. 808, C.A.; 17 Digest (Repl.) 93, *108*.

Rodocanachi v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, *2570*.

Hochster v. *De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 C.L.R. 846; 118 E.R. 922; 17 Digest (Repl.) 103, *174*.

Robson v. *North Eastern Rail. Co.* (1876), 2 Q.B.D. 85; 46 L.J.Q.B. 50; 35 L.T. 535; 41 J.P. 294; 25 W.R. 418, C.A.; 8 Digest (Repl.) 88, *595*.

Cobb v. *Great Western Rail. Co.*, [1893] 1 Q.B. 459; 62 L.J.Q.B. 335; 68 L.T. 483; 57 J.P. 437; 41 W.R. 275; 9 T.L.R. 253; 37 Sol. Jo. 248; 4 R. 283, C.A.; affirmed [1894] A.C. 419; 63 L.J.Q.B. 629; 71 L.T. 161; 58 J.P. 636; 10 T.L.R. 508; 6 R. 203, H.L.; 17 Digest (Repl.) 127, *359*.

Mediana (*Owners*) v. *Comet* (*Owners*, *etc.*), *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 9 Asp. M.L.C. 41, H.L.; 17 Digest (Repl.) 76, *10*.

No. 7 Steam Sand Pump Dredger (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp. M.L.C. 317, H.L.; 17 Digest (Repl.) 83, *56*.

Norristown v. *Moyer* (1871), 67 Pa. 355.

Great Western Rail. Co. v. *S. Pearson & Son, Ltd.* (1907), October 29, H.L.; unreported.

Adams v. *Great North of Scotland Rail. Co.*, [1891] A.C. 31, H.L.; 2 Digest (Repl.) 678, **1467*.

Doe d. Stimpson v. *Emmerson* (1847), 2 New Pract. Cas. 283; 9 L.T.O.S. 199; 2 Digest (Repl.) 656, *1760.*

Kent v. *Elstob* (1802), 3 East, 18; 102 E.R. 502; 2 Digest (Repl.) 650, *1714.*

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS and KENNEDY, L.JJ., BUCKLEY, L.J., dissenting) reported [1912] 3 K.B. 128, affirming a judgment of the Divisional Court (LORD ALVERSTONE, C.J., HAMILTON and AVORY, JJ.), reported [1911] 1 K.B. 575, upon a Special Case stated by an arbitrator.

The facts are set out in the opinion of the LORD CHANCELLOR, and in the report in the court below.

Sir A. Cripps, K.C., W. J. Disturnal and *R. T. G. Tangye* for the appellants.
J. D. Fitzgerald, K.C., Roskill, K.C., and *Lynden Macassey* for the respondents.

Their Lordships took time for consideration.

July 19, 1912. The following opinions were read.

VISCOUNT HALDANE, L.C.—The question raised in this appeal relates to the measure of damages payable by the appellants to the respondents on account of a breach of contract by the appellants. The contract, which was made in 1902, bound the appellants to deliver and erect within a stated period and in accordance with a specification eight steam turbines of 5,500 kilowatt capacity and eight turbo-alternators. Some alterations were afterwards by agreement made in the specification, but it is not necessary to refer to these. The price was to be £250,000, payable in instalments. The contract provided for reference of disputes as to its meaning or effect to arbitration. Differences arose between the parties. The appellants at various dates during 1904, 1905, and 1906, provided the machines, but the respondents alleged that the machines provided failed to satisfy the provisions of the contract with respect to economy and steam consumption. They claimed damages for breach of contract to the extent of £280,000 and upwards, which, they said, was their estimate of the loss caused by the excessive coal consumption for a period of twenty years at which they estimated the life of the machines. Alternatively, they claimed the cost of installing eight new Parsons' tubrines, being machines of an improved order, and of 6,000 instead of 5,500 kilowatt capacity, which they had purchased elsewhere when the appellants' machines proved insufficient. The cost of these machines they estimated at £78,186 4s., and they claimed in addition £42,000 for the estimated loss caused by the excess of coal consumption during the time in which the appellants' machines were working and before the Parsons' machines could be installed. It appeared that after the appellants' machines were installed they supplied power for several years, but in a manner which was defective. The respondents, however, used them and allowed the appellants to remove one temporarily to try to improve it, but the respondents always reserved their right to damages on account of breach of contract. It was not until 1908 that the respondents came to the conclusion that they would replace the appellants' machines with the Parsons' machines. The Right Honourable Alfred Lyttelton was appointed arbitrator. The Arbitration Act, 1889, applied to the reference.

The arbitrator heard the parties on the dispute which had arisen between them, and on June 14, 1910, stated a Special Case. He set out that the claim of the appellants was in substance for the unpaid balance of the price of their machines, and that as against this claim the respondents counterclaimed the larger sums to which I have already referred, as damages. The counterclaim, he said, was made originally in alternative ways. First, upon the footing of the loss and damage already caused to the respondents and of the loss which would afterwards have been caused to them by reason of the appellants' breach of contract on the assumption that the respondents had continued to make use of the appellants' machines. Alternatively, the respondents had claimed a smaller sum, composed of the damages already caused to them, plus the cost to them of the installation of

A the Parsons' machines. He stated that the damages flowing from the breaches of the contract by the respondents appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expenses of labour, and arising in connection with the disposal of ashes caused by the defects in the machines delivered, but subject to certain deductions by reason of defects in the condensing apparatus which the respondents themselves B had undertaken to provide. He stated that in addition to this head of claim, about which there was no serious controversy, the respondents further contended that they were entitled to recover the cost of putting in the Parsons' machines, alleging that by so doing further loss had been prevented which must otherwise have fallen on the appellants in respect of the prospective loss from extra consumption of coal and other matters, to be caused by the use of the defective machines. He C then found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the appellants' defective machines in the future. He found further that the purchase of the Parsons' machines was to the pecuniary advantage of the respondents, and that the superiority of Parsons' machines in D efficiency and economy over those supplied by the appellants was so great that, even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the said contract, it would yet have been to the pecuniary advantage of the respondents to have replaced at their own cost the machines supplied to the respondents by Parsons' machines so soon as the latter could be obtained.

E Having found these facts, he set out the contentions of the parties. The case of the appellants was in substance that on the facts as stated he was entitled to draw the inference that the "commercial life" of these machines had expired at the date of the purchase by the respondents of Parsons' machines, that these facts were, therefore, relevant to the question of the amount of damages recoverable on the counterclaim, and that, accordingly, no further damages of any kind were F recoverable by the respondents after the date when they could procure Parsons' machines, and, further, that the cost of procuring and installing Parsons' machines was not recoverable by the respondents. The contention of the respondents, on the other hand, was that the cost of the purchase and installation of the Parsons' machines was recoverable by them from the appellants as being the necessary cost and expense incurred by the respondents in mitigating, as from the respective G dates when a Parsons' machine was substituted for each of the appellants' machines, the damages which they would have been entitled to recover from the appellants. The arbitrator then stated, under the powers conferred by the Arbitration Act, 1889, two questions of law for the opinion of the court. The first was: Whether the contention of the appellants as above set out was well founded. The second was: Whether, if that was not so, the respondents were right in their contention that H the cost to them of the purchase and installation of the Parsons' machines was recoverable by them from the appellants as part of their damages.

These facts came before the Lord Chief Justice, HAMILTON and AVORY, JJ., sitting as a Divisional Court, and judgment was given to the effect that the contention of the appellants referred to in question (i) was not well founded, and that the contention of the respondents referred to in question (ii) was right. The judgments I proceeded on the footing that advantages had accrued to the respondents from the superiority of the Parsons' machines and the economy resulting thereby, but that the appellants were not entitled to have the pecuniary advantages so accruing taken into account. The cost of purchasing the Parsons' machines was properly incurred, and was the best course which the respondents could take in the interest of the appellants as well as of themselves, and they were entitled to recover it; but what profit they had made by their subsequent use related to transactions unconnected with the contract, and the respondents could not be called upon to

bring this profit into account. On these answers by the court to the questions submitted to them being brought before the arbitrator, he made his award on Feb. 23, 1911, and, acting on the answers, awarded that the appellants were not entitled to recover anything from the respondents, but that the respondents, on the other hand, were entitled to succeed in their counterclaim to the extent of a sum which he ascertained on the basis of the decision of the court, at £15,394. He arrived at this balance by allowing the respondents certain sums which they had to pay during the time when they used the appellants' machines, for extra coal consumption and labour due to the defects in these machines, which sums are not in dispute, and by crediting the respondents with the cost of obtaining and installing the Parsons' machines. The appellants moved in the King's Bench Division to set aside the award on the ground that it was bad as containing an error in law on the face of it. [HIS LORDSHIP dealt with a point which is no longer reportable owing to the repeal, by the Arbitration Act, 1934, of s. 19 of the Arbitration Act, 1880, and continued:] It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (1) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (1), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *Re Knight and Tabernacle Permanent Building Society* (2) is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award.

The question thus raised was decided by the majority in the Court of Appeal in favour of the respondents. They held that the law as to the measure of damages had been rightly laid down by the Divisional Court. They thought that the purchase of the Parsons' machines must be taken to have been merely for the purpose of mitigating the damages, and that the appellants were not entitled to have the pecuniary advantages arising from the subsequent use of these much superior machines, and the saving of working expenses which would have been incurred even had the appellants' machines been up to the standard of efficiency contracted for, brought into account. VAUGHAN WILLIAMS, and KENNEDY, L.JJ., held that the action of the respondents in purchasing the new machines had given them advantages in the conduct of their business subsequent to the breach, of which the appellants were not entitled to claim the benefit. BUCKLEY, L.J., on the other hand, thought that the appellants were entitled to have a decision from the arbitrator as to whether the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage, and, if so, whether it was the only reasonable and prudent course which they could take to mitigate the damages, or whether, for instance, they could have bought Parsons' machines, not of 6,000 kilowatts as in fact they did, but of 5,500 kilowatts, which was the standard of efficiency under the contract, with a length of life no greater than that of the discarded machines. On this point BUCKLEY, L.J., considered that the appellants had had no decision from the arbitrator and were entitled to it.

Upon the question which I have stated I am unable to agree with the majority of the Court of Appeal. For reasons which will appear I do not wholly agree with the view taken by BUCKLEY, L.J. While dissenting from the majority he still thought that the first question raised by the Special Case could not be answered in the appellants favour unless the arbitrator should first find that the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage. I think that the sequence of events and the facts actually found by the arbitrator obviate the necessity of him separately deciding this point. It was, in my opinion, really

disposed of by his finding. The arbitrator appears to me to have found clearly that the effect of the superiority of the Parsons' machines and efficiency in reducing working expenses was in point of fact such that all loss was extinguished and that actually the respondents made a profit by the course which they took. They were doubtless not bound to purchase machines of a greater kilowatt power than those originally contracted for, but they in fact took the wise course in the circumstances of doing so, with pecuniary advantage to themselves. They had, moreover, used the appellants' machines for several years, and had recovered compensation for the loss incurred by reason of these machines not being during these years up to the standard required by the contract. After that period the arbitrator found that it was reasonable and prudent to take the course which they actually did in purchasing the more powerful machines, and that all the remaining loss and damages was thereby wiped out.

In order to come to a conclusion on the question as to damages thus raised, it is essential to bear in mind certain propositions which I think are well established. In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance which the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould for the purposes of different kinds of claim the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations I think that there are certain broad principles, which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps. In the words of JAMES, L.J., in *Dunkirk Colliery Co.* v. *Lever* (3) (9 Ch.D. at p. 25):

> "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not having done what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

As JAMES, L.J., indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when, in the course of his business, he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss which he has suffered may be taken into account, even though there was no duty on him to act.

Staniforth v. *Lyall* (4) illustrates this rule. In that case the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay £500. The ship went to New Zealand, but found neither agent nor cargo there, and the captain chose to make a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original venture to New Zealand would have been. The Court of Common Pleas decided that the action was to be viewed as one for a breach of contract to put the cargo on board the plaintiff's vessel for which the plaintiff was entitled to recover all the damages which he had incurred, but that he was bound to bring into account, in ascertaining

the damages arising from the breach, the advantages which had accrued to him because of the course which he had chosen to adopt. I think that this decision illustrates a principle which has been recognised in other cases that, provided the course taken to protect himself, by the plaintiff, in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.

Recent illustrations of the way in which this principle has been applied, and the facts have been allowed to speak for themselves, are to be found in the decisions of the Judicial Committee of the Privy Council in *Erie County Natural Gas Co.* v. *Carroll* (5) and *Wertheim* v. *Chicoutimi Pulp Co.* (6). The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class illustrated by *Bradburn* v. *Great Western Rail. Co.* (7), where it was held that in an action for injuries caused by the defendants' negligence a sum received by the plaintiff on a policy for insurance against accident could not be taken into account in reduction of damages. The reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant which gave the plaintiff his advantage. Again, it has been held that in an action for delay in discharging a ship of the plaintiff's whereby he lost his passengers whom he had contracted to carry, the damages ought not to be reduced by reason of the same persons taking passage in another vessel belonging to the plaintiff—*Jebsen* v. *East and West India Dock Co.* (8), a case in which what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract.

The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair illustrate yet another class of authorities in which the qualifying rule has been excluded. In *Joyner* v. *Weeks* (9) the lessor had granted a lease to another lessee by way of anticipation, to commence from the expiration of the demised term, and the new lessee had made no claim to be reimbursed the cost which he had incurred in repairing after the expiration of the demised lease. On a claim by the lessor for the breach of covenant WRIGHT, J., held that the true test was the amount of diminution in value to the lessor, not exceeding the cost of doing the repairs. The Court of Appeal, including LORD ESHER, M.R., and FRY, L.J., took a different view. They thought that there had been a constant practice in laying down the measure of damages as being the cost of putting into repair, and that in the particular class of cases with which they were dealing it was a highly convenient rule which ought not to be disturbed. Any other measure appeared to involve complicated inquiries. Moreover, the arrangement between the lessor and the new lessee was res inter alios acta with which the original lessee had nothing to do, and one which he was not entitled to set up. [Note. The Court of Appeal, accordingly, held that the rule that the measure of damages for the breach of a covenant to repair is the sum which it will cost to put the premises into the state of repair in which the lessee is bound to leave them was not affected by the fact that the lessor had re-let the premises on the expiration of the term to a new lessee who had covenanted to re-build them.]

I think that the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not res inter alios acta, but one in which the person whose contract was broken took a reasonable and prudent course arising quite naturally out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing which they could properly do in replacing them with new and up-to-date machines. The arbitrator does not in his finding of fact lay any stress on the increase in kilowatt power of

A the new machines, and I think that the proper inference is that such increase was regarded by him as a natural and prudent course followed by those whose object was to avoid further loss, and that it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction. For the reasons which I have given I think that the questions of law stated by the arbitrator in the Special Case have been wrongly B answered by the courts below. The result is that the award cannot stand and must be sent back to the arbitrator, with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages was right, and that of the respondents on the second question was wrong. The appellants are entitled to their costs, here, and C in the Court of Appeal, and of the proceedings in the Divisional Court on the motion to set aside the award.

LORD ASHBOURNE.—I agree.

LORD MACNAGHTEN.—I agree.

D **LORD ATKINSON.**—I concur.

Appeal allowed.

Solicitors: *Faithfull & Owen; Bircham & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

E

RICKARDS *v.* LOTHIAN

F [PRIVY COUNCIL (Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson and Lord Moulton), December 2, 3, 1912, February 11, 1913]

[Reported [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281]

Negligence—Nuisance—Malicious act of third person causing damage—Liability of defendant—No duty to anticipate likelihood of malicious act—No precaution possible to prevent damage—Ordinary use of property—Application of Rylands *v.* Fletcher *doctrine—Provision of lavatory basin by landlord—Flooding of tenant's premises by third person stopping up waste pipes and turning on water.*

G To sustain an action for negligence it must be shown that the negligence of the defendant was the proximate cause of the damage. Where the proximate H cause of the damage is the malicious act of a third person the defendant is not liable unless he ought to have reasonably anticipated the likelihood of the malicious act so that it became his duty to take reasonable precautions to prevent its occurrence. Nor is the defendant liable if there is no precaution which would have been effective to prevent the damage.

The rule in *Rylands* v. *Fletcher* (1) is not brought into play by every use I to which land is put. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. The rule does not apply to a case where the damage caused by the escape from the defendant's land of something likely to do mischief is due to the malicious act of a third person.

A proper supply of water to the various parts of a house, which is not only reasonable, but in modern times is necessary and in some circumstances

obligatory, cannot be provided without some danger of leakage and overflow, and it would be unreasonable for the law to regard those who instal and maintain such a supply as doing so at their peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence. It would be still more unreasonable if liability were to be held to extend to the consequences of malicious acts by third persons against which no precaution could prevail and which the owner of the premises, who would only be using the premises in an ordinary and proper manner, would be powerless to prevent.

Accordingly, where the landlord of a house, let out to different tenants, put a properly constructed lavatory basin on an upper floor of the house for the use of his tenants, and an escape of water from the basin, caused by the malicious act of some third person which the landlord could not have anticipated, resulted in damage to the property of one of the tenants,

Held: the landlord was not liable to the tenant either for negligence or nuisance.

Notes. Considered: *Ruoff* v. *Long*, [1916] 1 K.B. 148. Distinguished: *Western Engraving Co.* v. *Film Laboratories, Ltd.*, [1936] 1 All E.R. 106. Applied: *Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E.R. 577; *Perry* v. *Kendricks Transport, Ltd.*, [1956] 1 All E.R. 154. Referred: *Charing Cross, West End and City Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K.B. 442; *Hanley* v. *Edinburgh Corpn.* (1913), 77 J.P. 233; *Job Edwards, Ltd.* v. *Birmingham Navigations Co. of Proprietor*, [1924] 1 K.B. 341; *Noble* v. *Harrison*, [1926] All E.R. Rep. 284; *Smith* v. *Great Western Rail. Co.*, [1926] All E.R. Rep. 242; *Pontardawe Rural District Council* v. *Moore-Gwyn*, [1929] 1 Ch. 656; *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114; *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co., Ltd.*, [1936] A.C. 108; *Marchant Manufacturing Co.* v. *Leonard D. Ford and Teller, Ltd.* (1936), 154 L.T. 430; *Collingwood* v. *Home and Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; *Hale* v. *Jennings Bros.*, [1938] 1 All E.R. 579; *Tilley* v. *Stevenson*, [1939] 4 All E.R. 207; *Hanson* v. *Wearmouth Coal Co.*, [1939] 3 All E.R. 47; *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349; *Makin (J. & J.), Ltd.* v. *London and North Eastern Rail. Co.*, [1943] 1 All E.R. 645; *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E.R. 533; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471; *Sutcliffe* v. *Holmes*, [1946] 2 All E.R. 599; *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1953] 1 All E.R. 179; *Beckett* v. *Newalls Insulation Co., Ltd.*, [1953] 1 All E.R. 250; *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923; *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555.

As to liability for interventions by a third party causing damage and as to the *Rylands* v. *Fletcher* doctrine see 28 HALSBURY'S LAWS (3rd Edn.) 22–27, 32, 33, 131–149, 155, 162, and for cases see 36 DIGEST (Repl.) 40–45, 282 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1865), 3 H. & C. 774; 34 L.J.Ex. 177; 13 L.T. 121; 29 J.P. 599; 11 Jur. N.S. 714; reversed (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(3) *Cooke* v. *Midland and Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(4) *Nichols* v. *Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421.*

(5) *Box* v. *Jubb* (1879), 4 Ex.D. 76; 48 L.J.Q.B. 417; 41 L.T. 97; 27 W.R. 415; 36 Digest (Repl.) 298, *424.*

(6) *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A.C. 381; 71 L.J.P.C. 122; 88 L.T. 457; 50 W.R. 657; 18 T.L.R. 523, P.C.; 36 Digest (Repl.) 284, *336.*

(7) *Blake* v. *Woolf*, [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 47 W.R. 8; 42 Sol. Jo. 688; 36 Digest (Repl.) 296, *414.*

(8) *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 293, *393.*

Also referred to in argument:

Dominion Natural Gas Co., Ltd. v. *Collins and Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 25 T.L.R. 831, P.C.; 36 Digest (Repl.) 36, *176.*

Reid v. *Friendly Societies Hall Co.* (1881), N.Z.L.R. 3 C.A. 238.

Challis v. *London and South Western Rail. Co.*, [1905] 2 K.B. 154; 74 L.J.K.B. 569; 93 L.T. 330; 53 W.R. 613; 21 T.L.R. 486; 49 Sol. Jo. 480; 7 W.C.C. 23, C.A.; 34 Digest 315, *2585.*

Nisbet v. *Rayne and Burne*, [1910] 2 K.B. 689; 80 L.J.K.B. 84; 103 L.T. 178; 26 T.L.R. 632; 54 Sol. Jo. 719; 3 B.W.C.C. 507, C.A.; 34 Digest 270, *2298.*

Marshall v. *Caledonian Rail. Co.* (1899), 36 Sc.L.R. 845; 36 Digest (Repl.) 45, **237.*

Hallenstein Brothers, Ltd. v. *Dwyer* (1908), 28 N.Z.L.R. 19; 36 Digest (Repl.) 39, **210.*

Hargroves, Aronson & Co. v. *Hartopp*, [1905] 1 K.B. 472; 74 L.J.K.B. 233; 92 L.T. 414; 53 W.R. 262; 21 T.L.R. 226; 49 Sol. Jo. 237, D.C.; 31 Digest (Repl.) 103, *2482.*

Engelhart v. *Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, *153.*

Clark v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest 31, *135.*

Barker v. *Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, *419.*

Milwaukee and St. Paul Rail. Co. v. *Kellogg* (1876), 94 U.S. 469.

Kenealy v. *Karaka* (1906), 26 N.Z.L.R. 1118 28 Digest (Repl.) 525, **200.*

Appeal from an order of the High Court of Australia reversing a decision of the Supreme Court of Victoria, and ordering that judgment should be entered for the respondent, plaintiff in the action, for £156 costs, and that the appellant, defendant in the action, should pay the costs of the appeal.

The matter out of which the appeal arose was commenced by a plaint in the Melbourne County Court by the respondent, by which the plaintiff demanded of the defendant damages for injury caused by water to his stock-in-trade through the carelessness of the defendant or his servants or agents in the construction, maintenance, management, and control of a certain lavatory basin, and of the tap, pipes, water surface, and flooring connected therewith on premises a portion of which were rented by the plaintiff from the defendant at 226, Little Collins Street, Melbourne, and alternatively for injury arising from a breach by the defendant of an implied covenant for quiet enjoyment in an agreement between the plaintiff and the defendant, and in the further alternative (which was added at the trial) for injury caused by the defendant wrongfully permitting large quantities of water to escape from the basin, and to flow into and upon a portion

of the premises occupied by the plaintiff, and the plaintiff claimed the sum of £359 2s. 11d. A

Dickens, K.C., and *Willoughby Williams* for the appellant (the landlord).
Levinson (of the Australian Bar) for the respondent (the tenant).

Feb. 11. **LORD MOULTON.**—The appellants are the personal representatives of Harry Rickards who was the defendant in an action brought by the respondent against him in the Melbourne County Court, for damages occasioned to the stock in trade of the plaintiff who was the tenant of the second floor of certain premises belonging to the defendant by an overflow from a lavatory basin situated on an upper floor of the same premises. Though the sum involved is not large the legal questions raised by the case are of considerable importance and the litigation has been characterised by remarkable differences of judicial opinion upon them. Upon the findings of the jury the judge at the trial directed judgment to be entered for the plaintiff for £156, the amount of the damages found by the jury. On appeal to the Supreme Court of Victoria that judgment was set aside and judgment entered for the defendant in accordance with the views of a majority of that court. This decision was reversed on appeal by the High Court of Australia in accordance with the views of a majority of that court, and the present appeal is brought by leave from that decision of the High Court of Australia. B C D

The circumstances out of which the action arose were as follows.—The defendant was the lessee under a long building lease of a building in Melbourne used for business purposes and the plaintiff was tenant under him of part of the second floor of such building. On the fourth floor there was a room used as a men's lavatory in which was fixed a wash-hand basin supplied with water by a screw-down tap situated immediately over it and connected by a pipe with the mains of the Metropolitan Water Supply System. The basin had the usual arrangements for getting rid of the water—viz., a vent-hole provided with a plug at the bottom of the basin and a hole situated near its upper edge to act as an overflow. Through the hole at the top overflowing water passed down a pipe which was connected with the waste pipe from the hole at the bottom of the basin some little distance below its upper end. It was common ground that the basin and fittings above described were of ordinary construction and such as are in common use and it was proved that on their erection they had been inspected and passed by the officials of the Metropolitan Board of Works in the regular way. The lavatory was intended for the use of the tenants of the upper floors and persons in their employment. The defendant employed one Smith as a caretaker of the building, and part of his business was to see that the lavatory was in good working order. On Aug. 18, 1909, he was on duty until 10.20 p.m. He gave evidence that at that hour he went to the lavatory and found it in proper order. On the plaintiff arriving on the premises the following morning he found that his stock-in-trade there (which consisted mainly of school books) was seriously damaged by water, and on examination it was discovered that the water tap of the basin had been turned full on and the waste pipe plugged so that there had been an overflow from the basin to the extent of the full supply which the tap was capable of giving, and that this overflow had flooded the rooms below. There was no direct evidence as to the length of time during which the water had been running in this way, but the extent of the overflow was so great that it seems to have been accepted by all parties at the trial that it must have continued for some hours. It was for the damage thus caused to the plaintiff's stock-in-trade that the action was brought. On examining the basin it was found that the waste pipe had been plugged up with various articles such as nails, pen-holders, string, and soap, and that the obstruction was situated so far down the pipe that it covered its junction with the waste pipe from the overflow holes. It therefore blocked both waste pipes. The manner in which the plugging was effected furnished strong evidence that it had been done intentionally, indeed, the materials had been rammed together E F G H I

so tightly that it was difficult to clear the pipe. For the purposes of the trial the capacity of the waste pipes for carrying off the water which the tap was capable of supplying was tested after the pipe had been cleared. It was found that at the ordinary pressure of the system during the daytime the waste pipes were able to carry off all the water which the tap could supply even when fully open, but that during the night the pressure rose somewhat and that at the night pressure the waste pipes were not sufficient to take off the whole of the water which the tap could supply. The plaintiff gave no evidence to show what fraction of the water which the tap was capable of so supplying during the night would fail to pass away by the waste pipes if they were clear and unobstructed, but it would seem probable that the amount of the overflow in such circumstances would only be a comparatively small fraction of the water issuing out of the tap and that the major portion would pass off by the waste pipes.

In his plaint the plaintiff claimed to recover the damage done to his stock-in-trade as injury caused by water through the carelessness of the defendant, his servants or agents in the construction, maintenance, management, and control of the lavatory basin and its pipes, &c., and, alternatively, as injury resulting from a breach by the defendant of an implied covenant for quiet enjoyment. At the trial he was permitted to add a third alternative whereby he claimed to recover such damage as injury caused by the defendant wrongfully permitting large quantities of water to escape from the basin and to flow into the premises occupied by the plaintiff. By his defence the defendant denied the allegations of negligence, breach of covenant, and duty, and further denied that, if any such covenant existed, there had been any breach of it. At the trial evidence was called on both sides and the above facts were proved. The claim upon implied covenant was obviously unsustainable and apparently was abandoned. The substantial case sought to be made on behalf of the plaintiff was twofold: first, that Smith (for whose actions the defendant was responsible) was guilty of negligence in leaving the tap turned on and in omitting to discover that the waste-pipe was choked; and, secondly, that the defendant was guilty of negligence in not placing a lead safe with an outlet pipe on the floor of the lavatory underneath the basin. Smith was called as a witness on behalf of the defendant and gave evidence that the basin was in proper condition when he left it on the evening before, and the tap turned off, and, as will presently be seen, the jury accepted his evidence. With regard to the second point—viz., whether it was necessary or usual to put a lead safe in such a lavatory—the evidence was very conflicting, the views of the various expert witnesses called for the parties differing widely. The learned judge summed-up very carefully and at considerable length, calling the attention of the jury to the whole of the evidence given. In the course of his summing-up he directed that

> "if this [i.e., the plugging up] were a deliberately mischievous act by some outsider, unless it were instigated by the defendant himself, the defendant would not be responsible. He would not be responsible for a malicious act under those circumstances because he could not guard against malice."

This direction was in substance repeated in that part of the summing-up which dealt with the question of the necessity of placing a lead safe in the lavatory. Referring to the contention of the defendant that the damage was caused, not by the absence of a safe, but by deliberate mischief, he said:

> "If it was, then, the defendant would not be responsible because the person who deliberately tried to flood the place could overcome the precautions. He could stop the plug of the basin, he could stop the overflow, and could very easily stop the escape from the lead floors. Nobody is expected to guard against deliberate malice or mischief."

The learned judge left the following questions to the jury whose answers are appended:

"1. Was the defendant (the said Harry Rickards) or any of his servants or agents guilty of negligence—(a) In not providing a reasonably sufficient escape for water in case of an overflow resulting from accidents or negligence having regard to the nature of the use of the rooms beneath? (b) In leaving tap turned on on the night of Aug. 18, 1909, or in omitting to discover all that night that the waste pipe was choked.—Answer: (a) We are of opinion that a lead safe was necessary on the floor of this particular lavatory, and that same would minimise risk. (b) No. We believe the evidence of Smith caretaker) who asserts that the lavatory was in thorough order when he ceased duties. 2. Was the negligence (if any) the cause of the injury to the plaintiff's goods?—Answer: Yes, it was. 3. Damages in any case.—Answer: We assess the damage to Lothian's property at £156."

The jury further found that this was the malicious act of some person. The learned judge entered judgment for the plaintiff for £156 with costs. These questions were not happily framed. For example, the word "negligence" in the first part of question 1 is used twice, and evidently refers to two different things in the two places where it occurs. In the earlier part of the question, it must refer to negligence in the construction of the apparatus, but in the latter part it must refer to negligence in the user. But this is not the most serious defect in these questions. There is also a fatal omission. The judge had directed the jury that if the act was malicious, the defendant would not be liable unless he instigated it, which was not even suggested. Yet this issue was not put to them, nor, indeed, was any question asked bearing upon it. It is evident that this omission puzzled the jury. The course which they took was, on the whole, one directed by common sense. They found a verdict upon that vital issue, although it had not been left to them separately, and they then proceeded to answer the questions specifically put to them. As their language shows, these questions related solely to the issue of negligence—the first asking as to its existence, the second as to the damage being a consequence of it, and the third as to the amount of the consequent damages. It is difficult to understand the answer of the jury to the second question, in view of the finding that the act was malicious, because, if the act was malicious, the negligence in not providing the lead safe could not be, legally speaking, the cause of the damage. But there can be no doubt of the meaning of the finding as to the act having been malicious, and, therefore, their Lordships consider that the only reasonable interpretation to be put upon the answer to the second question is that the jury thought that the negligence in omitting to provide a lead safe was physically the cause of the damage in the sense that the provision of a lead safe would have prevented the damage if the overflow had been due to negligence or accident.

Their Lordships are of opinion that there was abundant evidence to support the finding of the jury that the plugging of the pipes was the malicious act of some person, and, indeed, it is difficult to see how upon the evidence any other conclusion could have been arrived at reasonably. The answers to questions 1 (a) and (b) were also answers which the jury were competent to give upon the evidence, and no objection can be taken to them. By their answer to 1 (a) the jury show that they appreciated in an exceptionally clear way the nature of the question for their decision. In the face of the evidence as to its being an ordinary practice not to have such lead safes, and as to the lavatory being of ordinary construction and approved of by the water authorities, it would have been difficult, if not impossible, to give any finding of general application as to the duties of a house owner with regard to water fittings of this kind. Indeed, no such general finding could as a matter of law be sustainable. The degree to which it is incumbent upon a householder to provide automatic protection against careless user must depend on the nature of the user. In a laboratory for instance where the fitting would only be used by trained persons in the course of careful scientific work such

automatic safeguards against overflow might not be needed, whereas in a lavatory where the user was more indiscriminate it might be reasonable to have elaborate protective devices. But in this case the jury viewed the place, and their finding is a cautious one entirely within their competence. They found that it was negligent to omit to provide a lead safe on the floor of this particular lavatory. Their Lordships are satisfied that a finding so express and so carefully limited cannot be impugned.

It is clear that on these findings the plaintiff did not make good his claim as a claim in an ordinary action of negligence. To sustain such a cause of action it must be shown that the negligence is the proximate cause of the damage. The proximate cause of the damage here was the malicious act of a third person. The only negligence which the jury found in this case was the omission to provide against accident by placing a lead safe under the lavatory. Such automatic devices are security against accident or negligent user, but they are inoperative against intentional and mischievous acts. The person who did the malicious act in this case was obliged to do three distinct things to secure the success of his plan—namely, to open the screw tap to its utmost limit, to block the waste pipe from the bottom of the basin, and to block the waste pipe from the overflow holes. It cannot be doubted that the presence of a lead safe would have formed no obstacle to his plan, because the outlet from that safe could have been blocked up as easily as the two waste pipes.

The arguments on behalf of the plaintiff in the Courts of Appeal were, therefore, mainly directed to bringing the case under one of two other well-known types of action, viz.:—(i) It was contended that the defendant ought to have foreseen the probability of such a malicious act, and to have taken precautions against it, and that he was liable in damages for not having done so. (ii) It was contended that the defendant was liable apart from negligence on the principles which are usually associated with the well-known case of *Rylands* v. *Fletcher* (1). In the argument on the first of these points, *Lynch* v. *Nurdin* (2), *Cooke* v. *Midland and Great Western Railway of Ireland* (3), and other decisions of the same type were relied upon. There is, however, a short and conclusive answer to this contention. To make good such a cause of action the plaintiff must show that the defendant ought to have reasonably anticipated the likelihood of a deliberate choking of the pipe, so that it became his duty to take precautions to prevent such an act causing damage to others. This is an issue of fact in which the burden is upon the plaintiff, and he has obtained no finding from the jury in support of it. It is, perhaps, irrelevant to consider who is responsible for this omission, because it is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury. But in this case the defendant specifically requested the judge to put the question whether the defendant ought reasonably to have anticipated the deliberate choking of the pipe, and the plaintiff's counsel did not support the request, but accepted the questions framed by the judge. The absence of this finding is fatal to this part of the plaintiff's case, and it is not necessary, therefore, to inquire into it further. But it must be pointed out that there was no evidence which could have supported such a finding, and, moreover, that the only duty incumbent upon the defendant in such a case would have been to take reasonable precautions to prevent such an act causing damage, and throughout the whole of the case there was no suggestion of any precaution which would have had that effect; nor was there any finding by the jury that the defendant had in this respect omitted to do anything which he should have done. The only omission found against him was of something wholly irrelevant from this point of view. It is impossible, therefore, to support the plaintiff's claim so far as it is based upon the legal principles illustrated by the above class of cases.

The principal contention, however, on behalf of the plaintiff was based on the doctrine customarily associated with *Rylands* v. *Fletcher* (1). It was contended that it was the defendant's duty to prevent an overflow from the lavatory basin,

however caused, and that he was liable in damages for not having so done, whether the overflow was due to any negligent act on his part, or to the malicious act of a third person. The legal principle which underlies the decision in *Rylands* v. *Fletcher* (1) was well known in English law from a very early period, but it was explained and formulated in a strikingly clear and authoritative manner in that case, and, therefore, is usually referred to by that name. It is nothing other than an application of the old maxim sic utere tuo ut alienum non lædas. The defendants in that action had constructed a reservoir on their land to collect and hold water for the purpose of working their mill. Under that land were situated underground workings of an abandoned coal mine, the existence of which was unknown to everybody. After the reservoir had been filled the water found its way down to those underground workings through some old shafts, and escaping through them flooded the plaintiff's colliery. The defendants had been guilty of no negligence either in the construction or use of the reservoir, and they contended that in the absence of negligence they were not liable. The plaintiff contended, on the other hand, that the defendants, having brought and stored the water upon their land for their own purposes, were bound to keep it safely there, and that if it escaped to adjoining lands and did damage, the defendants were liable for the breach of this duty, whether or not it was due to negligence. The argument took place on a Special Case stated by an arbitrator setting forth the facts and the contentions of the parties. It was heard in the first instance before the Court of Exchequer, which by a majority decided in favour of the defendants, BRAMWELL, B., dissenting. Error was brought from this judgment, and the Court of Exchequer Chamber (consisting of WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH and LUSH, JJ.), reversed the decision of the Court of Exchequer by a unanimous judgment which was read by BLACKBURN, J. On appeal to the House of Lords the judgment of the Exchequer Chamber was affirmed—both LORD CAIRNS, L.C., and LORD CRANWORTH (who delivered the judgments on the hearing of the appeal) expressly approving of BLACKBURN, J.'s, statement of the law on the subject in the judgment appealed from. The formulation of the principle which is to be found in that judgment is, therefore, of the highest authority, as well from the fact that it received the express approval of the ultimate tribunal as from the eminence of the judges who took part in the decision. So far as is necessary for the present case the law on the point is thus laid down by BLACKBURN, J. (L.R. 1 Exch. at pp. 279, 280):

> "We think that the true rule of the law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

It will be seen that BLACKBURN, J., with characteristic carefulness, indicates that exceptions to the general rule may arise where the escape is in consequence of vis major, or the act of God, but declines to deal further with that question because it was unnecessary for the decision of the case then before him.

A few years later the question of law thus left undecided in *Rylands* v. *Fletcher* (1) came up for decision in a case arising out of somewhat similar circumstances. The defendant in *Nicholls* v. *Marsland* (4), had formed on her land certain ornamental pools which contained large quantities of water. A sudden and unprecedented rainfall occurred, giving rise to a flood of such magnitude that the jury found that it could not reasonably have been anticipated. This flood

caused the lakes to burst their dams, and the plaintiff's adjoining lands were flooded. The jury found that there was no negligence in the construction or maintenance of the lakes. But they also found that if such a flood could have been anticipated, the dams might have been so constructed that the flooding would have been prevented. Upon these findings the judge at the trial directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. On the argument of the rule the Court of Exchequer directed the verdict to be entered for the defendant, and on appeal to the Court of Appeal that judgment was unanimously affirmed. The judgment of the Court of Appeal (Cockburn, C.J., James and Mellish, L.JJ., Baggallay, J.A., and Archibald, J.) was read by Mellish, L.J. After pointing out that the facts of the case rendered it necessary to decide the point left undecided in *Rylands* v. *Fletcher* (1), he proceeds to lay down the law thereupon in the following language (2 Ex.D. at pp. 4, 5):

> ". . . the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* (1) establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher* (1) in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been inocuous), causes the disaster. A defendant, cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage which might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God."

Their Lordships are of opinion that all that is there laid down as to a case where the escape is due to vis major or the King's enemies applies equally to a case where it is due to the malicious act of a third person, if, indeed, that case is not actually included in the above phrase. To follow the language of the judgment just recited—a defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third

person was the real cause of its escaping without any fault on the part of the defendant. It is remarkable that the very point involved in the present case was expressly dealt with by BRAMWELL, B., in delivering the judgment of the Court of Exchequer in the same case. He says (L.R. 10 Exch. at pp. 259, 260):

> "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that if it was let loose it would do as it did, mischief. But suppose that a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? . . . I admit that it is not a question of negligence. A man may use all care to keep the water in . . . but would be liable if through any defect, though latent, the water escaped. . . . But here the act is that of an agent he cannot control."

Following the language of this judgment their Lordships are of opinion that no better example could be given of an agent which the defendant cannot control than that of a third party surreptitiously and by a malicious act causing the overflow.

The same principle is affirmed in *Box* v. *Jubb* (5). In that case the defendants had a reservoir on their land which was connected both for supply and discharge with a water course or main drain. Through the sudden emptying of another reservoir into the drain at a higher level than their reservoir and by the blocking of the main drain below, the defendants' reservoir was made to overflow and damage was done to the lands of the plaintiff. The defendants were guilty of no negligence either in the construction or maintenance of the reservoir, and the acts which led to its overflow were done by persons over whom they had no control. In giving judgment, KELLY, C.B., says (4 Ex.D. at pp. 78, 79):

> "The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible—did it proceed from their act or default, or from that of a stranger over which they had no control? The Case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose."

Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable on the principle of *Rylands* v. *Fletcher* (1) for damage caused by the wrongful acts of third persons.

But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in *Rylands* v. *Fletcher* (1). It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of LORD ROBERTSON in

Eastern and South African Telegraph Co. v. *Cape Town Tramways Cos.* ([1902] A.C. at p. 393), the principle of *Rylands* v. *Fletcher* (1)

> " subjects to a high liability the owner who uses his property for purposes other than those which are natural."

This is more fully expressed by WRIGHT, J., in his judgment in *Blake* v. *Woolf* (7). In that case the plaintiff was the occupier of the lower floors of the defendant's house, the upper floors being occupied by the defendant himself. A leak occurred in the cistern at the top of the house which, without any negligence on the part of the defendant, caused the plaintiff's premises to be flooded. In giving judgment for the defendant, WRIGHT, J., says ([1898] 2 Q.B. at p. 428):

> "The general rule, as laid down in *Rylands* v. *Fletcher* (1) is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue."

This is entirely in agreement with the judgment of BLACKBURN, J., in *Ross* v. *Fedden* (8). In that case the defendants were the occupiers of the upper floor of a house of which the plaintiff occupied the lower floor. The supply and overflow pipes of a water-closet which was situated in the defendants' premises and was for his use and convenience got out of order, and caused the plaintiff's premises to be flooded. Negligence was negatived. In giving judgment in favour of the defendant, BLACKBURN, J., says (L.R. 7 Q.B. at p. 665):

> "I think it is impossible to say that defendants as occupiers of the upper storey of a house were liable to the plaintiff under the circumstances found in the case. The water-closet and the supply pipe are for their convenience and use, but I cannot think that there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is, that, the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper storey, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril. I do not agree to that; I do not think that the maxim sic utere tuo ut alienum non lædas applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think that the law casts on the defendants any such obligation as the plaintiff contends for."

Their Lordships are in entire sympathy with these views. The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognised as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilised countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who

instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence. It would be still more unreasonable if, as the respondent contends, such liability were to be held to extend to the consequences of malicious acts on the part of third persons. In such matters as the domestic supply of water or gas, it is essential that the mode of supply should be such as to permit ready access for the purpose of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball cocks fastened open, supply pipes cut, and waste pipes blocked. Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part but probably a duty. Such a doctrine would, for example, make a householder liable for the consequences of an explosion caused by a burglar breaking into his house during the night and leaving a gas tap open. There is, in their Lordships' opinion, no support either in reason or authority for any such view of the liability of a landlord or occupier. In having on his premises such means of supply he is only using those premises in an ordinary and proper manner, and, although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons. On these grounds their Lordships are of opinion that the direction of the learned judge at the trial to the effect that

> "if the plugging up were a deliberately mischievous act by some outsider unless it were instigated by the defendant himself, the defendant would not be responsible,"

was correct in law, and that, upon the finding of the jury that the plugging up was the malicious act of some person, the judge ought to have directed the judgment to be entered for the defendant. The appeal must, therefore, be allowed and judgment entered for the defendant in the action with costs in all the courts, and the plaintiff must pay the costs of this appeal, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Wadeson & Malleson; Bartlett & Gluckstein.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

HEILBUT, SYMONS & CO. *v.* BUCKLETON

[House of Lords (Viscount Haldane, L.C., Lord Atkinson and Lord Moulton), October 15, November 11, 1912]

[Reported [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54]

B *Warranty—Evidence—Simple representation of fact—Need to prove intention to offer warranty, acceptance by other party, and action on offer—Need for strict proof.*

Words which on the face of them appear to be simply representations of fact may, if the context, expressly or impliedly, so requires, import a contract of warranty, but an affirmation can only be a warranty if it appears on the C evidence to have been so intended, and there must be proof that the other party has accepted the offer of the warranty and acted on it so as to make the collateral contract of warranty complete. Such a contract must be proved strictly.

Misrepresentation—Innocent misrepresentation—No right of action for damages.

D An innocent misrepresentation gives no right of action sounding in damages.

Deceit—Evidence—Need to prove actual fraud.

Proof of actual fraud is essential in an action for deceit.

Notes. Applied: *Harrison* v. *Knowles and Foster*, [1918–19] All E.R. Rep. 306. Considered: *Sullivan* v. *Constable* (1932), 48 T.L.R. 267. Applied: *Gilchester* E *Properties, Ltd.* v. *Gomm*, [1948] 1 All E.R. 493. Considered: *Routledge* v. *McKay*, [1954] 1 All E.R. 855; *Strongman (1945), Ltd.* v. *Sincock*, [1955] 3 All E.R. 90; *Chess (Oscar), Ltd.* v. *Williams*, [1957] 1 All E.R. 325. Referred to: *Guaranty Trust Co. of New York* v. *Hannay*, [1918–19] All E.R. Rep. 151; *Niblett* v. *Confectioners' Materials Co., Ltd.*, [1921] All E.R. Rep. 459; *Collins* v. *Hopkins*, [1923] All E.R. Rep. 225; *Jacobs* v. *Batavia and General Plantations* F *Trust*, [1924] 2 Ch. 329; *Cruse* v. *Mount*, [1932] All E.R. Rep. 781; *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960; *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E.R. 739; *Twertsche Overseas Trading Co.* v. *Uganda Sugar Factory, Ltd.* (1944), 114 L.J.P.C. 25; *Bob Guiness, Ltd.* v. *Solomonsen* (1948), 64 T.L.R. 306; *Mahon* v. *Ainscough*, [1952] 1 All E.R. 337; *Hornal* v. *Neuberger Products, Ltd.*, [1956] 3 All E.R. 970.

G As to misrepresentation and deceit, see 26 Halsbury's Laws (3rd Edn.) 844 et seq., 862 et seq., and as to warranty on a sale, see ibid., vol. 34, pp. 40 et seq. For cases see 35 Digest 24 et seq., 52 et seq., and 39 Digest 414 et seq.

Cases referred to:

(1) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, *24*.

(2) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, *163*.

H (3) *Chandelor* v. *Lopus* (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus* v. *Chandler*, 1 Dyer, 75, n., Ex.Ch.; 35 Digest 29, *200*.

(4) *Cross* v. *Gardner* (1689), 1 Show. 68; Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 89 E.R. 453; 35 Digest 29, *203*.

(5) *Medina* v. *Stoughton* (1700), 1 Ld. Raym. 593; Holt, K.B. 208; 1 Salk. 210; 91 E.R. 1297; 35 Digest 29, *204*.

I (6) *Peek* v. *Derry* (1887), 37 Ch.D. 541; 57 L.J.Ch. 347; 59 L.T. 78; 36 W.R. 899; 4 T.L.R. 84, C.A.; on appeal, sub nom. *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(7) *Cave* v. *Coleman* (1828), 3 Man. & Ry. K.B. 2; 7 L.J.O.S.K.B. 25; 39 Digest 409, *437*.

(8) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 49 W.R. 467; 17 T.L.R. 384, C.A.; 35 Digest 14, *79*.

Also referred to in argument:

Erskine v. *Adeane* (1873), 8 Ch. App. 756; 42 L.J.Ch. 849; 29 L.T. 234; 38 J.P. 20; 21 W.R. 802, L.JJ.; 12 Digest (Repl.) 142, *895*.

Appeal by the defendants in the action from a decision of the Court of Appeal (Lord Alverstone, C.J., Vaughan Williams and Farwell, L.JJ.), who affirmed a judgment of Lush, J., at the trial before him with a special jury at the Liverpool Assizes.

Buckmaster, K.C., Greer, K.C., and *A. H. Chaytor* appeared for the appellants.
F. E. Smith, K.C., A. R. Kennedy and *Harold Smith* for the respondent.

Their Lordships took time for consideration.

Nov. 11, 1912. The following opinions were read.

VISCOUNT HALDANE, L.C.—The appellants, who were rubber merchants in London, in the spring of 1910 underwrote a large number of shares in a company called the Filisola Rubber and Produce Estates, Ltd., a company which was promoted and registered by other persons about that time. They instructed a Mr. Johnston, who was the manager of their Liverpool business, to obtain applications for shares in Liverpool. Johnston, who had seen a draft prospectus in London, but had then no copy of the prospectus, mentioned the company to several people in Liverpool, including a Mr. Wright, who sometimes acted as broker for the respondent. On April 14 the respondent telephoned to Johnston from Wright's office. As to what passed there is no dispute. The respondent said: "I understand that you are bringing out a rubber company." The reply was, "We are." The respondent then asked whether Johnston had any prospectuses, and his reply was in the negative. The respondent then asked "if it was all right," and Johnston replied: "We are bringing it out," to which the respondent rejoined "That is good enough for me." He went on to ask how many shares he could have, and to say that he could take almost any number. He explained in his evidence in chief that his reason for being willing to do this was that the position which the appellants occupied in the rubber trade was of such high standing that, "any company which they should see fit to bring out was a sufficient warranty," to him, "that it was all right in every respect." As the result of the conversation, a large number of shares were allotted to the respondent. About this time the rubber boom of 1910 was at its height and the shares of the Filisola company were, and for a short time remained, at a premium. Later on it was discovered that there was a large deficiency in the rubber trees which were said in the prospectus to exist on the Filisola estate, and the shares fell in value. The respondent brought an action against the appellants for fraudulent misrepresentation, and alternatively for damages for breach of warranty that the company was a rubber company whose main object was to produce rubber. The action was tried at Liverpool Assizes before Lush, J., and a special jury. The jury found that there was no fraudulent representation by the appellants or Johnston, but that the company could not properly be described as a rubber company, and that the appellants or Johnston, or both, had warranted that the company was a rubber company. The only evidence of warranty before the jury was the conversation which I have quoted above. Lush, J., gave judgment for the respondent for £406 5s., being the agreed amount of damages. The appellants appealed to the Court of Appeal consisting of the Lord Chief Justice and Vaughan Williams and Farwell, L.JJ., on the ground that both findings ought to be set aside because of want of evidence to go to the jury, or as being against the weight of evidence, and that the appellants were consequently entitled to judgment. The Court of Appeal dismissed the appeal on the ground that the evidence entitled the jury to find as it did.

As the case, so far as based on fraudulent misrepresentation, has been decided in favour of the appellants, who acted honestly, it is not necessary to consider

whether the company was improperly described as a rubber company, unless the finding of the jury that there was a warranty can stand, for the warranty has become the sole ground on which the respondent can succeed. As I have already stated, the whole of the evidence of the conversation out of which the warranty alleged is said to have arisen, is contained in the passages which I have cited from the respondent's evidence in chief, and this conversation is not in dispute. It is true that, when a jury has found facts, a Court of Appeal is not free to review unfetteredly the reasoning by which the jury has arrived at its conclusion. When evidence has been properly submitted to the jury, that body is entrusted with a duty which in large measure limits the province of the judge. If there was evidence on which the jury could properly find, its finding cannot be set aside, merely because if the court had been dealing with that evidence the court would have found otherwise. So far I agree with the Court of Appeal in the present case. But the question always remains whether the evidence was, so far as the relevant issue is concerned, of a character so insufficient as to render it wrong in law for the judge to have submitted it to the jury as material on which to base a finding on that issue. As neither the circumstances of the conversation nor its words were in dispute, I think that the question of warranty or representation was one purely of law, and that it ought not to have been submitted to the jury. As soon as fraudulent representation was negatived, it seems to me that as to this there was no question of fact. The words of Mr. Johnston in the conversation proved by the respondent were words which appear to me to have been words, not of contract, but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards, and was embodied in two letters dated the next day, April 15. But neither in these letters nor in the conversation itself are there words either expressing, or, in my opinion, implying, a special contract of warranty collateral to the main contract, which was one of sale.

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it, and I think that the learned judge who tried the case ought to have informed the jury that on the issue of warranty there was no case to go to it, and that on this issue he and the Court of Appeal ought to have given judgment for the appellants. The strongest presentation of the case for the respondent seems to me that of FARWELL, L.J., to the effect that there was a contract that the shares should be shares in a rubber company, and that the jury has found that the company was not a rubber company. But even on the basis of this finding I do not think that the account given by the learned lord justice of the transaction describes it properly. The respondent did not ask the technical question whether the company of which he had heard vaguely was correctly described as a rubber company. That he was not thinking of this point seems to me clear from the fact that when he received the letters informing him that he was to have shares in the Filisola Rubber and Produce Estates (a description which was in accordance with that in the prospectus) he made no further inquiry. What he from the first wanted to know was whether Johnston thought the company was "all right," a question to which Johnston simply replied that the appellants were bringing it out, an answer which, to my mind, simply conveyed that a firm of their standing would not be bringing it out if they did not believe it to be all right. From the evidence of the respondent, which immediately follows the passage which I have quoted, it seems to me plain that this was accepted by the respondent as the answer which he wanted. Words which on the face of them appear to be simply representations of fact may, if the context so requires, import a contract of warranty. The judgment of LORD BLACKBURN in *Brownlie* v. *Campbell* (1) is instructive on this point. But I cannot find in the words under construction, or in the circumstances, any context which required the court to put upon them any interpretation beyond the natural one

which I have stated. This interpretation I think they naturally bore, and the parties themselves appear to have put it upon them. A

I wish to add that I entirely agree with the observations made by LORD MOULTON in the judgment which he is about to deliver, and I have had the advantage of reading, on the authorities as to the test whether words can be interpreted as giving rise to a warranty. Considerable confusion has arisen from failure to keep in view the simple principle to which he refers as enunciated by HOLT, C.J., that B an affirmation can only be a warranty provided that it appear on evidence to have been so intended. The words of HOLT, C.J., are cited with approval by BULLER, J., in *Pasley* v. *Freeman* (2). Not the least interesting of the older authorities which laid down the general principle, even in days when the action of assumpsit was by no means clearly marked off from that of case, is *Chandelor* v. *Lopus* (3). It C was there decided that the plaintiff, who was suing the defendant for misrepresentation as to the character of a precious stone sold to him, must declare on a contract, or, if he declared in tort for a misrepresentation, must aver a scienter. Had the moral of this decision been steadily kept in view, there would have been less disposition than the Reports disclose to slip, by the easy process of leaving a supposed question of fact to a jury, from one legal conception into another which is totally distinct. Neither the respondent nor Johnston appears to have had D any question in his mind other than whether some company dealing with rubber, as to the identity of which there was no question raised, was being brought out by the appellants. For the respondent says that the position of the appellants in the rubber trade was such that "any company which they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." His interest was in the shares for which he was minded to apply, and all that he E was really asking for was the assurance which I have mentioned. Had Johnston thought that he was being asked to do anything else than answer the question whether the appellants were bringing out the company, he might well have refused to pledge himself, and I do not believe that either he or the respondent, regard being had to the character of the conversation, was thinking of any other question. But if not, there was in point of law no evidence to go to the jury on the issue F as to warranty, and this issue ought not to have been submitted to it. In reality the only contract entered into seems to have been the contract reduced into writing by the two letters of April 15 for procuring an allotment of shares in what was described as the "Filisola Rubber and Produce Estates, Ltd." It is with great reluctance that, in a case where the Court of Appeal has agreed with the verdict of a jury and the judgment of the judge who tried the case, I feel myself bound G to come to a different conclusion. But I cannot, on the facts of this case, take any other view than that the appeal ought to be allowed. Judgment should, in my opinion, be entered in the action for the appellants, and the respondents ought to pay the costs here and in the courts below. I move your Lordships accordingly.

LORD ATKINSON.—I concur. The plaintiff, the respondent in this appeal, H having applied for 6,000 shares in a certain limited liability company about to be brought out, called the Filisola Rubber and Produce Estates, Ltd., the appellants procured the same to be allotted to him on April 14, 1910. The plaintiff accepted these shares and paid in respect of them the sum of £987 10s. The fact of this allotment having been made was communicated to him by two letters, both dated April 15, 1910, signed in the names of the appellants and addressed to him. One I of these letters dealt with 5,000 of these shares, and the other with 1,000 of them. The letters only differ from each other in their contents in the number of the shares with which they respectively deal and the amount of the premium to be paid, which was 1s. 3d. in the former instance and 1s. 6d. in the latter. It will only be necessary, therefore, to refer to the first. It ran as follows:

"14, Chapel Street, Liverpool, April 15, 1910.—E. Buckleton, Esq., 10, Croxteth Road, Liverpool.—Dear Sir,—We beg to confirm the arrangement we

A have made with you to secure the allotment to you of 5,000 shares in the Filisola Rubber and Produce Estate in consideration of a premium of 1s. 3d. per share to be paid to us.—Yours truly, HEILBUT, SYMONS & Co."

By these letters the respondent was fully informed what was the full name of the company, and, so far as that name would indicate, what was its intended business? It was to be a "produce" company as well as a "rubber" company. He made no B objection whatever on this account, nor any complaint that he had been misled as to the nature of its intended business. The appellants, who are persons of high position in rubber finance and trade, had underwritten shares of the company for a large amount. On April 11, 1910, they wrote to their agent, one Johnston, a letter asking him, for the first time, to induce his friends to apply for some shares in this company. So far as its contents are material they were as follows:

C "The Filisola Rubber and Produce Estates will come out Monday next. It has all been underwritten, but we shall be pleased if you can induce some of your friends to apply for some shares. The capital consists of £130,000 (2s. shares), of which 920,000 shares will be issued at par. Of these, so far, about 500,000 have been applied for. The prospectus shows profits for 1910–11 at D 30 per cent., going up to 49 per cent. in 1914–15.—Yours faithfully, HEILBUT, SYMONS & Co."

No information is afforded by this letter as to the character of the company, the nature of the assets which it was proposed that it should acquire, or the business which it would, when floated, carry on. Between this date and two o'clock in the afternoon of April 14 there is, in my view, nothing in the evidence to show that E Johnston had acquired any information upon any of these subjects in addition to what he possessed on the former of these days. It is, I think, vital to consider and bear in mind what was the precise nature and amount of that information. In his evidence in chief he stated that before April 11, 1910, at a time when he did not know that he would ever have anything to do with this company, one Mr. Reimers, in the presence of one Mr. Vogel, both interested in the company, F handed to him a draft prospectus of it. He only glanced, he said, at the draft, and from that glance, coupled with what passed between them on that occasion, merely learned that the prospectus was the prospectus of a company about to be brought out, that its title was to be Filisola, that it was to be (that is, I presume, was to operate) in Mexico, and that there were on the estates the number of rubber trees mentioned in it, but nothing more. He did not see a prospectus of the com- G pany till long after April 14, if at all.

That was the state of ignorance in which Johnston was when the conversation through a telephone, upon the effect of which this appeal turns, took place between him and the plaintiff. He stated, however, that he thought that the main business of the company was the production of rubber, and that had he then known what the real nature of its business turned out to be he would have thought it misleading H to have described it as a rubber company. He stated positively, however, that he himself never described it as a "rubber company" or the "Filisola Rubber Co.," that he might have spoken of it as the "Filisola," but otherwise always as the "Filisola Rubber and Produce Estates." I cannot find that this evidence is, to any material extent, contradicted or qualified. There is not a suggestion from beginning to end of the case that his principals ever expressly or impliedly authorised I or directed him to represent the company as a rubber company, or as a company whose business was solely or mainly in rubber. Happening to be in Manchester on business on April 12, Johnston induced two business acquaintances or friends of his engaged in the rubber trade to apply for 30,000 of these shares. On April 13 some persons in Liverpool, in addition apparently, applied for many thousands of them. That, as I take it, appears from a letter signed by him. He was, it would seem, rapidly disposing of these shares. They were being applied for briskly in large numbers. On April 14 he received a letter from his principals offering

him 75,000 more of their shares at 1s. 3d. premium, which offer he accepted. Now that was the condition of things when the respondent, to whom he, Johnston, had never applied to take any of these shares, or suggested that he should take any of them, opened negotiations by telephone with him. The respondent's account of what passed was accepted as correct. It has been already fully stated, and it is unnecessary to repeat it in detail. It is plain, however, from it that it was the respondent who, in the first instance, designated or described the company as a "rubber company." The description was his, not Johnston's, but Johnston unfortunately did not correct that misdescription, or rather that imperfect or incomplete description. If in answer to the respondent's question: "I understand that you are bringing out a rubber company?" he had replied: "Not a rubber company, but a rubber and produce company," this claim for breach of warranty could, I think, hardly have been maintained. It is this omission to correct the plaintiff's incomplete description of the company, coupled with what followed on April 14, which, it is contended, supplied evidence on which a jury could reasonably find as an inference of fact, not a mere conjecture or surmise, that this agent then intended on behalf of his principals to enter into and did enter into a contract binding upon them, warranting this company, of whose real business he knew almost nothing, to be a company intending to engage solely or mainly in the future in the production of rubber—a contract collateral to the written contract to take shares, but entering into, and forming part of, the entire bargain between the parties.

Even assuming that the omission by Johnston to correct the respondent's misdescription of this company should be treated as an adoption of that misdescription, and be taken as an affirmation by Johnston that the company was a "rubber company," which is putting it most strongly in favour of the respondent, more strongly perhaps than is legitimate, the question of Johnston's intention in making that affirmation remains. That is elementary law. It was laid down so long ago as 1789 by BULLER, J., in *Pasley* v. *Freeman* (2). He said (3 Term. Rep. at p. 57):

> "It was rightly held by HOLT, C.J., in [*Cross* v. *Gardner* (4) and *Medina* v. *Stoughton* (5)] and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to be so intended."

The existence or non-existence of such an intention in the mind of the party making an affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed, is in an action of breach of warranty, no doubt a question for the decision of the jury which tries the action, and all the evidence in the case touching the knowledge, conduct, words, and actions of that party, from first to last, may be considered by them in arriving at a conclusion on this question. In the present case it would appear to me that every relevant piece of evidence given, every fact proved, tends to disprove the existence of such an intention in Johnston's mind when this conversation took place, rather than to establish it. They found in his favour on the charge of fraud. He must now be taken not to have stated what he knew to be untrue in fact, and not to have recklessly stated to be true that as to which he did not know whether it was either true or false. Either of these things would have amounted to fraud, and the jury have found that there was no fraud. But reckless as it might have been in him, having regard to his comparative ignorance of all the facts, to have deliberately represented this company to be a rubber company within the meaning which these words have been held by the jury to bear in the language of the commercial world, it would have been still more reckless in him, without any authority or permission, to have contracted on behalf of his principals that this company was in fact of that character, and, moreover, it would apparently have been as unnecessary as reckless. Nothing was proved to show that Johnston was at all anxious to induce the

respondent to become a subscriber for these shares. Again, the respondent did not ask for any warranty. Indeed, he was not satisfied with the reply to the first question, which, as I understand, it is now contended constituted the warranty, for he asked had Johnston any prospectus? And being answered in the negative, he went on to inquire if it (the company) "was all right." Johnston, the ignorant and reckless agent, did not answer "Yes," as one would certainly have expected him to have done if he had already given, or intended to give, the warranty relied upon; on the contrary, he gave the guarded answer: "We are bringing it out." The respondent then replied, "That is good enough for me."

Surely the "that" which was good enough for him was obviously the fact that a firm of the high position of the appellants in the commercial world was bringing the company out. It was this, not the alleged warranty to which he never referred, which induced him to speculate in these shares for a rise during the frenzied boom then taking place in the rubber market. But it would not be enough that Johnston should have offered to give a warranty as a term of the bargain to take these shares. The respondent should accept that offer and act upon it so as to make complete this collateral contract. His own language on this occasion appears to me to be repugnant to the idea that he accepted the alleged offer or treated it as part of the bargain. For these reasons I think that there was no evidence before the jury upon which they could reasonably find, either that Johnston intended to give a warranty of these shares, or that the respondent intended to accept such a warranty or thought that he had got it. In what I have said I have assumed that this company was not, in fact, a rubber company, as these words, though not technical terms, are understood in the commercial world, because the jury have so found; and I think that there was sufficient evidence before them to sustain that finding. I confess that I should have had great difficulty, myself, in coming to such a conclusion, because it would appear to me that, according to the ordinary and natural meaning of language, a company formed to acquire land, to plant rubber trees extensively upon it, and to endeavour to produce large quantities of rubber in the future, does not cease to be a rubber company properly so called because, in the interval, while those trees are maturing, it raises upon its land bananas or any other product. That, however, is for the reason which I have mentioned, immaterial. I am, therefore, of opinion that this appeal should be allowed; that the verdict and judgment entered for the respondent should be set aside; and judgment entered for the appellants with costs both here and below, including the costs of the trial.

LORD MOULTON.—In this action the plaintiff, the present respondent, sought relief in damages against the defendants, the present appellants, in respect of two contracts whereby the defendants undertook to procure for the plaintiff, and the plaintiff undertook to accept, the allotment of 5,000 and 1,000 shares in a company called the Filisola Rubber and Produce Estates, Ltd. The claim for such relief was mainly based on the allegation that the plaintiff had been induced to enter into these contracts by the false and fraudulent representation of the defendants that the said company was a rubber company. This was the sole ground for relief which was put forward by the plaintiff in the proceedings before action and in the indorsement on the writ, but in the statement of claim an alternative claim for damages was included, based on the breach of an alleged warranty given by the defendants that the company was a rubber company. At the trial the substantial case which it was sought to make on behalf of the plaintiff had reference solely to the alleged false and fraudulent representation. Evidence was given by the plaintiff and not challenged by the defendants as to a conversation which took place over the telephone between the plaintiff and Mr. Johnston, a representative of the defendants, in which undoubtedly Mr. Johnston stated that the company was a rubber company. The making of the alleged representation was, therefore, not in issue, and the whole of the evidence on both sides was directed

to the issue whether such representation was false, and whether, if so, it was fraudulently made. No evidence was given upon the issue of a warranty having been given by the defendants that the company was a rubber company other than so far as the proof of the conversation above referred to may have amounted to such evidence. In answer to questions put to them by the judge, the jury found (i) that the company could not properly be described as a rubber company; (ii) that the defendants did not fraudulently represent, but that (iii) they did warrant, that it was a rubber company. Against the second of these findings there is no appeal, so that the only questions before us are whether the first and third of these findings can stand.

The alleged warranty rested entirely upon the following evidence. The plaintiff got a friend to ring up on the telephone Mr. Johnston (a representative of the defendants, for whose acts they accept the full responsibility) to tell him that the plaintiff wished to speak to him. The plaintiff's evidence continues thus:

> "I went to the telephone and I said: 'Is that you, Johnston?' He said: 'Yes.' I said: 'I understand that you are bringing out a rubber company,' and he said: 'We are'."

The material part of the evidence ends here. The further conversation related to the soundness of the company, but no claim for relief is based on what then passed either by way of fraudulent representation or warranty. The plaintiff then asked if he could have some shares. Mr. Johnston said he thought he could let him have 5,000 at a premium of 1s. 3d., which the plaintiff expressed himself ready to take, but no bargain was then concluded. On the next day, however, Mr. Johnston accepted in writing the offer of the plaintiff as to taking 5,000 shares. Later on the plaintiff applied to Mr. Johnston for a further 1,000 shares and obtained them at a somewhat higher premium. In each case the terms of the contract were reduced to writing by Mr. Johnston acting for the defendants, and sent to the plaintiff. The contracts were not contracts of sale of the shares of the company (which had not then been issued), but contracts whereby the defendants (who were underwriters of the shares in the forthcoming issue) undertook to procure for the plaintiff the allotment of the shares on his applying for them. There is, of course, no conflict as to the actual terms of these contracts which appear from the letters. They were acted upon by the plaintiff, who duly applied for and received the allotments of 5,000 and 1,000 shares of the company, such allotments having been procured by the defendants by the exercise of their rights as underwriters. The plaintiff parted with some of his shares, but retained the remainder, and it is in respect of these latter that the damages are claimed in this action.

There is no controversy between the parties as to certain points of fact and of law. It is not contested that the only company referred to was the Filisola Rubber and Produce Estates, Ltd., or that the reply of Mr. Johnston to the plaintiff's question over the telephone was a representation by the defendants that the company was a "rubber company," whatever may be the meaning of that phrase; nor is there any controversy as to the legal nature of that which the plaintiff must establish. He must show a warranty—i.e., a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The sole question in issue is whether there was any evidence that such a contract was made between the parties. It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be

to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are, therefore, viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter. There is in the present case an entire absence of any evidence to support the existence of such a collateral contract. The statement of Mr. Johnston in answer to plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. It was this representation which he alleged to have been false and fraudulent and to have induced him to enter into the contracts and take the shares. There is no suggestion throughout the whole of his evidence that he regarded it as anything but a representation. Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to show the existence of any animus contrahendi other than as regards the main contracts. The whole case for the existence of a collateral contract, therefore, rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true, and, therefore, to give a right to damages if such should not be the case.

In the history of English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognise the existence of what was sometimes called "legal fraud," i.e., that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake, or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in *Peek* v. *Derry* (6), when they laid down that where a mis-statement of fact by the defendant materially tended to induce the plaintiff to do an act by which he had incurred damage, the defendant might be made liable in an action of deceit. But on appeal to your Lordships' House this decision was unanimously reversed, and it was definitely laid down that, in order to establish a cause of action sounding in damages for misrepresentation, the statement must be fraudulent, or, what is equivalent thereto, must be made recklessly, not caring whether it be true or not. The opinions pronounced in your Lordships' House in that case show that both in substance and in form the decision was and was intended to be a reaffirmation of the old common law doctrine that actual fraud was essential to an action for

deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages. On the common law side of the court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits, and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. The present case is, in my opinion, an instance of this. But in respect of the question of the existence of a warranty the courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by HOLT, C.J., with respect to the contract of sale. He says:

> "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended."

So far as decisions are concerned, this has, on the whole, been consistently followed in the courts of common law. But from time to time there have been dicta inconsistent with it which have, unfortunately, found their way into text-books and have given rise to confusion and uncertainty in this branch of the law. For example, one often sees quoted the dictum of BAYLEY, J., in *Cave* v. *Coleman* (7), where, in respect of a representation made verbally during the sale of a horse, he says that "being made in the course of dealing, and before the bargain was complete, it amounted to a warranty"—a proposition which is far too sweeping and cannot be supported. A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle* v. *Guildford* (8), which was cited to us in the argument in the present case. In discussing the question whether a representation amounts to a warranty or not, the judgment says ([1901] 2 K.B. at p. 221):

> "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."

With all deference to the authority of the court which decided that case, the proposition which it thus formulates cannot be supported. It is clear that the court did not intend to depart from the law laid down by HOLT, C.J., and cited above, for in the same judgment that dictum is referred to and accepted as a correct statement of the law. It is, therefore, evident that the use of the phrase "decisive test" cannot be defended. Otherwise it would be the duty of a judge to direct a jury that if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty whether or not the totality of the evidence shows that the parties intended the affirmation to form part of the contract; and this would be inconsistent with he law as laid down by HOLT, C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

It is of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is

a representation as to a specific thing and nothing more. The judge, therefore, ought not to have left the question of warranty to the jury, and if, as a matter of prudence, he did so in order to obtain their opinion in case of appeal, he ought then to have entered judgment for the defendants notwithstanding the verdict. It will, of course, be evident that I have only been dealing with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when goods are sold by description and their answering to that description becomes a condition of the contract. It is, in my opinion, a failure to recognise that in the present case the parties were referring (as is evident by the written contracts) to one specific thing only which led Farwell, L.J., to come to a different conclusion from that to which your Lordships ought, in my opinion, to come in this appeal.

Appeal allowed.

Solicitors: *Coward, Hawksley, Sons & Chance; Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

E. CLEMENS HORST CO. *v.* BIDDELL BROS.

[Court of Appeal (Vaughan Williams, Farwell and Kennedy, L.JJ.), January 30, 31, February 1, March 21, 1911]

[Reported [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp. M.L.C. 1]

[House of Lords (Earl Loreburn, L.C., Lord Atkinson, Lord Gorell and Lord Shaw), November 3, 1911]

[Reported [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp. M.L.C. 80; 17 Com. Cas. 55]

Sale of Goods—C.i.f. contract—Payment—Due date—Tender of shipping documents.

Where goods are sold for net cash under the terms of a c.i.f. contract the buyer is bound to pay for the goods on tender of the usual shipping documents, even though the goods have not arrived at their destination and the contract does not provide for payment against such documents,

Notes. Considered: *Landauer* v. *Craven and Speeding Bros.*, [1912] 2 K.B. 94. Distinguished: *Orient Co.* v. *Brekke & Howlid*, [1913] 1 K.B. 531. Considered: *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, *Schneider & Co.* v. *Burgett and Newsam*, [1915] 2 K.B. 379. Applied: *Groom, Ltd.* v. *Barber*, [1914–15] All E.R. Rep. 194. Considered: *Happe* v. *Manasseh* (1915), 84 L.J.K.B. 1895. Applied: *Sharpe* v. *Nosawa*, [1917] 2 K.B. 814. Considered: *Johnson* v. *Taylor*, [1920] A.C. 144; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R. Rep. 283; *Hansson* v. *Hamel and Horley, Ltd.*, [1922] All E.R. Rep. 237; *Finska Cellulosaforeningen* v. *Westfield Paper Co., Ltd.*, [1940] 4 All E.R. 473; *Comptoir D'Achat et De Vente Due Boerenbond Belge S.A.* v. *Luis De Ridder, Limitada, The Julia*, [1947] 1 All E.R. 118. Referred: *The Miramichi*, [1915] P. 71; *Upjohn* v. *Hitchens, Upjohn* v. *Ford*, [1918] 1 K.B. 171; *Manbre Saccharine Co.* v. *Corn Products Co., Ltd.*, [1918–19] All E.R. Rep. 980; *Aron* v. *Comptoir Wegimont*, [1921] 3 K.B. 435; *Ballantine & Co.* v. *Cramp and Bosman*, [1923] All E.R. Rep. 579; *Scriven* v. *Schmoll Fils Inc.* (1924), 40 T.L.R. 677; *Canada Atlantic Grain Export Co. (Inc.)* v. *Eilers* (1929), 35 Com. Cas. 90;

Churchill and Sim v. *Goddard*, [1936] 1 All E.R. 675; *Rayner & Co.* v. *Hambros Bank, Ltd.*, [1942] 2 All E.R. 694; *Colin and Shields* v. *Wedder & Co.*, [1952] 2 All E.R. 337; *Carapanayoti, Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115.

As to c.i.f. contracts, see 34 HALSBURY'S LAWS (3rd Edn.) 164–175. For cases see 39 DIGEST 530, 558, 594 et seq., and for Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274*.

(2) *Parker* v. *Schuller* (1901), 17 T.L.R. 299, C.A.; Digest (Practice) 350, *657*.

(3) *Sanders* v. *Maclean* (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462; 31 W.R. 698; 5 Asp. M.L.C. 160, C.A.; 39 Digest 595, *1936*.

(4) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp. M.L.C. 389, H.L.; 39 Digest 560, *1677*.

(5) *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex.D. 164; 47 L.J.Q.B. 418; 38 L.T. 597; 3 Asp. M.L.C. 591, C.A.; 39 Digest 520, *1357*.

(6) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593; 7 Scott, N.R. 269; 12 L.J.Ex. 477; 1 L.T.O.S. 172; 134 E.R. 1029, Ex.Ch.; 39 Digest 587, *1891*.

(7) *Tregelles* v. *Sewell* (1862), 7 H. & N. 574; 158 E.R. 600; affirmed (1863), 7 H. & N. 584, Ex.Ch.; 39 Digest 495, *1119*.

(8) *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch.D. 20; 39 L.T. 239.

Appeal by the plaintiffs, the buyers, from a decision of HAMILTON, J., in an action in the Commercial List tried by him without a jury.

The plaintiff's claim was for damages in respect of breaches of two agreements. On Oct. 13, 1904, the defendants (the sellers) entered into an agreement with C. Vaux & Sons, Ltd., whereby the sellers agreed to sell to Messrs. Vaux 100 bales equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905 to 1912 inclusive. The hops were to be shipped to Sunderland, and Messrs. Vaux agreed to pay for the said hops at the rate of 90s. sterling per 112 lb. c.i.f. to London, Liverpool, or Hull. Terms, net cash. On Dec. 21, 1904, the defendants entered into a further agreement with the buyers whereby they sold them fifty bales of British Columbia hops equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1906 to 1912 inclusive, the material terms of which were identical with those of the former contract. On Aug. 11, 1908, Messrs. Vaux assigned all their rights and benefits under these contracts to the plaintiffs. On Jan. 29, 1910, the sellers, by letter of that date, offered to ship to the buyers 150 bales of hops of the 1909 crop according to the agreement, and they alleged that the buyers on Feb. 1, 1910, required them as a condition precedent to the shipment of the hops to submit samples of the hops to be so shipped, and said they would only pay for the hops against the examination of each bale. By their statement of claim the buyers said that they required the sellers to ship and deliver the hops in accordance with the terms of the two agreements, but that the sellers refused to ship or deliver the hops, and they claimed £787 10s. damages. By their defence the sellers alleged that, as the contract was a c.i.f. contract, payment was to be net cash against documents, and they alleged that by reason of the buyers' violation of the entire unfulfilled portion of each of the agreements, they, the sellers, refused, by letter of Feb. 5, 1910, to perform the agreements further. The defendants counterclaimed £525 damages for the refusal to take and pay for the 150 bales of the 1909 crop in accordance with the agreement. HAMILTON, J., held that where goods were sold under the terms of a c.i.f. contract and for "net cash" the buyer was bound to pay for the goods on tender of the usual shipping documents, even when the goods had not arrived at their first destination, and he gave judgment for the sellers. The buyers appealed.

Shearman, K.C., and *Eustace Hills* (*Leslie Scott, K.C.*, with them) for the plaintiffs.

Atkin, K.C., and *George Wallace* for the defendants.

Cur. adv. vult.

Mar. 21, 1911. Judgments were read by **VAUGHAN WILLIAMS** and **FARWELL, L.JJ.**, allowing the appeal. The following dissenting judgment was delivered by

KENNEDY, L.J.—This is an appeal of the plaintiffs in the action, the buyers, against the judgment of HAMILTON, J., sitting as a judge without a jury for the trial of commercial cases in the King's Bench Division. The action before him comprised a claim of the buyers for damages for breaches of two contracts, partly typewritten and partly printed, and a counterclaim of the sellers for breaches of the same contracts. So far as regards the claim of the buyers which HAMILTON, J., has dismissed, his judgment was, in my opinion, right, and, but for the contrary opinion of the other members of this court, from whom I have the misfortune to differ, I should have ventured to think the case a reasonably simple one.

The material terms of the two contracts, with the conflicting contentions of the litigants thereon, are carefully stated by HAMILTON, J., in the opening portion of his judgment ([1911] 1 K.B. 214) and it is needless for me to repeat them here at length. It is sufficient, in order to make clear the reasoning of my judgment, to summarise the statement of the learned judge. Each of the contracts in question is a contract for the sale of foreign hops of specified quality, to be shipped by the defendants, the sellers, from the Pacific coast to Sunderland, and to be paid for by the plaintiffs, the purchasers, at the rate of 90s. sterling per 112 lb. c.i.f. to London, Liverpool, or Hull, terms net cash. No point arises, as the learned judge states, upon the question of the calculation of freight being to London, Liverpool, or Hull while the shipment was to Sunderland. Possibly the explanation of this arrangement is that C. Vaux & Sons, Ltd., the original purchasers, who assigned their interest under the contracts to the plaintiffs, carried on business at Sunderland. Anyhow, the fact is, as it has been treated throughout the argument, immaterial.

The dispute between the parties is as to the conditions under which, according to the true interpretation of these contracts, the price is to be paid. The plaintiffs' case is that the price was not to be paid until they had been given an opportunity of inspecting the shipment, which could not be given until after its arrival in this country. The defendants contend that the plaintiffs' obligation was to pay for the hops, whether they arrived or not, against tender of the shipping documents. I agree with HAMILTON, J., and indeed it was not disputed on the argument before us, that the buyers in the correspondence clearly expressed their intention not to take delivery of the 1909 shipment (which is that to which this litigation is confined) except upon the terms of payment for which they now contend; and, therefore, if they are wrong in that contention, they relieved the sellers from the obligation to tender, and they have themselves broken these contracts so far as regards this particular shipment. Before litigation began the sellers, for the sake of peace, offered as a matter of grace to make the buyers the reasonable and businesslike concession of attaching to the shipping documents certificates of quality of the Merchants' Exchange at San Francisco, or other competent authority. But this offer was rejected by the buyers, and each of the parties is now standing upon his rights, as he alleges, under the documents which contain the contracts. The court, therefore, has in the present case to decide what are the true conditions of the right of the seller to payment under a c.i.f. contract, if that commercial contract is to be performed strictly according to its tenor. HAMILTON, J., has unhesitatingly decided in favour of the sellers. In his opinion, it was unnecessary to refer to authorities as to the meaning of the terms "cost, freight, and insurance," because those terms are now well settled and, as he hoped he might add, well

understood. But he has given a reasoned judgment, to which I can discover no answer in the argument of the buyers' counsel, which was for all practical purposes the same as that which appears from the report to have been put forward by them unsuccessfully in the court below. But for the differing opinion of VAUGHAN WILLIAMS and FARWELL, L.JJ., which, of course, raises in my mind a doubt of the correctness of my own, I should have been content to adopt that judgment as it stands. But, in the circumstances, and believing, as I do, that the matter of this appeal affects a large and important branch of import business, it is, I think, right that I should deal with the case in my own way although this will involve a much longer judgment than I should otherwise have thought necessary or justifiable.

The buyers' argument, apart from a reference to certain subordinate and subsidiary printed clauses, to which I shall advert after dealing with the main question, hangs upon considerations arising from (a) the absence after the words "net cash" of such words as "against documents," or "in exchange for documents"; and (b) the provisions of s. 28 and s. 34 of the Sale of Goods Act, 1893, in respect of the buyer's right to have delivery in exchange for the price and to have an opportunity to examine goods tendered for acceptance. In regard to the wording of the contract, I do not think that the comment that the terms might have been more fully expressed helps one way or the other as to the interpretation of the contract as it stands. All that can be said is that, the conditions of payment not being expressly stated except in so far as the words "net cash" negative payment by acceptance and the allowance of deduction or discount, it must be settled by the interpretation of the document according to established principles of mercantile law. If any implication is necessary, the law, as stated by BOWEN, L.J., in his judgment in *The Moorcock* (1), desires to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men. This is not a case, as it seems to me, of a contract the terms of which present ambiguity or conflict. There is no contrariety between "cost, freight, and insurance, net cash," and "cost, freight, and insurance, net cash against documents." Both the longer and the shorter form are in everyday use; examples of both can be found within the covers of modern law reports; see, for example, *Parker* v. *Schuller* (2), and *Sanders* v. *MacLean* (3), and, although it is probable, I should think—and the present litigation certainly vindicates its expediency—that the longer form is the more common, it has so far as I am aware, never before this case been suggested that a contract "cost, freight, and insurance, net cash," or a contract 'cost, freight, and insurance, payment by acceptance," may not imply "against documents" in each case. The well-known passage, in the opinion of BLACKBURN, J., in *Ireland* v. *Livingston* (4), referred to by HAMILTON, J., in which a great master of the commercial law stated the course of business in the performance of a cost, freight, and insurance contract as very usual and well understood, plainly cannot be cited for the sellers as an actual decision in their favour, for the statement itself is obiter, and the particular contract in *Ireland* v. *Livingston* (4) contained the words "payment by acceptance on receiving shipping documents." But BLACKBURN, J.'s, opinion was delivered in the House of Lords forty years ago, and, speaking for myself, I do not recollect hearing it suggested, until I listened to the argument of the buyers' counsel in this case, that the value of that opinion as setting forth the relative rights and duties of seller and buyer in the ordinary course of procedure under a c.i.f. contract wholly depended upon the insertion of "against (or ("in exchange for") shipping documents" after the statement of the mode of payment by cash or by acceptance, as the case may be.

Let us, however, leave out of sight altogether for the present all question of usage or judicial recognition of usage. The application of the principles and rules of the common law, now embodied in the Sale of Goods Act, 1893, to the business transaction embodied in the c.i.f. contract appears to me to be decisive of the

A issue between these parties. Let us see, step by step, how according to those principles and rules the transaction specified in such a c.i.f. contract as that before us is, and, I think, must be, carried out in order to fulfil its terms. At the port of shipment—in this case San Francisco—the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, s. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the B contract, and, by virtue of s. 32, the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is prima facie to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy C of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative: see the judgments of BRAMWELL and COTTON, L.JJ., in *Mirabita* v. *Imperial* D *Ottoman Bank* (5). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignee. But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is according to the express terms of s. 32 only "prima facie deemed to be a delivery to the buyer," and under s. 28 of the Sale of Goods Act as under the common law (an E exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *Macdonald* (6) a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession.

How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit F by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser.

> "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading G by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such H property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door I of the warehouse, floating or fixed, in which the goods may chance to be."

That is the language of BOWEN, L.J., in *Sanders* v. *MacLean* (3), (11 Q.B.D. at p. 341). The meaning of "delivery" under the Sale of Goods Act is defined by s. 62 to be "voluntary transfer of possession from one person to another." Such delivery, as the learned draftsman of the Act and its editor remarks in his note to this section, may be either actual or constructive; and, as BOWEN, L.J., has pronounced, in the case of sea-borne goods the delivery of the bill of lading operates as a symbolical delivery of goods.

But then I understand it to be objected on behalf of the buyers: "Granted that the purchaser might, if he pleased, take this constructive delivery and pay against it the price of the goods, what is there in the 'cost, freight, and insurance' contract which compels him to do so? Why may he not insist on an option of waiting for a tender of delivery of the goods themselves after having had an opportunity of examining them after their arrival?" There are, I think, several sufficient answers to such a proposition. In the first place, an option of a time of payment is not a term which can be inferred, where the contract itself is silent. So far as I am aware, there is no authority for the inference of an option as to times of payment to be found either in the law books or in the Sale of Goods Act. Secondly, if there is a duty on the vendor to tender the bill of lading, there must, it seems to me, be a corresponding duty on the part of the purchaser to pay when such tender is made. Very relevant on this point is the language of BRETT, L.J., in his judgment in *Sanders* v. *MacLean* (3), which applies to this class of contract the general law expounded by BOWEN, L.J., in *The Moorcock* (1). He said (11 Q.B.D. at p. 337):

> "The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable";

and if it be the duty implied in the c.i.f. contract, as held by BRETT, L.J., in that case, that the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, "mercantilely reasonable" that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading, either drawn originally in his favour or indorsed to him, and accompanied, in case of loss, by the policy of insurance. For thereunder, as the bill of lading with its accompanying documents come forward by mail, the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or, perhaps, in the case of shipments from a distant port, months, before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to secure by a c.i.f. contract. But, in truth, the duty of the purchasers to pay against the shipping documents, under such a contract as the present, does not need the application of that doctrine of the inference in mercantile contracts that each party will do what is "mercantilely reasonable," for which we have the great authority of LORD ESHER. The buyers' assertion of the right under a cost freight, and insurance contract to withhold payment until delivery of the goods themselves and until after an opportunity of examining them cannot possibly be effectuated except in one or two ways. Landing and delivery can rightfully be given by the shipowner only to the holder of the bill of lading. Therefore, if the buyers' contention is right, one of two things must happen. Either the seller must surrender to the purchaser the bill of lading, whereunder the delivery can be obtained, without receiving payment, which, as the bill of lading carries with it an absolute power of disposition, is, in the absence of a special agreement in the contract of sale so unreasonable as to be absurd, or, alternatively, the vendor must himself retain the bill of lading, himself land and take delivery of the goods, and himself store the goods on quay (if the rules of the port permit), or warehouse the goods for such time as may elapse before the purchaser has an opportunity of examining them. But this involves a manifest violation of the express terms of the contract, "90s. per cwt., cost, freight, and insurance." The parties have in terms agreed that for the buyer's benefit the price shall include freight and insurance, and for his benefit nothing beyond freight and insurance. But if the present buyers' contention were to prevail, the vendor must be saddled with the further payment of those charges at the port of discharge which ex necessitate rei would be added to the freight and insurance premium which alone he has by the terms of the contract undertaken to defray.

Finally, let me test the soundness of the plaintiffs' contention that according to the true meaning of this contract their obligation to pay arises only when delivery of the goods has been tendered to them after they have had an opportunity of examination, in this way. Suppose the goods to have been shipped, the bill of lading taken, and the insurance for the benefit of the buyer duly effected by the seller, as expressly stipulated in the contract. Suppose the goods, then, during the ocean transit to have been lost by the perils of the sea. The vendor tenders the bill of lading with the insurance policy and the other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed and at whose risk, covered by the insurance, the goods were at the time of loss. Is it arguable that the purchaser could be heard to say: "I will not pay because I cannot have the delivery of and an examination of the goods"? But it is just this which is necessarily involved in the contention of these buyers. The sellers' answer, and I think conclusive answer, is: "You have the bill of lading and the policy of insurance." It is noticeable that in the course of the argument in *Tregelles* v. *Sewell* (7) MARTIN, B., observes (7 H. & N. at p. 579): "The purchaser was to have a policy of insurance which is usually considered as equivalent to the goods." And earlier in the same argument WILDE, B., asked (ibid. at p. 578): "If the meaning is 'to be delivered in Hamburg' what necessity is there for insurance?" The contract in that case was a contract in the longer form—namely, against documents—but it does not seem to me that that affects the value of those observations as to the relative rights of the buyer and seller.

I have only to add as to this, the main question in the present case, a few words in regard to ss. 28 and 34 of the Sale of Goods Act. As I have already said, my own view as to s. 28 is that the section is satisfied by the readiness and willingness of the seller to give possession of the bill of lading. I am, however, far from saying that the view which is suggested in the course of HAMILTON, J.'s, judgment—namely, that when the parties have entered into a c.i.f. contract they have "otherwise agreed"—is not one which could be supported, as I hold that a similar view is the true view also in regard to s. 34 (2). As to s. 34 (1), there is no difficulty. No one suggests that the plaintiffs, if they pay against documents, become thereby precluded from rejecting the goods if on examination after their arrival they are found to be not goods in accordance with the contract, or from recovering damages for breach of contract if they prefer that course.

So far I have tested the validity of the buyers' contention in the present case that under a simple c.i.f. contract the seller is entitled to payment only against delivery of the goods themselves and after examination of the goods, altogether apart from authority, by applying established principles and rules of law to a c.i.f. contract so as to give it in BOWEN, L.J.'s, language such efficacy as must have been intended by the parties to it as business men. But, in truth, the judgment of the Court of Appeal (SMITH, M.R., and COLLINS and ROMER, L.JJ.) in *Parker* v. *Schuller* (2) cannot, in my judgment, be reconciled with this contention of the present buyers. In *Parker* v. *Schuller* (2) the case came before the court on an appeal from the judge in chambers who had affirmed an order giving the plaintiffs leave under Ord. 11, r. 1 (e), to issue a writ and serve the defendant to an action in contract, who was a foreigner out of the jurisdiction, with notice of the writ. The validity of the judge's order depended, according to the terms of Ord. 11, r. 1 (e), upon the existence of a breach, or alleged breach, within the jurisdiction. The contract was in every essential point identical with the contract in the present case. It was a simple c.i.f. contract, without mention of payment against documents, the goods sold being goods to be shipped from Germany to Liverpool. The goods had not been shipped. The breach alleged by the plaintiffs in the indorsement upon the writ of summons and in the affidavit in support of their application was the non-delivery of the goods themselves to them in Liverpool. The judge in chambers, FARWELL, J., who heard the application ex parte in the first instance, and LAWRENCE, J., who affirmed his order, had held that the non-delivery of the

goods in Liverpool did, as the plaintiffs contended, constitute a breach of the contract within the jurisdiction. The Court of Appeal reversed their decision, holding that this non-delivery of the goods themselves upon which the plaintiffs relied in their writ and the affidavit in support of their application did not constitute a breach of the c.i.f. contract; and there is, I think, a noteworthy confirmation of HAMILTON, J.'s, opinion that the law on this point has long been treated as well settled in the fact that MR. HORRIDGE, the counsel for the plaintiffs in *Parker* v. *Schuller* (2) expressly declined even to argue the point upon which his clients had obtained their order from the judges appealed from and upon which the plaintiffs in the present case base their appeal to this court, but endeavoured to uphold that order upon the ground, not relied upon in the writ or in the affidavit, that under the c.i.f. contract the seller is bound to deliver to the buyer the bill of lading and the policy of insurance with the other shipping documents (if any), and that their unquestionable failure to do this constituted a breach within the jurisdiction which would justify the grant to his clients of the order for service of notice of the writ which they had obtained. According to the judgment of HAMILTON, J., and my own also, MR. HORRIDGE'S argument as to the obligation of the seller under a c.i.f. contract, not merely to ship the goods at the foreign port, but to deliver the shipping documents to his buyer here, was well founded, and the judgments of the Court of Appeal in *Parker* v. *Schuller* (2) contain nothing in conflict with that view. But all the members of the court declined to deal with any defence of the order appealed against which rested upon a breach other than that which was put forward in the plaintiff's writ of summons and affidavit; and, being clearly of opinion that under a c.i.f. contract there was no obligation on the seller to deliver the goods themselves in this country, they allowed the appeal. The case is so important that I think it is my duty to quote one passage from the judgment of the Master of the Rolls (17 T.L.R. at p. 300).

> "Upon the appeal the alleged contract to deliver the goods at Liverpool was dropped, the contract being 'c.i.f. Liverpool,' and it was not argued that the contract was to deliver the goods at Liverpool. That was abandoned. The plaintiff was therefore wrong in his application. It was not contended that a c.i.f. contract was a contract to deliver goods in this country."

Then, after referring to MR. HORRIDGE'S argument that the contract did bind the seller to deliver the shipping documents, the Master of the Rolls proceeded (ibid.):

> "It was enough in the present case to say that that was not the cause of action indorsed on the writ of summons, nor the cause of action alleged in the affidavit upon which leave to issue the writ and to serve notice thereof out of the jurisdiction was granted. The claim was for non-delivery of the goods. It was not until the case came into this court that the plaintiff set up another cause of action. That could not be allowed."

The case of the buyers on this present appeal that the sellers can demand payment only upon delivery of the goods logically depends upon the alleged obligation of the sellers to deliver the goods themselves in this country; and we cannot, it appears to me, reverse HAMILTON, J.'s, judgment in this case without holding, as a necessary conclusion, that this court decided wrongly in *Parker* v. *Schuller* (2) when it held, in regard to a simple c.i.f. contract, essentially identical with the c.i.f. contract in the present case, that it created no such obligation on the part of the seller.

In regard to the subsidiary or supplemental clauses of the contracts in question, from which the buyers' counsel sought, to some slight extent, to draw support for their interpretation of the principal or governing provisions, with which I have already dealt, I have really little or nothing to add to that which my brother HAMILTON has said in considering this part of the plaintiffs' argument. These

clauses are printed clauses not very clearly expressed; but apparently intended to meet certain possible contingencies which we have not to consider in deciding the present issue. They do not appear to me to throw any useful light upon the construction of the contracts in regard to the conditions of payment. I may add that the fact that there is a reference to delivery of goods in a c.i.f. contract was held in *Tregelles* v. *Sewell* (7) not sufficient to alter the effect of the c.i.f. terms. There the contract was in its longer form—payment upon delivery of bill of lading and policy—but this does not affect the principle if the contracts are to be performed strictly according to their tenor.

In my judgment, the judgment of HAMILTON, J., was right, and this appeal, so far as relates to the buyers' claim, should be dismissed. The only remaining question upon this appeal is as to the defendants' counter-claim. The learned judge, with some amount of doubt, has come to the conclusion, in regard to one of the two contracts, that the sellers had given sufficient proof of damage to the extent of £175. They proved to his satisfaction an actual genuine bid of 70s. as the best they could get at auction in London on an offer to sell exactly on the terms of the contract in question. Hence a loss of 20s. on 175 cwt. The question is whether or not this proof of damage ought to be treated as sufficient. I quite understand the reluctance of the sellers to incur the great expense of calling witnesses from San Francisco or of obtaining evidence there on a commission to prove what was actually done in regard to the disposal of the hops, which, but for the buyers' wrongful (as I think) repudiation of the contract, would have been appropriated to the fulfilment of it. But, in the absence of such evidence, I feel myself constrained to hold, though not without doubt, that the legal requirement of proof of substantial damage in such a case, according to the authorities (see especially the judgment of JAMES, L.J., in *Dunkirk Colliery Co.* v. *Lever* (8) (9 Ch.D. at p. 25)), and as laid down in s. 50 of the Sale of Goods Act, 1893, has not been fulfilled. The utmost, therefore, that the defendants can claim would be nominal damages.

The decision of HAMILTON, J., being reversed as a result of the opinions expressed by the majority of the court, the sellers appealed to the House of Lords.

Atkins, *K.C.*, and *F. D. Mackinnon* appeared for the appellants.
Shearman, *K.C.*, and *Eustace Hills* for the respondents.

EARL LOREBURN, L.C.—In this case there has been a remarkable divergence of judicial opinion. HAMILTON, J., and KENNEDY, L.J., holding one view, and VAUGHAN WILLIAMS and FARWELL, L.JJ., another. The contract, no doubt is one of a special and peculiar kind, as might be inferred from the difference of opinion to which I have referred. For my part, I think it reasonably clear that this appeal ought to be allowed. The admirable and remarkable judgment of KENNEDY, L.J., illuminating, as it does, the whole field of controversy, relieves me from the necessity of saying much.

This contract is what is known as a cost, insurance, and freight, or c.i.f. contract, and under it the buyers were to pay cash. But when? The contract does not say. The buyers say on the physical delivery and acceptance of the goods when they have come to England. Section 28 of the Sale of Goods Act, 1893, says in effect that, unless otherwise agreed, payment must be made on delivery—that is, on giving possession of the goods. It does not say what is meant by delivery. Accordingly, we have to supply from the general law the answer to that question. The question is: When is there delivery of goods on board ship? That may be quite different from delivery of goods on shore. The answer is that delivery of the bill of lading when goods are at sea may be treated as delivery of the goods themselves. That is so old and so well established that it is unnecessary to refer to authorities on the subject. In my judgment, it is wrong to say, upon this contract, that the vendor must defer tendering the bill of lading until the ship has arrived in this country, and still more wrong to say that he must wait

until the goods are landed and examination made by the buyer. Upon the counterclaim I am of opinion that the Court of Appeal were right. The result will be that HAMILTON, J.'s, order will be restored as to the claim, and that, as to the counterclaim, there must be judgment for the defendants, with 1s. damages, without costs.

LORD ATKINSON, LORD GORELL and **LORD SHAW** concurred.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Nicholson, Graham & Jones.*

[*Reported by* E. J. M. CHAPLIN, ESQ., and C. E. MALDEN, ESQ., *Barristers-at-Law.*]

OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 7, 8, 25, 1911]

[Reported [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289]

Trade Union—Legality—Restraint of trade—Sanction of strike action—Voluntary decision by members to strike—Right to expel member guilty of attempting to injure union—Action by member against union—Enforcement of contract for application of funds for member's benefit—Claim for declaration that member wrongly expelled—Interest of member in property of union—Trade Union Act, 1871 (34 *& 35 Vict., c.* 31), *s.* 4 (3) (*a*).

By a rule of a registered trade union it was provided that the executive committee could, in the event of a dispute between members of the union and their employers and an offer of arbitration being refused by the employers, sanction (but not direct) a strike and "use every lawful means to assist the men in their struggle." By another rule the executive committee had power to expel "any member or members found guilty of attempting to injure the society," in which event the member or members "shall forfeit all claims on the funds and benefits of the society." Under the rules a member of the union had a right to benefit from the funds of the union, an interest in common with his fellow members in its property, and a right to a share of its assets in the event of its dissolution. The plaintiff, who was a member of the union, had been expelled from it, and he brought an action against the union claiming a declaration that the resolution of the executive committee expelling him was ultra vires, illegal and void.

Held: (i) the courts would not hold an association to be illegal at common law unless it clearly appeared from its rules that its objects were in restraint of trade, on the construction of the rules of the defendant union they did not contain any such illegal provisions, and so the union was not an unlawful association at common law; (ii) under s. 4 (3) (a) of the Trade Union Act, 1871, no agreement between the plaintiff and the union contained in the rules for the application of the funds of the union to provide benefits for the plaintiff could be enforced by the court, but an order to restore him to membership with the consequent enjoyment of those unenforceable rights was not an order to enforce those rights within s. 4; accordingly, the plaintiff's action was maintainable and he was entitled to the declarations which he claimed.

Notes. Distinguished: *Thomas* v. *Portsmouth "A" Branch of Ship Constructive, etc., Association* (1912), 28 T.L.R. 372. Followed: *Kelly* v. *National Society of Operative Printers' Assistants* (1914), 84 L.J.K.B. 557. Considered: *R.* v. *Cheshire County Court Judge, Ex parte Malone*, [1921] All E.R. Rep. 344; *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite, General Union of Operative Carpenters and Joiners* v. *Ashley*, [1922] All E.R. Rep. 53. Referred to: *Donkin* v. *Pearson*, post; *Parr* v. *Lancashire and Cheshire Miners' Federation* (1913), 108 L.T. 446; *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175.

As to the legality of trade unions and trade union agreements, see 32 HALSBURY'S LAWS (2nd Edn.) 459 et seq., and for cases see 43 DIGEST 92 et seq. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Cases referred to:

(1) *Osborne* v. *Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; 25 T.L.R. 107; 53 Sol. Jo. 98, C.A.; on appeal sub nom. *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 43 Digest 93, *963*.

(2) *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 38 W.R. 261; 6 T.L.R. 121, C.A.; 43 Digest 91, *950*.

(3) *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; 47 W.R. 619; 15 T.L.R. 394; 43 Sol. Jo. 550; sub nom. *Re Printers and Transferrers Society, Challinor* v. *Maskery*, 68 L.J.Ch. 537; 43 Digest 109, *1142*.

(4) *Rigby* v. *Connol* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650; 43 Digest 98, *1035*.

(5) *Chamberlain's Wharf, Ltd.* v. *Smith*, [1900] 2 Ch. 605; 69 L.J.Ch. 783; 83 L.T. 238; 49 R. 91; 16 T.L.R. 514; 44 Sol. Jo. 643, C.A.; 43 Digest 99, *1036*.

(6) *Wolfe* v. *Matthews* (1882), 21 Ch.D. 194; 51 L.J.Ch. 833; 47 L.T. 158; 30 W.R. 838; 43 Digest 107, *1123*.

(7) *Howden* v. *Yorkshire Miners' Association*, [1903] 1 K.B. 308; 72 L.J.K.B. 176; 88 L.T. 134; 19 T.L.R. 193; 47 Sol. Jo. 237, C.A.; affirmed sub nom. *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, *1127*.

(8) *Pender* v. *Lushington* (1877), 6 Ch.D. 70; 46 L.J.Ch. 317; 9 Digest (Repl.) 609, *4039*.

Also referred to in argument:

Farrer v. *Close* (1869), L.R. 4 Q.B. 602; 10 B. & S. 553; 38 L.J.M.C. 132; 20 L.T. 802; 33 J.P. 517; 17 W.R. 1129; 43 Digest 93, *968*.

Russell v. *Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506; 79 L.J.K.B. 507; 102 L.T. 119; 26 T.L.R. 228; 54 Sol. Jo. 213, C.A.; affirmed post; [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 94, *987*.

Waugh v. *Morris* (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 21 W.R. 438; 1 Asp. M.L.C. 573; 12 Digest (Repl.) 264, *2041*.

Edgware (*or Edgeware*) *Highway Board* v. *Harrow District Gas Co.* (1874), L.R. 10 Q.B. 92; 44 L.J.Q.B. 1; 31 L.T. 402; 38 J.P. 806; 23 W.R. 90; 25 Digest 471, *11*.

Gozney v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901; 78 L.J.K.B. 616; sub nom. *Gosney* v. *Bristol, West of England and South Wales Operatives' Trade and Provident Society*, 100 L.T. 669; 25 T.L.R. 370; 53 Sol. Jo. 341, C.A.; 43 Digest 92, *962*.

Aitkin v. *Associated Carpenters and Joiners of Scotland* (1885), 12 R. (Ct. of Sess.) 1206; 22 Sc.L.R. 796; 43 Digest 97, *f*.

Hilton v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur. N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex.Ch.; 43 Digest 10, *50*.

Appeal by the plaintiff from an order of WARRINGTON, J.

The plaintiff was at one time a member of the Walthamstow branch of the defendant society, but had been expelled by a resolution of the executive committee. He alleged that, he having in a previous action successfully taken proceedings against the defendant society (see *Osborne* v. *Amalgamated Society of Railway Servants* (1) it was to punish him for taking those proceedings, and for no other reason, that the executive committee of the defendant society had expelled him. Accordingly, he brought an action claiming (i) a declaration that the resolution of the executive committee of the defendant society, whereby it was resolved that he be expelled from the society forthwith, was ultra vires the society and void, and that the resolution was illegal, unconstitutional, and against public policy; (ii) a declaration that r. 9 (14) of the current rules of the defendant society was ultra vires, illegal, and void, and was unconstitutional and against public policy; (iii) a declaration that the resolution was ultra vires and void as being unauthorised by the constitution of the defendant society or by any of its rules or by any of the provisions of the Trade Union Acts; (iv) a declaration that so much of the resolution as related to the dissolution of the Walthamstow branch of the defendant society was ultra vires, illegal, and void; and (v) an injunction restraining the defendants, their officers, agents, or servants from acting upon or enforcing the resolution or such part of it as referred (a) to the expulsion of the plaintiff, or (b) to the dissolution of the Walthamstow branch. By consent it was ordered that the points of law raised should be disposed of as a preliminary point at the trial of the action. It was then decided by WARRINGTON, J., on the construction of the rules that the defendant society was illegal at common law as being in restraint of trade, and that the court had no jurisdiction to entertain the action which was a proceeding "instituted with the object of directly enforcing" what was in effect an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of s. 4 (3) (a), of the Trade Union Act, 1871. From that decision the plaintiff appealed.

Spencer Bower, K.C., and *Stuart Bevan* (with them *L. W. Byrne*) for the plaintiff.

Peterson, K.C., *Clauson*, K.C., and *Preston* for the defendant union.

Cur. adv. vult.

Feb. 25, 1911. The following judgments were read.

COZENS-HARDY, M.R.—The plaintiff alleges that he has been unjustly expelled from the defendant society, which is a trade union, without having received notice of the charge (if any) made against him, and without being afforded any opportunity of being heard. He further alleges that the proceeding was not authorised by the rules of the society, and was contrary to natural justice, and that the resolution purporting to expel him was passed to punish him for having successfully invoked the aid of the courts to prevent the application of the funds of the society to illegal purposes, and was ultra vires and void. The defendants do not admit any of these allegations; they contend that no cause of action is disclosed by the statement of claim; and they rely on s. 4 of the Trade Union Act, 1871. By a consent order made in chambers it was ordered that the points of law raised should be disposed of as a preliminary point at the trial of the action as if the said points had been set down for hearing pursuant to Ord. 25, r. 2. The parties having consented to this course, it is our duty to treat all the allegations in the statement of claim as true, and to consider whether they suffice to entitle the plaintiff to any relief.

A The society of which the plaintiff admittedly was a member is a registered trade union governed by rules which were amended in 1905. The contention of the defendants involves two propositions: (a) That the society is at common law an unlawful association; and (b) that this action is a legal proceeding which no court can entertain, having regard to s. 4 of the Act of 1871. If either of these propositions is not well founded, the defendants fail, and the action must proceed B to trial in the usual way. WARRINGTON, J., held that both propositions were established, and, accordingly, dismissed the action with costs. It is necessary to consider these propositions separately.

It is not alleged that the society is unlawful, except on the ground of restraint of trade. There is nothing in the objects of the society as stated in r. 1 (2), which suggests illegality, which were:

C "To improve the condition and protect the interests of its members; to obtain and maintain reasonable hours of duty and fair rates of wages; to promote a good understanding between employers and employed, the better regulation of their relations and the settlement of disputes between them by arbitration, or, failing arbitration, by other lawful means; to provide temporary assistance to members when out of employment through causes over which they have no D control, or through unjust treatment; to provide legal assistance when necessary in matters pertaining to the employment of members, or for securing compensation for members who suffer injury by accidents in their employment; to aid the young orphan children of all members in scale A; to provide a grant of money to members in scale A permanently disabled or killed by accident, or when by reason of old age they cannot follow their regular employment; also E to use every effort to provide for the safety of railway work and of railway travelling; also to provide donations to any charitable institution from which the members may derive benefit; and to have power to render as occasion may arise assistance to other trade unions, and other lawful purposes. Also to enable such members as voluntarily desire it to provide funds for their relief in sickness or temporary disablement and for their interment. The objects F of the society shall be pursued and the benefits provided in accordance with the following rules and not otherwise."

But though the objects are free from the taint of illegality, there may be provisions in the rules which seek to advance the objects by unlawful means. It is remarkable that there is no provision such as is very often found in rules of trade unions for G calling out members in the event of a strike. It is, however, urged that r. 13 (3), indirectly amounts to such a provision and is in restraint of trade, but I am unable to assent to this view. The executive committee can only sanction a strike, as distinct from ordering a strike, and there are careful provisions to secure legality. Rule 13 (2) (a) says:

H "The authority of the executive committee to give sanction to such trade movements is subject to the following conditions: (a) Before any step in connection with a proposed movement is taken the sanction of the executive committee must be obtained. Should any movement take place before such sanction is obtained, the executive committee must afterwards indorse the same and give their sanction for its continuance. Any member striking without the sanction of the executive committee, or in breach of his contract of service I with his employer, or doing any other unlawful act or act in contravention of these rules, shall not be entitled to the benefit of the protection fund."

The following sub-ss. (b) and (g) are steps towards a pacific settlement, and then we come to (h) and (i).

"(h) Should the offer of arbitration be refused or ignored, and every effort at pacific settlement fail, then the executive committee may issue notice papers to the men for signature. If two-thirds of the men sign the notice papers,

the executive committee may fix a day or days for handing the same to the company or companies, and upon a withdrawal from work in accordance with these notices it shall be the paramount duty of the executive committee to use every lawful means to assist the men in their struggle, which shall be directed by the general secretary. (i) Should the vote of the men be adverse to ceasing work, or should the number of the notices signed not warrant their being handed to the company or companies with a reasonable prospect of success, then the sanction of the executive committee shall be withdrawn from the said movement, and no further expense shall be defrayed from the society's funds in connection therewith."

Now it seems to me reasonably plain that the signing of the notices is a voluntary act, and that the only notices to be handed in are those which have been thus voluntarily signed. WARRINGTON, J., held, and I agree, that there is no taint of illegality in this voluntary act on the part of the two-thirds majority. I can find nothing to hinder a man who has handed in his notice from resuming work. He will, under r. 3, cease to be entitled to strike pay, but that is all. Nor can I find any trace of an intention to call out, or to put pressure upon, those members, the minority, who have not voluntarily signed. WARRINGTON, J., thought he found it in r. 9 (14):

"Any member or members found guilty of attempting to injure the society, or to break it up otherwise than as allowed by these rules, and the same being proved to the satisfaction of the executive committee, the committee shall expel him or them from the society, and he or they shall forfeit all claims on the funds and benefits of the society, but he or they shall have the right of appeal to the annual general meeting."

This rule is the only provision for expelling a member, and it is apparently the rule under which the plaintiff's expulsion is justified. I am not prepared to hold that a member who declines to join with the majority of his fellow-workmen in signing and handing in notices can be said to be "guilty of attempting to injure the society." Illegality must not be presumed or inferred. It must be established, if at all, upon some plain provision in the rules: see *Swaine* v. *Wilson* (2), 24 Q.B.D. at p. 259. I can find no such provision in the rules of this society.

It follows that, in my opinion, the first proposition is not established. The society is a lawful association at common law. It is possessed of considerable property which belongs to the members, and any member unjustly excluded may invoke the assistance of the court. This principle has been repeatedly acted upon in the case of London clubs, and the conclusion is enough to dispose of the appeal in favour of the plaintiff, but we have had able arguments on the second proposition, and it seems desirable that I should state my view upon it, in case it should be held elsewhere that the society is an illegal association at common law on the ground of restraint of trade. I may add that the mere introduction of some objectionable rules will not necessarily taint the whole of the rules. As was observed by LINDLEY, L.J., in *Swaine* v. *Wilson* (2) (24 Q.B.D. at p. 260):

"No doubt if the real object of this society were unduly to fetter trade its rules might all be tainted by the vice of the object, and none of the rules might be enforceable."

In the present case there is no evidence to show how the rules are in fact used, even if such evidence would be admissible, as to which I express no opinion. We have nothing but the rules before us, and everything turns upon the construction of these rules.

The second proposition depends upon ss. 3 and 4 of the Act of 1871. Section 3 is perfectly general:

A "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

If that section stood alone it would validate and make enforceable the whole agreement contained in the rules. But s. 4 qualifies it to some extent:

B "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of [certain specified agreements]."

The real question is whether the present action is a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of an agreement for the application of the funds of the trade union to provide benefits C to the plaintiff: see s. 4 (3) (a). Apart from authority, I should answer this question in the negative. The statement of claim asks a declaration in several forms to the effect that the resolution purporting to expel the plaintiff is ultra vires and void, and an injunction to restrain the society from acting upon and enforcing the resolution. It does not claim the payment of any sum of money out of the funds of the union. If the plaintiff obtains the relief he seeks, he will be entitled, not as D a matter of legally enforceable right, but as a matter of reasonable expectation, to certain benefits for which he has subscribed. If a member is threatened with expulsion on grounds not justified by the rules, there is nothing in s. 4 which prevents him from maintaining an action to restrain the contemplated wrong. And I see no reason why the mere passing of the resolution should preclude the court from giving relief. The language of s. 4 is narrow, and it ought not to be E construed so as to cover every agreement under s. 3. I may add that the plaintiff has an interest in the funds of the society, an interest which, in the event of a dissolution of the union, may be asserted in a court of justice: see *Re Printers and Transferrers Amalgamated Trades Protection Society* (3). He has rights of voting under r. 9 (11), and a right of voting is a property right.

I have felt some doubt whether the authorities leave it open to this court to F adopt the construction which personally I think correct. The first of these authorities is *Rigby* v. *Connol* (4), decided in 1880 by SIR GEORGE JESSEL as Master of the Rolls. There the plaintiff, who had been expelled, wrongfully, as he alleged, expressly claimed to be entitled to participate in the property and effects of the union, and in its rights, privileges, and benefits, and an injunction to restrain the defendants from excluding him from such participation. This G came within the very words of s. 4, and I feel no doubt that the decision of SIR GEORGE JESSEL dismissing the action was perfectly correct. But there are observations in the judgment of SIR GEORGE JESSEL which seem to enlarge greatly the operation of s. 4, and in effect to exclude the intervention of the court in any question arising upon the agreement constituted by the rules. The Court of Appeal in *Chamberlain's Wharf, Ltd.* v. *Smith* (5), the facts of which were H substantially the same as the facts in *Rigby* v. *Connol* (4), except that it fell within sub-s. (1) of s. 4, and not within sub-s. (3), followed that case. They did not, however, discuss the general observations of SIR GEORGE JESSEL. But in *Wolfe* v. *Matthews* (6) FRY, J., declined to follow *Rigby* v. *Connol* (4) if it decided that the court would not enforce any such agreement. There the plaintiffs pleaded that they were members of the society, and as such were entitled to I receive out of the funds certain payments and other benefits as provided by the rules, and they sought an injunction to restrain the application of any part of the funds in carrying out an amalgamation which was alleged to be illegal. FRY, J., drew a distinction between "directly enforcing" and "indirectly enforcing," and overruled a preliminary objection based upon s. 4. This view was distinctly adopted by the Court of Appeal and by the House of Lords in *Yorkshire Miners' Association* v. *Howden* (7). The criticisms of LORD HALSBURY ([1905] A.C. at p. 260), of LORD MACNAGHTEN, (ibid. at pp. 265 and 266), and of LORD LINDLEY (ibid. at pp. 282

and 283), satisfy me that I am not precluded by *Rigby* v. *Connol* (4) and *Chamberlain's Wharf, Ltd.* v. *Smith* (5) from adopting the view which, apart from authority, I should have held. And in truth the decision of this court and of the House of Lords in the former action between the plaintiff and the defendants involves the same principle. It follows, therefore, that, in my opinion, the second proposition as well as the first proposition, upon which the defendants rely, cannot be maintained. The appeal must be allowed, with costs here and below, and the action must proceed to trial in the usual course.

FLETCHER MOULTON, L.J.—The point of law raised by the defendants in support of their allegation that the statement of claim discloses no cause of action is that an action to establish a claim to membership of the defendant society is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the society to provide benefits to members; and that, as it is a society whose rules are in restraint of trade, the courts are not competent to entertain such a proceeding by reason of s. 4 (3) (a), of the Trade Union Act, 1871. It is evident that to make good this preliminary objection to the plaintiff's claim the defendants must establish that they are in fact a society whose rules contain provisions in restraint of trade in such wise that prior to the Trade Union Act, 1871, they would have been an illegal association. This is a point which depends on the rules of the society, which the courts must construe for the purpose, due regard being had to the principle that it is for the defendants to establish that the society would have been illegal at common law. Illegality is not to be presumed. But this issue becomes immaterial if the courts would have jurisdiction to entertain the action even if the defendants were a society whose legality rests upon the provisions of the Act of 1871. And as this is a point of law of wide general interest I propose to give my opinion upon it before considering the particular case of the defendant society.

The decision of this point turns entirely on the effects of ss. 3 and 4 of the Trade Union Act, 1871. These sections effected a material change in the position of trade unions in respect of agreements and trusts. Prior to that Act, if the purposes of a trade union were in restraint of trade, as was usually the case, the union was an illegal body. And all agreements made by it and all trusts for its purposes were tainted with illegality and, consequently, were unenforceable by the courts. But by s. 3 of this Act it was provided that the purposes of a trade union should not be unlawful merely by reason that they were in restraint of trade so as to render void or voidable any agreement or trust. It follows, therefore, that in such a case as that which is now before us—where no illegality is suggested other than that the object and rules of the society are in restraint of trade—the position of a trade union is the same as that of any other association of the like kind for purposes lawful under common law so far as the validity of any agreement or trust is concerned. But although the existence of such purposes was no longer to have the effect of making the contracts of such a trade union void or voidable, the Act did not place all such contracts in the same position as contracts made between other parties. Had s. 3 stood alone, all valid contracts by or with such a trade union could have been enforced by appeal to the courts, or damages could have been obtained for breaches of them. But the legislature declined to go so far as this in legitimating the position of trade unions. It leaves certain classes of agreements specified in s. 4 still under disabilities. Nothing in the Act is to enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any such agreement. So far, therefore, as the jurisdiction of the courts is concerned with enforcing those agreements or recovering damages for breaches of them, those contracts are left in the same position as that in which they stood prior to the Act. To illustrate the combined effect of ss. 3 and 4 of the Act I will take an example which is quite outside the circumstances of the present case. Suppose that a

A trade union agrees to make a contribution to an employer in consideration of his acting in conformity with the rules or resolutions of the union; such an agreement is valid under the provisions of s. 3 of the Act. To use the funds of the trade union for the purpose of making such a payment is neither ultra vires on the part of the officials of the trade union nor a breach of trust on the part of the trustees in whom those funds are vested. If the payments are made they are in the eye of B the law payments made for valid consideration, and can under no circumstances be recovered back. But such a contract comes within the provisions of s. 4. It follows that if the trade union after making such an agreement (which, as I have said, is valid) chooses to refuse to make any of the stipulated payments neither the aggrieved party nor any other person can compel it to do so. The law refuses its assistance in the matter, and thus in effect leaves it entirely at the option C of the trade union whether it will or will not fulfil its engagement.

The only disabilities, therefore, under which a trade union or its members lie, relate to the enforcement of contracts and not to their validity. In the present case we have to assume for the purposes of this argument that the plaintiff lawfully became, and continued to be, a member of the trade union, and that he has been wrongfully expelled therefrom. He comes to the courts to have this wrong righted. D If this had not been a trade union, but some society whose lawfulness did not depend on the Act of 1871, no one could have seriously contended that the courts could not entertain his claim for reinstatement into his former position of membership. Now trade unions and their members are, as I have said, in as good a position in all respects as other societies and their members, except as regards the enforcement of contracts, and there only if the contract which is sought to E be enforced comes within one of the excepted classes. The contract of membership is the contract which the plaintiff seeks here to enforce. He says that he has been admitted to membership and has performed all conditions for his continuance therein. This is not denied for the purposes of today. But the defendants say that this demand for reinstatement is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the F trade union to provide benefits for members. If they are wrong in this, the appeal must be allowed and the action go to trial on the facts. To test this, let us assume that the relief is granted, and that the plaintiff is declared a member of the trade union. Will the effect of that be to enforce an agreement for the application of the funds of the trade union to provide benefits for him? The only possible answer to this question is: "Certainly not." By the statute that is the very thing which G his membership does not entitle a man to do, and, therefore, declaring him a member simpliciter not only does not directly enforce the application of funds for his benefit, but does not even help him in any future proceeding to enforce any such agreement. It seems to me to be a logical contradiction to say that to put a man in a position where he cannot enforce a particular agreement is enforcing it. All that the court is asked to do here is to declare that the plaintiff is entitled H to the performance of the agreement to accept and to keep him as a member, and inasmuch as this is not in itself an application of the funds of the trade union to provide benefits for a member and does not even enable the plaintiff by subsequent proceedings to enforce any agreements so to apply them, the subject-matter of this action appears to me to be entirely outside the excepted classes enumerated in s. 4.

The same conclusion may be arrived at by another course of reasoning. The I Act of 1871 by s. 3 rendered legal the contracts of a trade union. This included the contract of membership, and in *Yorkshire Miners' Association* v. *Howden* (7), and more recently in *Amalgamated Society of Railway Servants* v. *Osborne* (1), we find the courts, including the House of Lords, enforcing at the suit of members of trade unions rights arising out of their contract of membership in the one case against the society itself and its officers, and in the other case against the trustees of its funds. It is true that in each of those cases the membership of the plaintiff was admitted, but it is impossible to conceive that the mere non-admission of the

membership of the plaintiff on the pleadings would have been a bar to the jurisdiction of the courts to entertain the action. If the law is prepared to defend personal rights it must possess the power of deciding who possesses them. Further, a suit to defend the property of the society can certainly be brought by the society itself since the Act of 1871. To enable this to be done was one of the main objects of that Act. In such a suit the courts must of necessity decide whether the plaintiff has the right to call itself the society. This may well depend on decisions as to membership. Schisms are not confined to religious bodies; they may also exist in voluntary associations of other kinds, and it requires no stretch of imagination to conceive that a dispute might arise in a trade union in which the one side or the other by illegal expulsions or admissions, or by other violations of its rules, might wrongfully claim to have a majority in the executive committee or at the annual meeting, and thus to be entitled to act in the name of the society. In a suit purporting to be in the name of the society the court must decide whether the plaintiffs are entitled to use its name, and this must entail in such a case an examination as to the legality of the acts and their legal effect on membership. Otherwise the rights of members would be at the mercy of those who most persistently pursued illegal courses. When the legislature legalised the status and contracts of trade unions, it was to save them from such chaos as this, and if the limitations to the action of the courts contained in s. 4 be closely looked at it will be found that they leave untouched the jurisdiction of the courts to pronounce on the meaning or validity of any contract whatever. Since the Judicature Acts the courts have jurisdiction to make declarations without granting consequential relief, and even when consequential relief is not asked. Section 4 only limits the jurisdiction to give relief to certain types in certain cases. It affords no bar to any party who claims to be interested in contracts which are legally valid coming to the courts to obtain a pronouncement as to his rights thereunder. Such a pronouncement will leave those rights enforceable or not according as they do not or do come within the exceptions of s. 4. It is such a pronouncement that the plaintiff seeks in the present action, and nothing more. The injunction asked for is only the necessary consequence of the declaration to which the plaintiff is entitled, and is in no wise affected by s. 4.

It follows then that in the interpretation of the statute I should hold that judgment must be given for the plaintiff on the preliminary point. But it is said that I am precluded from so holding by the existence of certain decisions binding on this court. The two cases relied on by the defendants' counsel in this behalf were *Rigby* v. *Connol* (4), before SIR GEORGE JESSEL, M.R., and *Chamberlain's Wharf, Ltd.* v. *Smith* (5), before the Court of Appeal. I shall accordingly proceed to examine these two decisions. The plaintiff in *Rigby* v. *Connol* (4) was a member of a trade union the rules of which undoubtedly contained provisions in restraint of trade. He had been expelled from his union for alleged breaches of the rules which, if proved, would undoubtedly have justified such expulsion. But he denied that he had committed any breaches of the rules in fact, and he claimed a declaration that he was entitled to participate in the enjoyment of the property and effects of the trade union and in its rights, privileges, and benefits, and that the defendants might be restrained by injunction from excluding the plaintiff from such participation, and there was also a claim for damages by reason of the alleged improper expulsion. The defendants, who were the committee and trustees of the union, denied his allegations of fact, and further submitted that the court had no jurisdiction in respect of the matter in difference between the plaintiff and the union or the members or committee thereof. SIR GEORGE JESSEL, M.R., before whom the action came, decided in favour of the defendants on the ground that s. 3 and s. 4 of the Act of 1871 conferred no jurisdiction on the court to entertain the plaintiff's claim, and that, therefore, it was in the same position as though that Act had not passed and the trade union had been an illegal association. I think that the explanation of this decision is to be found in the nature of the relief

asked. Had the claim of the plaintiff been limited to his restoration to membership the result of the case might have been different. But it is clear that the learned judge considered the claim in substance to go far beyond this and to be an attempt to obtain an order of the court giving him a share in the assets of the union. He says:

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefit for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and if I restrain the society from preventing that participation it seems to me that is directly enforcing that agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

Such language would have been quite inappropriate had the claim been to membership only. The learned judge also lays down that the jurisdiction of the court to prevent a member of a voluntary association from being improperly expelled is based on the right of property vested in the member, of which he is justly deprived by such unlawful expulsion, and that no court of justice can interfere so long as there is no property, the right to which is taken away from the person complaining. If by the term "property" the learned judge intended to mean a beneficial interest in land or chattels, I am of opinion that this dictum goes too far. There are many rights which in such a sense could not be called rights of property, which, nevertheless, the law will protect, as, for instance, if there was an association of men subscribing for a benevolent purpose, say for the endowment of a scientific institution, the whole funds of the association being dedicated to that charitable purpose on the terms that the administration should be under the control of the association, I can see no reason why membership of such an association should not have the same legal protection as would be given in the case of an association where the members had a beneficial interest in the funds. But I do not think it at all necessary to examine this part of the judgment, because in the case of a trade union such as the present there is undoubted interest in property, even in the narrow sense of the word. The funds of the union belong to the members, and are by reason of agreement and trusts which are valid in law appropriated to the purposes of the trade union, and more especially to giving benefit to members. Should the trade union be dissolved these funds would be divided among its members. While it is in existence these members are eligible, and are the only persons who are eligible, to receive the benefits which by its rules follow from membership. They have the right to come to the courts to protect the misapplication of those funds. It is true that they cannot enforce the application of the funds to the granting of those benefits, but that is a defect in their remedies and not in their rights. Accordingly, it is not necessary to discuss the limits of the jurisdiction of a court in this respect. If the learned judge is to be understood to have decided that the mere declaration that the plaintiff in that case was entitled to membership would amount to decreeing the specific performance of the whole contract of membership—as some of the expressions in his judgment would seem to imply—I respectfully differ from that decision. But I agree that if it had been so, the decision of the case would have been right and on right grounds. I prefer, however, to treat it as a case in which the plaintiff sought relief so extensive as to render the action a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits for members. That being so, the court could not entertain it, and that none the less because some portion of the relief included in the general claim for relief in the action might by itself have formed the subject of a proper and maintainable action.

In *Chamberlain's Wharf, Ltd.* v. *Smith* (5) the plaintiff company had been a member of a voluntary association called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers. Its object was to compel its members to charge certain scheduled rates on teas and no other, and, indeed, the whole of the rules were directed towards securing this. It would not be too much to say that the whole agreement of membership might be aptly described in the words of s. 4 (1) as an

> "agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods [or] transact business . . ."

The committee had found the plaintiff guilty of departing from these rules as to trading, and expelled him, and he came to the court to restrain them from so doing. The defendants claimed that the Act of 1871 had given to the court no power to entertain the claim, and grounded the contention solely on s. 4 (1). There could be no doubt that independently of the Act of 1871 the court was not competent to entertain it. The Court of Appeal held that the contention of the defendants was well founded, and dismissed the action on the ground that it was instituted with the object of directly enforcing the agreement contained and embodied in the rules of the association, and that this agreement came within the terms of s. 4 (1) of the Act of 1871. There is nothing in this decision which affects the present case, in which it is admitted by the defendants that s. 4 (1) has no bearing on the case, and that in order to succeed they must bring the matter within the ambit of the widely different provisions of s. 4 (3) (a). Without, therefore, expressing my agreement or disagreement with the decisions—which, of course, binds me—I am satisfied that it does not conflict with my judgment on the point involved in the present case.

It remains to consider the other point—viz., whether the rules of the society show it to be an association which would have been illegal at common law prior to the Act of 1871. On reading the rules one is struck by the absence of all the familiar provisions relating to strikes and the power of the society to direct whether men shall or shall not work under particular circumstances, which are so frequently to be found in the rules of trade unions. The ingenuity of the defendants' counsel could only find two places in the rules in which he could with any plausibility argue that they were in restraint of trade. The first, and the one on which the argument of the defendants chiefly turned, is to be found in r. 13 (3) (g), (h) and (i), which prescribe and limit the powers of the executive committee in dealing with trade disputes. It was contended that the construction to be put on these clauses was that the references to notice papers to be handed in meant that every member was compellable by the executive committee to sign a notice paper under the circumstances therein referred to, and that the handing in of the notice papers meant the handing in of notice papers on behalf of all the members. Even if (h) stood alone, I should think this to be an unwarranted construction of the language, used, but (i), in my opinion, points so clearly to the fact that the notices to be handed in are only those voluntarily signed by the men that all doubt on the question is removed. I am, therefore, of opinion that this group of sub-clauses contains no provision in restraint of trade such as would render the association illegal at common law. The other passage relied on on behalf of the respondents has occasioned me more difficulty. By r. 2 (4) (f), it is provided that the annual general meeting shall have power to inaugurate any movement or decree any proceedings in the interests of the society and its members. These are very wide words, which, if taken in all their breadth, might cover almost anything. Some reasonable limit must be put upon them, and the proper mode of construction is, in my opinion, to treat the rules as indicating the nature of the movements or proceedings there referred to. The courts will not hold an association to be illegal at common law unless it clearly

A appears from the rules of the association that its objects are in restraint of trade to an unreasonable extent, and I do not think that we should be justified in construing this provision as giving undefined powers to act in restraint of trade if we came to the conclusion, as I do, that there is nothing else in the constitution of the society as defined by its rules, and nothing in the objects of society as set out in r. 1 (2), which points to such illegality. I am, therefore, of opinion B that the plaintiff's contention is right on this point also, and that the defendant union is not shown to be an association which would be illegal at common law. On both grounds, therefore, I am of opinion that this appeal should be allowed and the preliminary objection to the trial of the action be overruled.

BUCKLEY, L.J.—The joint effect of ss. 3 and 4 of the Trade Union Act, 1871, C is to render lawful the contract of co-membership in a trade union even if it have purposes in restraint of trade, but to render certain of the mutual relations unenforceable. The judgment under review affirms that such a lawful contract of co-membership cannot be enforced. In this judgment I shall give my reasons for holding that this is not the law.

I will for the moment and in the first instance assume that the trade union with D which I have to do is a society illegal at common law as having purposes in restraint of trade. Upon that assumption there arises that which is far the most important question in the case—viz., the question of the effect of ss. 3 and 4 of the Trade Union Act, 1871. I address myself in the first instance to the language of the Act itself to the exclusion of the decisions to which we have been referred, and for this reason, that I sympathise with LORD MACNAGHTEN in the opinion which he E expressed in *Yorkshire Miners' Association* v. *Howden* (7) ([1905] A.C. at p. 263) that:

> "The difficulty is not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text."

F Assuming a society illegal at common law by reason of having purposes in restraint of trade, s. 2 of the Act of 1871 renders those purposes lawful in any question of criminal liability for conspiracy. Section 3 renders those purposes lawful in any question of validity of agreement or trust. By virtue of s. 3, contractual relations which would have been for illegality void become lawful contractual relations and enforceable accordingly. But this is qualified by s. 4. That is a G section which carefully defines certain agreements which may form part of the contractual terms and enacts that nothing in the Act shall enable any court to entertain any legal proceeding to enforce those defined agreements. Notwithstanding that s. 3 has rendered contractual relations which include such terms lawful, the particular defined agreements are nevertheless to be unenforceable in any court. Among those defined agreements is included "Any agreement for H the application of the funds of a trade union,—(a) To provide benefits to members." The contention before us has been that this action is one in which the plaintiff asks the court to entertain legal proceedings to enforce an agreement for such an application of the trade union funds, and that the statute precludes the court from entertaining it. The action is one brought by a plaintiff who was a member of the society and has been expelled therefrom. He asks for a declaration that I the resolution for his expulsion is ultra vires, and an injunction to restrain the defendants from acting upon or enforcing it. He was a person who before his expulsion enjoyed certain contractual relations with the other members of the society, which, even if the trade union was illegal at common law, were by s. 3 of the Act lawful as matter of contract between him and his co-members. He enjoyed a vote as a member, a right to subscribe to certain funds, a right to benefits from those funds, an interest in common with his fellow-members in the property of the society, a like right in all the advantages of membership, and, in case the

society should be dissolved and the common purposes thus come to an end, a right to his distributive share of the assets. These rights were all, by virtue of s. 3, lawful, although some, but not all, were by virtue of s. 4 unenforceable. The right to have benefits from the funds was unenforceable, others seem to me to be clearly enforceable. There is nothing in s. 4 to forbid a court to entertain legal proceedings to enforce the member's right to his vote or his right to his distributive share in winding-up. It is quite plain that he had rights in respect of property. All the property of the society belonged to him and his co-members, and none the less because s. 4 renders unenforceable certain rights in respect of that property. His vote was property: *Pender* v. *Lushington* (8). The jurisdiction of the court is, therefore, not excluded by any absence of rights of property. But it is said that an order to declare his expulsion ultra vires and a proper consequential injunction will be an enforcement of the agreement in the rules to apply the funds to provide him with benefits. I cannot follow that contention. The plaintiff was a member of a society with (among others) rights as regards those benefits which were unenforceable. How can an order to restore him to membership do more than make him what he was before—viz., a member with the same unenforceable right? How does such an order enforce those rights? What benefit in the application of the funds is it that the order compels the society to give him? Obviously none. If he succeeds in the action, he merely resumes the position in which he stood before. His rights by way of benefit are neither greater nor less than before his expulsion. The whole answer to the contention on this part of this case may be summarised in a sentence. An order to restore to membership with unenforceable rights is no order to enforce those rights.

WARRINGTON, J., however, felt himself constrained by authority to hold otherwise. I do not think he was so bound, at any rate after what had been said in the House of Lords in *Yorkshire Miners' Association* v. *Howden* (7), and, whether he was or not, I think that we are not so bound. The authorities which are said to decide the point are *Rigby* v. *Connol* (4) and *Chamberlain's Wharf, Ltd.* v. *Smith* (5). In dealing with those cases, LORD LINDLEY in *Yorkshire Miners' Association* v. *Howden* (7) said this ([1905] A.C. at p. 283):

> "The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights as a member of the trade union to the benefits conferred by the rules on the members."

If this was so, the action was plainly not maintainable. Section 4 forbade it. In *Rigby* v. *Connol* (4) a member had been expelled for breach of the rules and for refusal to pay a fine which had been imposed for breach of a rule which fell within s. 4 (1) of the Trade Union Act, 1871. He brought an action claiming a declaration that so long as he conformed to the rules he was entitled to participate in the enjoyment of the property and effects of the trade union and for an injunction to restrain the defendants from excluding him from participation. Relief in that form he could not have. A declaration that he was entitled to participate could only be made in a case in which the court could make an order to enforce its declaration. It could not enforce participation in the benefits. Section 4 (3) (a), of the Act forbade it. The dominant sentence in SIR GEORGE JESSEL'S judgment is as follows (14 Ch.D. at pp. 490, 491):

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

If that sentence is understood as meaning that the plaintiff had sued for a declaration that as long as he conformed to the rules he was entitled to participate in the benefits upon the footing that they were enforceable benefits, and was claiming to be reinstated in order to give effect to that declaration of right, the language of SIR GEORGE JESSEL seems to me to be free from criticism, and that, as it seems to me, is the meaning of his words. If it is to be understood as meaning that an order to restore membership must carry with it as matter of necessity a declaration of a right to participation and an injunction to restrain the defendants from preventing participation, I cannot agree. Nothing in *Chamberlain's Wharf, Ltd.* v. *Smith* (5) supports it from that point of view. The decision in *Rigby* v. *Connol* (4) I think was right, for two reasons—first the reason already assigned, viz., that relief by way of enforcement of right of participation was forbidden by the statute; and, secondly, that to have restored the plaintiff to membership in that case would have involved an investigation of the ground for his expulsion, and that would have involved the question of the validity of the rule for breach of which he suffered. This reason was not assigned by SIR GEORGE JESSEL, but I think it was a valid ground. The same, as presently pointed out, was the case in *Chamberlain's Wharf, Ltd.* v. *Smith* (5). No similar reason exists in the present case. Osborne was not expelled for breach of any rule covered by any of the provisions in s. 4 of the Act of 1871. Upon the allegations in this pleading he was expelled for resorting to the courts of this country to enforce the law applicable to the society of which he was a member.

The point in *Chamberlain's Wharf, Ltd.* v. *Smith* (5) was as follows. There was a rule in that case which fell within the words of s. 4, "agreement concerning the conditions on which any members . . . shall sell their goods." For a breach of the rule the plaintiffs were expelled in exercise of a power of expulsion in the rules. They asked for an injunction to restrain the defendants from acting on the resolution, alleging that they had not had a fair opportunity of being heard in their own defence. Their case, therefore, was that they had not broken the rule. To adjudicate in the action would have involved an investigation whether they had broken it or not. This the court could not entertain. The action was to enforce an agreement falling within s. 4 (1), not affirmatively, it is true, by restraining members from breaking it, but negatively, by restraining the society from expelling them for a breach of it, which the society alleged and they denied. Had the breach been established in the action, the court would have been called upon to decide that the expulsion was valid because the members had broken a rule which could be enforced against them. This the court could not do. As RIGBY, L.J., said ([1900] 2 Ch. at p. 614):

> "They desire to be restored to their membership, and for that purpose to discuss the rules on the footing of which the committee acted, and they ask the court to decide this point. The court has no jurisdiction to entertain the case."

RIGBY, L.J., pointed out that it is only certain agreements which the Act prevents the court from interfering to enforce. The decision was only that that action was to enforce an agreement falling within the defined class. LORD MACNAGHTEN in *Yorkshire Miners' Association* v. *Howden* (7) criticises ([1905] A.C. at p. 266) SIR GEORGE JESSEL's language in *Rigby* v. *Connol* (4), and points out that the Act of 1871 strikes only at certain agreements and leaves the jurisdiction untouched as to everything else. The decisions in both *Rigby* v. *Connol* (4) and *Chamberlain's Wharf, Ltd.* v. *Smith* (5) I think were right, but neither of them is, I think, an authority for the proposition in support of which it has been sought to use them in this case.

There are, in my opinion, no words in s. 4 of the Act of 1871 which prevent this court from entertaining an action in which no larger remedy is sought than an order to restore the plaintiffs to the contractual rights flowing from membership,

including all such (if any) benefits flowing therefrom as he enjoyed before his expulsion. For these reasons it seems to me that, whether this society is illegal at common law or not, this action can be maintained and this appeal must be allowed. Under these circumstances it is not necessary to decide whether the society is illegal at common law or not, but as this question has been argued and the learned judge has expressed an opinion upon it, I will go on to state what is at present my view upon the point. These rules do not, I think, provide that when a strike, or, as the rules call it, a trade movement, is sanctioned by the executive committee, every member is bound to strike. Rule 3 (2) (h) provides that the executive committee may issue notice papers to the men "for signature." This does not, I think, mean notices which they are bound to sign. For the next following words contemplate that some only may sign, and the matter is to go forward if two-thirds sign, but not otherwise. The provision that the executive committee may fix a day or days for handing "the same" to the company means, I think, for handing to the company such notices as have been signed. There is room for a contrary construction on both of these points, but that the construction which I adopt is the better is, I think, supported by the words at the beginning of sub-r. (i). They are words which contemplate that the number of notices signed is, not a known, but an unknown, number. There may be in the grade in which a strike is proposed both union and non-union men, and the words at the beginning of sub-r. (i) I agree may point to a question of discretion to be exercised according as the number of union men is or is not sufficient to justify aggressive proceedings. But this does not cover the ground, for the number of non-union men in the grade would be known from an earlier date. These words contemplate an uncertainty as to the number of notices. The number would not be uncertain if every member was bound to sign. For these reasons I think that these rules do not provide that a member shall be bound to strike if a strike is sanctioned. When the two-thirds who have signed hand in their notices and strike, they do so voluntarily, and there is nothing unlawful so far. Then, having struck, is there anything to prevent them or any of them resuming work if they think fit? Are they bound to remain on strike until the executive committee give sanction to the contrary? I fail to find anything in the rules as to bringing a strike to an end or anything which provides affirmatively either that a man shall strike or that, having struck, he shall not resume work. It is argued that under r. 9 (14) a member who does not strike, or, having struck, returns to work, is exposed to expulsion for attempting to injure the society, and that is the view which the learned judge adopted. I feel great difficulty in thinking that this can be so. If it be the fact that the rules reserve to the member freedom of action, it cannot be that he is liable to expulsion for using that freedom as he thinks fit. If, say, nine-tenths of the men who have struck resume work and the remaining one-tenth do not, it would seem that under r. 13, s. 3 (3) the one-tenth would still continue to draw strike pay. This is neither a reasonable nor a probable intention. But in fact the rules are not worked out as regards either strikes or the termination of strikes. A society is not to be found illegal by reason of difficulties in interpreting the rules, but by finding in sufficiently plain language that there are in the rules provisions so in restraint of trade as to render the society illegal at common law. These rules do not, I think, contain anything plain in that direction, and upon this ground I am disposed to think that this society is not illegal. At the same time, I repeat that it is not necessary to determine this point. I rest my judgment upon the point which I first discussed. I hold that this action is maintainable, and that this appeal should be allowed, with costs here and below.

Appeal allowed.

Solicitors: *C. T. Wilkinson; Pattinson & Brewer.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

LATHAM *v.* RICHARD JOHNSON & NEPHEW, LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), November 14, 15, December 6, 1912]

[Reported [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127]

Child—Negligence—Allurement—Heap of stones on unfenced waste land—"Trap"—Injury by stone falling on child's hand—Liability of occupier.

The defendants were the owners of a piece of unfenced waste ground, on which to their knowledge and with their permission children had been in the habit of playing. Early one morning a heap of stones was deposited on the land by the defendants' servants, and soon after, while on the land alone, the plaintiff, a child under three years of age, was injured by one of the stones falling on her hand. In an action brought on behalf of the plaintiff for damages for this injury,

Held: there was neither allurement, trap, invitation, or any specially dangerous thing on the land; there was no greater liability on the defendants towards children than towards adults; if the child was too young to understand danger, the licence to her to go on the land ought not to be held to extend to such child unless accompanied by a competent guardian; and, therefore, the defendants were not liable.

Cooke v. *Midland Great Western Railway* (1), [1909] A.C. 229, distinguished.

Notes. This case must be read in the light of the provisions of the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832), which abolished the distinction between licensees and invitees and prescribed a "common duty of care" which the occupier of premises owes to all his "visitors," i.e., those persons who at common law would have been licensees or invitees. By s. (2) the common duty of care is "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises," and it is felt that much of the judgments in the present case are of value in determining either of these aspects of reasonableness, especially with regard to liability towards children, concerning whom (s. 2 (3) (a) of the Act) "an occupier must be prepared for children to be less careful than adults."

Explained: *Crane* v. *South Suburban Gas Co.*, [1914–15] All E.R. Rep. 93. Considered: *Ruoff* v. *Long*, [1916] 1 K.B. 148; *Wilson, Sons & Co.* v. *Barry Rail Co.* (1916), 116 L.T. 71; *Hardy* v. *Central London Rail Co.*, [1920] All E.R. Rep. 205; *Glasgow Corpn.* v. *Taylor*, [1921] All E.R. Rep. 1; *Coleshill* v. *Manchester Corpn.*, [1928] 1 K.B. 776; *R. Addie & Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] All E.R. Rep. 1; *Compania Mexicana de Petroleo "El Aguila"* v. *Essex Transport and Trading Co., Ltd.*, [1929] All E.R. Rep. 589. Applied: *Donovan* v. *Union Cartage Co., Ltd.*, [1932] All E.R. Rep. 278; Considered: *Coates* v. *Rawtensall Borough Council*, [1937] 3 All E.R. 602; *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572; *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283; *Bates* v. *Stone Parish Council*, [1954] 3 All E.R. 38; *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Dyer* v. *Ilfracombe U.D.C.*, [1956] 1 All E.R. 581. Applied: *Perkowski* v. *Wellington Corpn.*, [1958] 3 All E.R. 368. Referred to: *Elliott* v. *Roberts*, [1916] 2 K.B. 518; *Hayward* v. *Drury Lane Theatre*, [1916–17] All E.R. Rep. 405; *Pritchard* v. *Peto*, [1917] 2 K.B. 173; *Mersey Docks and Harbour Board* v. *Procter*, [1923] All E.R. Rep. 134; *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746; *De Freville* v. *Dill*, [1927] All E.R. Rep. 205; *Sycamore* v. *Ley*, [1932] All E.R. Rep. 97; *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R. Rep. 222; *Purkis* v. *Walthamstow Borough Council*, [1934] All E.R. Rep. 64; *Ellis* v. *Fulham Corpn.*, [1937] 3 All E.R. 454; *Culkin* v. *McFie & Sons, Ltd.*,

[1939] 3 All E.R. 613; *Haseldine* v. *Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Lewys* v. *Burnett and Dunbar*, [1945] 2 All E.R. 555; *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1948] 2 All E.R. 1086; *Williams* v. *Cardiff Corpn.*, [1950] 1 K.B. 514; *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737; *Edwards* v. *Railway Executive*, [1952] 2 All E.R. 430; *Cuttress* v. *Scaffolding (Great Britain), Ltd.*, [1953], 1 All E.R. 165; *Phipps* v. *Rochester Corpn.*, [1955] 1 All E.R. 129; *Slade* v. *Battersea and Putney Group Hospital Management Committee*, [1955] 1 All E.R. 429.

As to care in relation to the acts of children, see 28 HALSBURY'S LAWS (3rd Edn.) 16–19, and for cases see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

(1) *Cooke* v. *Midland Great Western Railway of Ireland*, [1908] 2 I.R. 242; reversed, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(2) *Jewson* v. *Gatti* (1886), 2 T.L.R. 381, 441, C.A.; 36 Digest (Repl.) 116, *582*.

(3) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

(4) *Lynch* v. *Nurdin* (1841), 1 Q.B. 28; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(5) *Burchell* v. *Hickisson* (1880), 50 L.J.Q.B. 101; 36 Digest (Repl.) 69, *374*.

(6) *Bolch* v. *Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur. N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett* v. *Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, *358*.

(7) *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; 32 L.J.Q.B. 26; 122 E.R. 92; sub nom. *Bincks* v. *South Yorkshire Railway and River Dun Co.*, 1 New Rep. 50; 7 L.T. 350; 27 J.P. 180; 11 W.R. 66; 7 Digest (Repl.) 292, *166*.

(8) *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur. N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, *356*.

(9) *Indermauer* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293, Ex.Ch.; 36 Digest (Repl.) 46, *246*.

(10) *Gautret* v. *Egerton*, *Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gautret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

(11) *Townsend* v. *Wathen* (1808), 9 East, 277; 103 E.R. 579; 2 Digest (Repl.) 375, *522*.

(12) *Deane* v. *Clayton* (1817), 7 Taunt. 489; 1 Moore, C.P. 203; 2 Marsh. 577; 129 E.R. 196; 2 Digest (Repl.) 375, *517*.

(13) *Ponting* v. *Noakes*, [1894] 2 Q.B. 281; 63 L.J.Q.B. 549; 70 L.T. 842; 58 J.P. 559; 42 W.R. 506; 10 T.L.R. 444; 88 Sol. Jo. 438; 10 R. 265; 1 Digest (Repl.) 38, *282*.

(14) *Corby* v. *Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur. N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) *67,370*.

(15) *Southcote* v. *Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 29 Digest 10, *123*.

(16) *Chapman* v. *Rothwell* (1858), E.B. & E. 168; 27 L.J.Q.B. 315; 4 Jur. N.S. 1180; 120 E.R. 471; 36 Digest (Repl.) 57, *313*.

(17) *Brock* v. *Copeland* (1794), 1 Esp. 203; 2 Digest (Repl.) 379, *547*.

(18) *Lowery* v. *Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; 26 T.L.R. 108; 54 Sol. Jo. 99, C.A.; reversed [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol. Jo. 62, H.L.; 2 Digest (Repl.) 332, *232*.

A (19) *Schofield* v. *Bolton Corpn.* (1910), 26 T.L.R. 230; 54 Sol. Jo. 213, C.A.; 36 Digest (Repl.) 114, *567.*

(20) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10.*

21) *Earl* v. *Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, *532.*

B (22) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 35 W.R. 141; 3 T.L.R. 233, H.L.; 36 Digest (Repl.) 130, *667.*

(23) *Sullivan* v. *Waters* (1864), 14 I.C.L.R. 460; 36 Digest (Repl.) 69, **366.*

(24) *Grand Trunk Rail. Co. of Canada* v. *Barnett*, [1911] A.C. 361; 80 L.J.P.C. 117; 104 L.T. 362; 27 T.L.R. 359, P.C.; 36 Digest (Repl.) 71, *379.*

C (25) *Devlin* v. *Jeffray's Trustees* (1902), 5 F. (Ct. of Sess.) 130; 40 Sc.L.R. 92; 10 S.L.T. 375; 7 Digest (Repl.) 293, **170.*

(26) *Lewis* v. *Ronald* (1909), 101 L.T. 534; 26 T.L.R. 30; 54 Sol. Jo. 32, D.C.; 31 Digest (Repl.) 102, 2478.

(27) *Collis* v. *Selden* (1868), L.R. 3 C.P. 495; 37 L.J.C.P. 233; 16 W.R. 1170; 29 Digest 10, *125.*

D (28) *Holmes* v. *North Eastern Rail. Co.* (1869), L.R. 4 Exch. 254; 38 L.J.Ex. 161; 20 L.T. 616; 17 W.R. 800; affirmed (1871), L.R. 6 Exch. 123; 40 L.J.Ex. 121; 24 L.T. 69, Ex.Ch.; 36 Digest (Repl.) 49, *257.*

(29) *Batchelor* v. *Fortescue* (1883), 11 Q.B.D. 474; 49 L.T. 644, C.A.; 36 Digest (Repl.) 66, *363.*

E (30) *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 9 Jur. N.S. 280; 158 E.R. 1038; 36 Digest (Repl.) 12, *39.*

(31) *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; 28 L.J.Ex. 139; 32 L.T.O.S. 297; 23 J.P. 183; 5 Jur. N.S. 150; 7 W.R. 326; 157 E.R. 761; 36 Digest (Repl.) 312, *597.*

(32) *Prentice* v. *Assets Co., Ltd.* (1890), 17 R. (Ct. of Sess.) 484; 36 Digest F (Repl.) 74, **414.*

(33) *Ross* v. *Keith* (1888), R. (Ct. of Sess.) 86; 26 Sc.L.R. 55; 36 Digest (Repl.) 72, **397.*

(34) *Parnaby* v. *Lancaster Canal Co.*, *Lancaster Canal Co.* v. *Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.; 36 Digest (Repl.) 57, *311.*

G (35) *Barker* v. *Herbert*, post; [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, *419.*

(36) *Campbell* v. *Ord and Maddison* (1873), 1 R. (Ct. of Sess.) 149; 11 Sc.L.R. 54; 36 Digest (Repl.) 136, **1041.*

H (37) *Gavin* v. *Arroll & Co.* (1889), 16 R. (Ct. of Sess.) 509; 26 Sc.L.R. 370; 36 Digest (Repl.) 136, **65.*

(38) *Cass* v. *Edinburgh and District Tramways Co., Ltd.*, 1909 S.C. 1068; 46 Sc.L.R. 734; [1909] 1 S.L.T. 513; 36 Digest (Repl.) 124, **920.*

(39) *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100.*

I (40) *Bird* v. *Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, *808.*

(41) *Sullivan* v. *Creed*, [1904] 2 I.R. 317; 36 Digest (Repl.) 84, **505.*

(42) *Dixon* v. *Bell* (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, *431.*

(43) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190, N.P.; 36 Digest (Repl.) 43, *224.*

(44) *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 30, *135.*

(45) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, *153.*

(46) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603, C.A.; 36 Digest (Repl.) 40, *200.*

(47) *Williams* v. *Eady* (1893), 10 T.L.R. 41, C.A.; 36 Digest (Repl.) 81, *436.*

(48) *Coffee* v. *M'Evoy*, [1912] 2 I.R. 290; 36 Digest (Repl.) 72, **393.*

(49) *Jenkins* v. *Great Western Rail. Co.*, post p. 216; [1912] 1. K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882, C.A.; 36 Digest (Repl.) 64, *346.*

(50) *Holland* v. *District Committee of Middle Ward of Lanarkshire*, 1909 S.C. 1142; 46 Sc.L.R. 758; [1909] 2 S.L.T. 7; 7 Digest (Repl.) 294, **175.*

Also referred to in argument:

The Bernina (2) (1887), 12 P.D. 58; 56 L.J.P. 17; 59 L.T. 258; 35 W.R. 314; 6 Asp. M.L.C. 75, C.A.; affirmed sub nom. *Mills* v. *Armstrong, The Berning* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp. M.L.C. 257, H.L.; 36 Digest (Repl.) 184, *984.*

Waite v. *North Eastern Rail. Co.* (1858), E.B. & E. 719; 27 L.J.Q.B. 417; 4 Jur. N.S. 1300; affirmed (1859), E.B. & E. 728; 28 L.J.Q.B. 258; 32 L.T.O.S. 334; 5 Jur. N.S. 936; 7 W.R. 311; 120 E.R. 682, Ex.Ch.; 36 Digest (Repl.) 125, *628.*

Stevenson v. *Glasgow Corpn.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest (Repl.) 74, **423.*

Williams v. *Great Western Rail. Co.* (1874), L.R. 9 Exch. 157; 43 L.J.Ex. 105; 31 L.T. 124; 22 W.R. 531; 36 Digest (Repl.) 114, *566.*

Jackson v. *L.C.C. and Chappell* (1912), 76 J.P. 37, 217; 28 T.L.R. 66, 359; 56 Sol. Jo. 428; 10 L.G.R. 75, 348, C.A.; 19 Digest 557, *21.*

Appeal by the defendants from an order made by SCRUTTON, J., in an action tried by him with a special jury.

The plaintiff was an infant under three years of age and the defendants were the owners of land at Bradford, near Manchester, called the Croft. The plaintiff by her next friend alleged that for some months before October, 1911, the defendants had allowed the Croft to remain open and unfenced and that to their knowledge and with their permission children had been in the habit of playing there. It appeared that on Oct. 7, 1911, the plaintiff went on to the Croft unaccompanied. On the land was a heap of stones which had been deposited there by the defendants' servants early in the morning, and while playing there, the plaintiff was injured by one of the stones falling on her hand, with the result that her third finger had to be amputated. The plaintiff claimed damages in respect of this injury. At the trial the jury answered the questions put to them by the judge to the effect that children played on the Croft with the knowledge and permission of the defendants; that there was no invitation to the plaintiff to use the land unaccompanied; that the defendants ought to have known that there was a likelihood of children being injured by the stones and had not taken reasonable care to prevent children being injured; and they gave a verdict for the plaintiff for £5 damages. The judge thought that the answers brought the case within *Cooke* v. *Midland Great Western Railway of Ireland* (1) and gave judgment for the plaintiff. The defendants appealed.

E. Sutton for the defendants.

C. Atkinson for the plaintiff.

Cur. adv. vult.

Dec. 6, 1912. **COZENS-HARDY, M.R.**—I concur in the judgments about to be read by the lords justices.

FARWELL, L.J.—In this case the injured child was between two and three years old, and the place on which she was injured was a piece of waste ground, from which houses condemned by the local authority had been recently cleared.

This waste ground adjoins a path leading to the house in which the child lived with her parents but did not adjoin any public highway, although accessible from it by the before-mentioned path. No question, therefore, arose of the duty not to do anything that might be a nuisance close to or upon a highway, such as arose in *Jewson* v. *Gatti* (2), *Harrold* v. *Watney* (3), or in *Lynch* v. *Nurdin* (4), which, with all respect to LORD MACNAGHTEN'S contrary opinion in *Cooke* v. *Midland Great Western Railway of Ireland* (1) was clearly a case of nuisance. As VAUGHAN WILLIAMS, L.J., said in *Harrold* v. *Watney* (3) ([1898] 2 Q.B. at p. 324), the horse and cart left unattended on the highway "constituted a danger to those using the highway—that is, constituted a nuisance." The accessibility from the highway in this case was not of any importance, because the child did not come from the highway, but from her own home on to the pathway and so on to the land. The case on the findings of the jury raises the question of the liability of the owner of land, who permits the public, adult and infant alike, to pass and re-pass over it and to run about and play on it, to people so using it. The jury by their answer to the second question have precluded all argument founded on invitation, and I am not sure that their answer did not impliedly negative leave and licence as well. For if the true inference is, as LINDLEY, J., puts it in *Burchell* v. *Hickisson* (5), that the plaintiff never invited a child of so tender an age as to be unable to appreciate any danger to come except under the care of some responsible person, the same reasoning would apply to mere leave and licence. For myself, I am prepared to hold that there was no evidence to go to the jury which would show any legal liability. But as the case has been argued on the assumption that leave and licence was given to all alike, I will deal with it on that footing also.

The law as to mere licensees is well settled. The grant of the licence to go on the land creates no right, but merely affords an answer to a charge of trespass: *Bolch* v. *Smith* (6). It is a mere permission, and those who take it must take it with all chances of meeting with accidents: *Binks* v. *South Yorkshire Railway and River Dun Co.* (7), 3 B. & S. at p. 252, where WIGHTMAN, J., adopted the judgment of WILLIAMS, J., in *Hounsell* v. *Smyth* (8), where he said (7 C.B.N.S. at p. 743):

> "No right is alleged: it is merely stated that the owners allowed all person who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and it may be perils."

Any complaint by the licensee "may be said to wear the colour of ingratitude so long as there is no design to injure him": WILLES, J., in *Indermaur* v. *Dames* (9), L.R. 1 C.P. at p. 285. The same learned judge, one of the greatest common law lawyers of the last century, said in *Gautret* v. *Egerton* (10) (L.R. 2 C.P. at p. 375):

> "The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty; otherwise a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence."

The owner of cliffs by the sea who allows the public to walk there is not bound to fence them off, nor is the owner of downs who allows people to walk and ride

thereon, liable for unfenced quarries or banks, honeycombed by rabbits, however dangerous they may be.

There are, however, the following exceptions to this freedom from liability. (i) Allurement, in the evil sense of alluring with malicious intent to injure. This gives a right of action even to a trespasser: *Townsend* v. *Wathen* (11); *Deane* v. *Clayton* (12), 7 Taunt. at p. 523; *Ponting* v. *Noakes* (13), [1894] 2 Q.B. at p. 290 and a fortiori, therefore, to a licensee. (ii) Concealed trap. That is something added to the condition of the ground, as when the licence was given in a way likely to be dangerous without giving notice to the licensee:

> "A person coming on lands by licence has a right to suppose that the person who gives the licence . . . will not do anything which will cause him an injury":

per WILLES, J., in *Corby* v. *Hill* (14), 27 L.J.C.P. at p. 321. So, too, something known to the owner to be in a dangerous state and put on the premises for the purpose of being used by the licensee—e.g., rotten planks for a bridge over a stream; and this is actionable, notwithstanding that the grantor of a right of way is not bound to repair if foundrous: GALE ON EASEMENTS (8th Edn.), p. 475, and cases there cited. (iii) "Invitation" is excluded by the finding of the jury in this case, but the authorities throw some light on the question before us. In *Southcote* v. *Stanley* (15) BRAMWELL, J., said (1 H. & N. at p. 250):

> "I agree with Mr. Gray to this extent, that where a person is in the house of another either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges an act of commission. If a person asked another to walk in his garden, in which he had placed spring guns or man-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission."

In *Chapman* v. *Rothwell* (16) ERLE, J., referring to that case said (E.B. & E. at p. 170):

> "The distinction is between the case of a visitor, as the plaintiff was in *Southgate* v. *Stanley* (15), who must take care of himself, and a customer who, as one of the public, was invited for the purposes of business carried on by the defendants";

and in *Indermaur* v. *Dames* (9) WILLES, J., drew the same distinction between the person "on the premises on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest" and "the person there on bare permission." In my opinion, invitation within the meaning of that phrase in the decided cases does not extend to persons coming merely for their own pleasure as members of a general body of licensees. (iv) The last exception is the introduction into the land to which the licence applies of something out of the normal user of the land, known to the owner to be dangerous, without warning the licensee. There is a dictum of LORD KENYON illustrating this in *Brock* v. *Copeland* (17), which is thus stated and explained by GIBBS, C.J., in *Deane* v. *Clayton* (12) (7 Taunt. at p. 532):

> "The defendant kept a mischievous bull in a close of his own and the plaintiff, crossing this close, was gored by the bull. It was further proved that the defendant had acquiesced in the use of a way over his close, and that the plaintiff was passing along such permitted way. Upon this ground LORD KENYON, and afterwards the Court of King's Bench, held that the action was maintainable, because the defendant had held out to the plaintiff and the rest of the public

that they had a right of passage through this close, and having encouraged them to exercise the right he must not annoy them in the act of using it."

Lowery v. *Walker* (18) was another instance of this exception.

I am not aware of any case that imposes any greater liability on the owner towards children than towards adults. The exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian: *Burchell* v. *Hickisson* (5); *Schofield* v. *Bolton Corpn.* (19). A child may be too young to be guilty of contributory negligence and yet old enough to tease a peaceful donkey or cow into kicking; but it cannot be said that the owner who allowed adults and children alike to walk through his meadow where he turned out the ordinary quiet dairy cows is liable for injury done to a child who torments them. There must be something more than the mere normal user by ordinary animals or for ordinary purposes. There must be something abnormally dangerous in the animal introduced to create any liability for introducing it.

If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendant. There is neither allurement nor trap, invitation, or dangerous animal or thing. The use of the land for depositing stones was a normal use, and stones are no more, if indeed as, dangerous as cows or donkeys. It is impossible to hold the defendant liable unless we are prepared to say that he was bound to employ a ground keeper to look after the safety of his licensees, and the result of such a finding would be disastrous, for it would drive all land-owners to discontinue the kindly treatment so largely extended to children and others all over the country. We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles. The plaintiff's counsel, however, relied (as all counsel in similar cases since 1909 have relied) on *Cooke* v. *Midland Great Western Railway of Ireland* (1) as establishing some new law. I have read and re-read that case many times and I am convinced that none of their Lordships intended to overrule any settled law or to establish any new principle theretofore unknown to the common law. In my opinion, that case was a little obscured by the use of the track or pathway to the turntable. The boys used the track as licensees, but did not suffer any injury in the use of that licence. The real mischief was that there was at the end of the track, being indeed the terminus ad quem of the track, a machine, "unattractive to children and dangerous as a plaything," to use LORD MACNAGHTEN'S words ([1909] A.C. at p. 236). There is cast on persons who put in a place open to their licensees a thing dangerous in itself a duty to take precautions for the protection of others who will certainly come into its proximity: *Heaven* v. *Pender* (20) (11 Q.B.D. at p. 517). This is the ground taken by LORD LOREBURN, L.C. ([1909] A.C. at p. 242), by LORD ATKINSON (ibid. at p. 240), and by LORD COLLINS (ibid. at p. 241), and although there may be observations of a wider character in some of the speeches, it is only the decision of the House that is binding and no dicta of individual members of the House can alter the law or form any ground for extending the real decision beyond the established principles of the common law. But *Cooke* v. *Midland Great Western Railway of Ireland* (1) will, therefore, not help the plaintiff here; for the proposition enunciated in *Heaven* v. *Pender* (20) applies only to a thing dangerous in itself, such as a loaded gun, and does not extend to a wagon or the like, as was pointed out by STIRLING, L.J., in *Earl* v. *Lubbock* (21) ([1905] 1 K. B. at p. 258), and still less to a heap of stones. I am, therefore, of opinion that this appeal must be allowed.

HAMILTON, L.J.—I am of the same opinion. All that is known of the cause of this accident, which no one witnessed, is this. The plaintiff, aged two years and two months, strayed alone a short distance into the defendants' unfenced croft and was found shortly after sitting on a large stone with another on her hand,

three fingers of which were badly crushed. Adults and children habitually entered this croft, some using it as a short cut, some simply playing there. This the defendants knew. Paving stones were shot there and there was a large heap of them. A load had been shot shortly before the accident, at least with the defendants' leave, and, as I gather, though it is not clear, with their authority. The stones were large; the jury saw one for themselves. There is no evidence whether or no any other person was there when the child was hurt. There is no evidence that anyone was seen about when the child was found injured, and no statement that no one was about. The stone may have been dislodged by the child herself or by a third person, infant or adult. Opinions may differ as to the probabilities, but it is a mere matter of speculation. We do not know in fact whether the child was "entrapped" or "allured" at all. We do not know what the child was doing. It is suggested that she was playing, but in a child of her age that only means that she is not known to have been doing anything else. In order to succeed the plaintiff must establish against the defendants a breach of duty, which would cover either hypothesis. A duty on the defendants' part to use care sufficient to prevent the child from hurting herself, but not extending to the prevention of hurt caused by a third person would not support the plaintiff's verdict, for in such a case the injury would be equally consistent with the performance as with the neglect of the alleged duty: *Wakelin* v. *London and South-Western Rail. Co.* (22). The argument for the plaintiff ably put, postulates that *Cooke* v. *Midland Great Western Railway of Ireland* (1) establishes such a comprehensive duty that an infant, even though a trespasser, is entitled to have the place it wanders into and the things it finds there, made so safe, with reference to its non-incapacity to take care of itself, as to safeguard it from injury. If so, the decision in that case has radically altered the law. Before considering that case it is accordingly necessary to look back to the older law.

The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission, is relative both to the person injured, the person charged with neglect, and the circumstances attending the injury. Among other such circumstances is that of place. Where a question arises, not between parties who are both present in the exercise of equal rights inter se, but between parties, of whom one is the owner or occupier of the place, and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognised three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. The cases down to 1864 are collected in *Sullivan* v. *Waters* (23). Contractual obligations, of course, stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee, more again to an invitee. The latter term is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the material objects which the host may remotely have had in view. Apart from express "licence" or express "invitation," conduct may prove either by implication. An open shop "invites" and perhaps "allures" the possible customer: CHANNEL, B., in *Bolch* v. *Smith* (6), 31 L.J.Ex. at p. 208, an open goods yard, invites the visiting carter. In a frequented neighbourhood, and where the owner or occupier may be supposed to know that others regularly enter it and he does not object, an open field may be enough to prove that persons who would otherwise have been trespassers, in fact enter it by his tacit permission and are licensees.

The rule as to trespassers is most recently indicated in *Lowery* v. *Walker* (18) by LORD HALSBURY ([1911] A.C. at p. 13), and is stated and discussed in *Grand Trunk Rail. Co. of Canada* v. *Barnett* (24). The owner of the property is under a duty not to injure the trespasser wilfully; "not to do" a wilful act in reckless

disregard of ordinary humanity towards him; "but otherwise a man trespasses at his own risk." On this point Scottish law is the same. In English and Scottish law alike

> "when people come on the lands of others for their own purposes without right or invitation, they must take the lands as they find them and cannot throw any responsibility upon the person, on whose lands they have trespassed":

per LORD KINNEAR in *Devlin* v. *Jeffray's Trustees* (25), 5 F. (Ct. of Sess.) at p. 134.

The rule as to licensees is that they must take the premises as they find them, apart from concealed sources of danger when dangers are obvious, they run the risk of them. In darkness where they cannot see whether there is danger or not, they walk on at their peril: *Gautret* v. *Egerton* (10); *Lewis* v. *Ronald* (26); and see generally *Indermaur* v. *Dames* (9); *Collis* v. *Selden* (27); *Holmes* v. *North Eastern Rail. Co.* (28); *Batchelor* v. *Fortescue* (29). Where

> "the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint . . . one who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant condition and, it may be, perils":

per WILLIAMS, J., in *Hounsell* v. *Smyth* (8) (7 C.B.N.S. at p. 743); and see *Wilkinson* v. *Fairrie* (30), *Binks* v. *South Yorkshire Railway and River Dun Co.* (7), and *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (31).

> "The licensee or visitor must take care of himself in using the premises as he finds them. He is not entitled to be protected from the existing risks of the premises in their ordinary state":

per PIGOT, C.B., in *Sullivan* v. *Waters* (23), 14 L.C.R. at p. 469. Again, Scottish law is the same:

> "When a person uses by permission private property, where a pond or other dangerous excavations exist, he must take the benefit of the use, subject to the risk which attends it":

per LORD SHAND in *Prentice* v. *Assets Co., Ltd.* (32), 17 R. (Ct. of Sess.) at p. 489; and *Ross* v. *Keith* (33).

The rule as to invitees is stated in the Exchequer Chamber by TINDAL, C.J., in *Parnaby* v. *Lancaster Canal Co.* (34) (11 Ad. & El. at p. 243):

> "The common law in such a case [viz., where a canal company invites customers and persons who come on business to use its canals] imposes a duty on the proprietors not perhaps to repair the canal, or absolutely to keep it free from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property . . . they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection by which his customers suffer injury,"

and in *Indermaur* v. *Dames* (9) the Exchequer Chamber again approved the rule as stated in the court below by WILLES, J., who said (L.R. 1 C.P. at p. 288):

> "With respect to such a visitor [i.e., a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant have an interest] we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by the jury as a matter of fact."

It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular, be to some extent in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of. *Lynch* v. *Nurdin* (4), *Jewson* v. *Gatti* (2), *Harrold* v. *Watney* (3), and *Barker* v. *Herbert* (35), especially per VAUGHAN WILLIAMS, L.J., are all of this class. In the present case it is not suggested that the stones were near enough to a highway to constitute a nuisance, nor is the claim vested on a nuisance but on negligence. Children's cases are always troublesome. English law has been very ready to find remedies for their injuries; Scottish law, as might have been expected, has been less indulgent: see *Campbell* v. *Ord and Maddison* (36); *Gavin* v. *Arrol & Co.* (37); *Cass* v. *Edinburgh and District Tramways Co.* (38). They are the commonest cases of the general rule, which is as old as *Scott* v. *Shepherd* (39) that a person, who, in neglect of ordinary care puts or leaves his property in a condition which may be dangerous to another, may be answerable for resulting injury, even though, but for the intervening act of a third person, or of the plaintiff himself: *Bird* v. *Holbrook* (40); *Lynch* v. *Nurdin* (4); that injury would not have occurred. Children acting in the wantonness of infancy, and adults, acting on the impulse of personal peril, may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh independent cause the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred, the result would be that his negligence would lead to mischief. Such cases are collected and elaborately discussed in *Sullivan* v. *Creed* (41) ([1904] 2 I.R. at p. 335). The following are instances: *Dixon* v. *Bell* (42); *Illidge* v. *Goodwin* (43); *Lynch* v. *Nurdin* (4); *Clark* v. *Chambers* (44); *Engelhart* v. *Farrant & Co.* (45); *McDowall* v. *Great Western Rail. Co.* (46); and *Williams* v. *Eady* (47).

Each decision seems clear enough, but to fit them all into their places in the theory of negligence is not so easy. We may put aside the questions: When is a child capable of, and guilty of, contributory negligence?—When does the contributory negligence of the injured child's attendant disentitle it to recover? It is also not directly germane to the present case to investigate the duty which a person owning a public place owes to a child who is there as of right, or the obligation of a person who leaves about, in a place known to be frequented by children, objects in themselves capable of causing injury if meddled with, and which children are likely to meddle with. Loaded guns and heaps of lime left on playgrounds are almost a class by themselves. It is plain that the responsibility of the owner of a close, into which an infant strays in circumstances not consistent with a bare trespass might be very formidable if the law stopped here. The child must take the place as he finds it and take care of himself, but how can he take care of himself? If his injury is not to go without legal remedy altogether by means of his failure to use diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of this dilemma was found in *Burchell* v. *Hickisson* (5) by deciding that the circumstances may evidence the attachment of a condition to the licence or permission to enter—namely, that the child shall only enter if accompanied by a person in charge, and thus placing both himself and his charge in the position of an ordinary licensee, both able and bound to look after himself. LINDLEY, L.J., says (50 L.J.Q.B. at p. 102):

> "There could be no duty on the part of the defendant towards the plaintiff (aged four) further than that the defendant must take care that no concealed danger exists. . . . The defendant never invited such a person as the plaintiff

to come unless he was taken care of by being placed in charge of others, and if he was in charge of others there was no concealed danger."

In short there was no invitation if not guarded, and if guarded no trap. Logically this principle is applicable to all if suffering from infirmity or disability, and not to infants only. It was of *Burchell* v. *Hickisson* (5) I take it that SCRUTTON, J., was thinking when he put to the jury the question No. 2. His observations almost repeat the words used in the case. Furthermore, the summing-up and his question not only covered the attachment of a condition to the leave and licence, but also the point whether in any case the plaintiff was more than a bare licensee. Of invitation in the strict sense there was and would be no evidence. When he afterwards came to enter his judgment the learned judge, not having the actual words before him, assumed that the jury only meant that there was no invitation to this particular child unaccompanied, though there was to others. Even so, the effect of the answer in an action brought by this child would be the same, but I think he hardly did justice to the intelligence of the jury. It was impossible in face of the clear direction given them that they should have meant no more than this. Their verdict on this point places the plaintiff in the position of a bare licensee and no more. Whether it places her position so high, or how a person, whose presence is licensed only on a condition, can be a licensee if that condition is not performed, need not be considered, for it was not argued that the plaintiff was a trespasser in this case.

Three other terms must be attended to—a "trap," an "attraction," or an "allurement." A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under the circumstances cloaking in reality danger. Owners and occupiers expose licensees and invitees to traps on their premises alike at their peril, but a trap is a relative term. In the case of an infant there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. "Allurements" too, is a vague word, it may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if it goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the "allurement" may arise after he has entered with leave or as of right. Then the presence, in a place where he lawfully is, of some object of attraction, tempting him to meddle when he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought as a reasonable man to have anticipated the presence of the child and the attractiveness and peril of the object. Finally, what objects which attract infants to their hurt are traps even to them? Not all object with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight on a private close cannot so combine the properties of temptation and contribution as to be properly called a trap. I believe this summary of familiar cases to be correct, though not every case can be fitted into the scheme, and some contain language which makes it doubtful where they should be placed. I have made it in order to emphasise the contrast between the law as it was and is apart from *Cooke* v. *Midland Great Western Railway of Ireland* (1) and the new law which it is suggested that that case has authoritatively lain down. If it is right, this plaintiff would have failed before 1909, for being a bare licensee she got hurt, whether by the act of a third person or her own we do not know, by the

fall of one of a heap of stones, which was not a trap either in itself or relatively to its surroundings, including the child. Furthermore, the child's permission to be there at all was conditional, and the condition was not performed. The law could not place the owner's duty of care towards the child so as to safeguard her from injury by the fall of the stone in whichever way it may have been caused to fall, nor is there any evidence that the defendants knew that there was anything dangerous about any stones in general or these stones recently shot there, in particular.

Has then *Cooke* v. *Midland Great Western Railway of Ireland* (1) silently altered all this? The case has been several times considered both in England, Scotland, and Ireland. The Court of Appeal in Ireland in *Coffee* v. *M'Evoy* (48) declined to regard it as a case on the duty of an owner or occupier of property towards a trespasser, and decided against the injured plaintiff there because he clearly was a trespasser. In *Lowery* v. *Walker* (18) in the Court of Appeal the reversal of which decision in the House of Lords does not affect the present point, BUCKLEY, L.J. ([1910] 1 K.B. at p. 193) treats the decision as being one upon the liability that

> "may arise from the fact, that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not";

and KENNEDY, L.J., says of it (ibid. at p. 200):

> "it is in my opinion a decision of plainly limited application . . . depending upon the special circumstances that there was an allurement to children by reason of the condition in which the defendants kept their premises and the existence thereon of this unprotected machine, and that they knew that such a machine would be likely to allure children."

In *Jenkins* v. *Great Western Rail. Co.* (49) in this court all members of the court stated that in their opinion *Cooke* v. *Midland Great Western Railway of Ireland* (1) was decided on the assumption that Cooke was licensed by the railway company not merely to come upon the land, but to play with the turntable, and the jury had found in terms that the child was allured "through the hedge and up to the turntable." LORD KINNEAR says in *Holland* v. *District Committee Middle Ward of Lanarkshire* (50), that in *Cooke* v. *Midland Great Western Railway of Ireland* (1) the company had "tempted children to play." If so, the present case is at once distinguishable. The finding of the jury in the present case is confined to leave to come upon and play upon the land. It is difficult to see how there could be any implied leave to play with the actual stones in question for they had only just been put down, and, equally whether the assumed leave was special or general, there was no evidence that the defendants knew of any danger connected with the stones or of any complaint or accident, that might reasonably bring home to them the existence of such danger.

But assume, as the appellants' argument before us did assume, that *Cooke* v. *Midland Great Western Railway of Ireland* (1) turned upon the duty of an owner who keeps on the land on to which he has invited another, some chattel capable of being dangerous to such person. In *Cooke* v. *Midland Great Western Railway of Ireland* (1) the following things are clear. (i) Their Lordships declared no new law and overruled no old cases. The question for decision was whether the special facts of the case could be brought within the existing law, so as to be proper to be submitted to a jury. (ii) The case was an extreme one. LORD LOREBURN says it was so extreme that but for the special combination of danger and attractiveness in the machine with neglect of a usual safeguard on the defendants' part by failing to lock it, he could not have concurred, and LORD MACNAGHTEN reserves a doubt whether he would have viewed the facts as the jury did. (iii) The report in the LAW REPORTS is very laconic as to the facts. It refers to the headnote for the

"circumstances," and the headnote states that the children were "trespassing" which is wrong. At least they were licensees on the premises, and their habit of playing with this identical turntable was known to the defendants, and counsel admitted that the turntable in the condition in which it actually was on the occasion of the accident was a dangerous plaything for children. This error in the headnote and the unfortunate omission to state the facts have, I believe, been the cause of the frequency with which this case has been relied on for principles that it does not lay down and applied to facts to which it does not apply. Reference to the report in the court below, which is necessary if the case is to be understood, shows that there was evidence, though not uncontradicted, that the bolt, supposed to fasten the turntable, could be withdrawn by a child, and that it could then be revolved with "your finger": see judgment of JOHNSON, J., [1908] 2 I.R. at p. 254. Further, the worn track made by frequent entry and passages led from the gap in the fence up to the turntable itself. (iv) The whole of the law summarised above had been elaborately examined and analysed in the judgment in Irish courts and particularly the authority and true effect of *Lynch* v. *Nurdin* (4), also the obligations due to licensees and invitees, the responsibility resulting from dangerous chattels left in public or accessible places, and the effect, if any, upon the directness or remoteness of causation, of children's acts of intervening so as to be a causa sine qua non. (v) There was some difference of opinion among their Lordships on the point, whether the children were licensees or invitees. All agreed, and the uncontradicted evidence proved that they were not trespassers on the close. LORD ATKINSON took them to be licensees. LORD COLLINS to be invitees. LORD MACNAGHTEN thought that in a case of negligence, such as this, it mattered not whether the children found it, the dangerous but attractive object, in a place where they were as of right or only under a licence or invitation of the owner. LORD ATKINSON in terms speaks of a most important addition, that the children had leave and licence to play with the turntable, to be inferred from their being habitually suffered to do so. One asks what kind of chattel is it in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place, or in his own premises, and equally whether the strangers are invited or only licensed? There is only one answer—the chattel must be something highly dangerous in itself, inherently, or from the state in which its owners suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation. Hence, in my opinion, in any view of it, the decision in *Cooke* v. *Midland Great Western Railway of Ireland* (1) is a decision on traps for children. Each of the four opinions say so, LORD MACNAGHTEN said ([1909] A.C. at p. 236),

> "but it does not seem unreasonable to hold that if they allow their property to be open to all comers—infants as well as children of maturer age—and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable in consequence of their tender age to take care of themselves."

As LORD ATKINSON said (ibid. at p. 240), the defendants

> "owed to the child a duty not to permit the machine to be in the moveable and dangerous, because moveable, condition in which they permitted it in fact to be."

LORD COLLINS said (ibid. at p. 241), the turntable "was a dangerous thing for young children to play with." LORD LOREBURN, L.C. (ibid. at p. 242), referred to the turntable as "a machine, dangerous unless protected." The argument that the question for the jury as stated by LORD MACNAGHTEN (ibid. at p. 234) gives the

decision a wider scope is fallacious. It ignores the fact that LORD MACNAGHTEN, speaking of the turntable in question, spoke of that machine as "attractive to children and dangerous as a plaything," an observation which he directs to the consequences which ought to be foreseen by a reasonable man as resulting from his own acts or omissions if the acts of other persons intervene, and with which he concludes his speech. The question was vital, because Cooke had been put on the turntable by other boys, who then revolved it, he being purely passive, and the remoteness of his consequent injury had been relied on. Indeed, it is one which generally arises in children's cases and is characteristic of them.

In this respect I think that SCRUTTON, J., failed to appreciate *Cooke* v. *Midland Great Western Railway of Ireland* (1) distinctly. He framed the questions put to the jury in order to give effect to this passage in LORD MACNAGHTEN'S judgment, as if it laid down the whole of the matters to be considered, thus omitting reference to the special character of the object in question. As put by LORD MACNAGHTEN, with reference to such an object, I think the question was specially directed to the point that the intervening act of another person, or of the plaintiff himself, may not necessarily break the chain of causation between the defendants' negligence, whatever it may be, and the plaintiff's injury, which was so fully discussed in *Sullivan* v. *Creed* (41), and by PALLES, C.B., in *Cooke* v. *Midland Great Western Railway of Ireland* (1) in the court below. SCRUTTON, J., has treated it as being exhaustive in itself, and as being directed to the condition of a plot of land upon which persons are permitted to enter, irrespective of the particular chattels to be found there. I cannot concur with this view. I am fully sensible of the burdens that the extension of the principle of *Cooke* v. *Midland Great Western Railway of Ireland* (1), for which the respondents contend, would impose on property owners, but I prefer not to rest my judgment on them. People who will be publicly good-natured must pay the price. It only shows the wisdom of doing good by stealth if you do any good at all. Besides, in towns where land is waiting to be built upon, it saves the cost of fencing to let people have access to it, and there are owners who, in such circumstances, would make a virtue of economy. In my opinion, there was no evidence that this recently deposited heap of stones was a trap. It was no more than was to be looked for on such an open plot as this was, and whether it was placed there or was part of the surface left after demolition of the houses could not matter. There is no authority for saying that with regard to such chattels, even placed as they were, and towards a child who came on the land with tacit permission only, the owner was under a duty to see that she should take no hurt from the stones, whether dislodged by herself or by another. In face of the answer to the second question put to the jury the answer to the third became irrelevant, and as to the fourth there was no duty in law under the circumstances to take care with regard to the matter in question. The appeal must be allowed, and judgment must be entered for the defendants.

Solicitors: *Busk, Mellor & Norris*, for *Sales & Co.*, Manchester; *Richard Preston*, for *Rowley & Co.*, Manchester.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

GLASGOW CORPORATION *v.* LORIMER

[House of Lords (Lord Loreburn, L.C., Lord Kinnear, Lord Atkinson and Lord Shaw), March 16, 1911]

[Reported [1911] A.C. 209; 80 L.J.P.C. 175; 104 L.T. 354]

B *Master and Servant—Liability of master for alleged defamation by servant—Scope of servant's employment and authority.*

The defendant was a tax-collector in the service of Glasgow Corporation and his duties included the collection of police tax and giving receipts for it. In the course of his duties he called at the plaintiff's house and demanded the balance of tax due from her husband. The plaintiff produced a receipt C for an instalment of the tax which showed that the amount due was less than that claimed by the collector. He accused her of tampering with the receipt in order to defraud his employers, the corporation, and repeated the accusation on subsequent occasions. In an action for slander brought by the plaintiff against the corporation,

D **Held:** the collector was not acting within the scope of his employment in making the statement complained of, and the action would not lie.

Notes. Referred: *Lloyd* v. *Grace, Smith & Co.*, ante p. 51.

As to master's liability to third party in tort, see 25 Halsbury's Laws (3rd Edn.) 535 et seq., and for cases see 34 Digest 125 et seq.

Cases referred to in argument:

E *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 34 Digest 129, *988*.

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex.Ch.; 34 Digest 129, *987*.

F *Dyer* v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, *996*.

Citizens' Life Assurance Co. v. *Brown*, [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497, P.C.; 13 Digest (Repl.) 323, *1300*.

Agnew v. *British Legal Life Assurance Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 442; G 43 Sc.L.R. 284; 13 S.L.T. 742; 32 Digest 30, *f*.

Finburgh v. *Moss' Empires, Ltd.*, [1908] S.C. 928; 45 Sc.L.R. 792; 16 S.L.T. 116; 32 Digest 86, *1166 iii*.

Cameron v. *Yeats* (1899), 1 F. (Ct. of Sess.) 456; 36 Sc.L.R. 350; 6 S.L.T. 329; 32 Digest 82, k.

Ellis v. *National Free Labour Association* (1905), 7 F. (Ct. of Sess.) 629; 42 H Sc.L.R. 495; 13 S.L.T. 70; 32 Digest 86, *1166 iv*.

Eprile v. *Caledonian Rail. Co.* (1898), 6 Sc.L.T. 65.

Nicklas v. *New Popular Café Co.* (1908), 15 Sc.L.T. 735.

Beaton v. *Glasgow Corpn.*, [1908] S.C. 1010; 45 Sc.L.R. 780; 16 S.L.T. 207; 32 Digest 86, *1166 ii*.

I *M'Adam* v. *City and Suburban Dairies, Ltd.*, [1911] S.C. 430; 48 Sc.L.R. 318; 1 S.L.T. 99; 32 Digest 87, *1166 v*.

Mackenzie v. *Cluny Hill Hydropathic Co.*, [1908] S.C. 200; 45 Sc.L.R. 139; 15 S.L.T. 518; 34 Digest 135, *b*.

Appeal from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Macdonald), Lord Low, Lord Ardwall and Lord Dundas, who had affirmed a judgment of the Lord Ordinary (Lord Salvesen) in favour of the respondent, the plaintiff below.

J. Avon Clyde, K.C., and *M. P. Fraser* (both of the Scottish Bar) for the appellants. A

J. Crabb Watt, K.C., and *J. A. Christie* (both of the Scottish Bar) and *Barrington Ward* for the respondent.

LORD LOREBURN, L.C.—This is an action for slander against Glasgow Corporation in respect of certain utterances on the part of one Gilmour, a person in their employment. He was in the service of the corporation and a tax collector, and his duties included the collection of police assessment and the granting of receipts therefor. His duty was to go to the houses of ratepayers for the purpose of collecting assessments which were due. On one of these visits he is alleged to have made a charge of forgery against the wife of a ratepayer. The point for decision is whether the corporation are liable in damages for the slander. I see no difference in principle between an oral and a written slander, and I think that that point was not made by counsel for the appellants. I do not think in principle that there is really any doubt on this point. If it was the duty of the servant within the scope of his authority to make a statement on behalf of his principal, the principal would be liable for the statement made. In the course of his duty he had to consider what were the credits to which the ratepayer was entitled. Was it within the scope of this collector's authority to express his own opinion as to the falsity or genuineness of any receipt, or was it within the scope of his authority to make any statement or comment at all? I think that he had no such implied authority, because I do not see where his opinion was of any benefit to the corporation. The collector might act upon the belief that the credit was just or he might take the credit as doubtful, and then he might enforce or not enforce at the peril of his employers the warrant of the sheriff, or he might suspend enforcement in order to ascertain the truth. I do not see that he has any authority to express an opinion, and I think that it would be necessary to establish an authority of that kind. I do not think that it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether there was any authority communicated on behalf of the corporation to make any statement of opinion at all. In my view authorities are chiefly valuable when they establish a principle. When they do not, but merely record the application of principles to a particular set of facts, they may be instructive as to the point of view from which the judge regards the fact, but they are of little importance from any other point of view. I therefore move that this appeal be allowed. B C D E F G

LORD ATKINSON.—I agree that there is nothing on the face of the pleadings to show expressly or by implication that Gilmour was clothed with authority to express any opinion on the genuineness of receipts which might be produced for the payment of rates. To express such an opinion was not within the scope of his employment, and that being so on the authorities the corporation are not responsible for a slander contained in the expression of such views. H

LORD KINNEAR.—I am entirely of the same opinion.

LORD SHAW.—The scope of Gilmour's employment was defined as including the collecting of police assessment and the granting of receipts. It is perfectly true that it was part of his duty to look at the receipts given for payments formerly made, but I entirely agree that it was no part of his duty to express his own opinion as to the genuineness of such documents. I may be allowed to say that this is a euphemistic way of saying that he was not permitted to slander the producer of such documents, or to allege that they were forged or altered in any way. There is nothing in this record to suggest that it was within the scope of his employment to do anything else than to report the occurrence to his superiors and to inspect the books. If he were allowed to express an opinion as to a I

document it would then be open to make the corporation responsible for a statement of a most defamatory character which was in no respect within the real duty of the servant's employ. In the old-fashioned phrase adopted in Scottish pleadings I am of opinion that this record contains no issuable matter.

Interlocutor appealed from reversed.

Solicitors: *Martin & Co.*, for *Campbell & Smith*, Edinburgh, and *A. W. Myles*, Town Clerk, Glasgow; *Warlow & Patey*, for *E. Rolland M'Nabb*, Edinburgh, and *M'Dougall, Macmillan & Co.*, Glasgow.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

DEIGHTON *v.* COCKLE AND OTHERS

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), November 27, 28, 1911]

[Reported [1912] 1 K.B. 206; 81 L.J.K.B. 497; 105 L.T. 802]

Practice—Summary judgment—Judgment signed more than twelve months from date of order—Need of notice of intention to proceed—R.S.C. Ord. 64, *r.* 13.

When an order has been made under Ord. 14, giving the plaintiff leave to sign final judgment and no further proceeding has been taken in the action for a year, the case does not come within Ord. 64, r. 13, and the plaintiff is not required to give the defendant notice of his intention to proceed before signing judgment in pursuance of the order.

Staffordshire Joint Stock Bank v. *Weaver* (1), [1884] W. N. 78, overruled.

Notes. Order 64, r. 13 has been amended by R.C.S. (No. 2), 1958. The concluding sentence now reads: "A summons on which no Order has been made shall not be deemed a proceeding within this Rule."

As to notice of intention to proceed, see 30 Halsbury's Laws (3rd Edn.) 411, and for cases see Digest (Practice) 846, 847.

Cases referred to:

(1) *Staffordshire Joint Stock Bank* v. *Weaver*, [1884] W.N. 78; Bitt. Rep. in Ch. 243; Digest (Practice) 847, *3936*.
(2) *May* v. *Wooding* (1815), 3 M. & S. 500.
(3) *Theobald* v. *Crickmore* (1819), 2 B. & Ald. 594.
(4) *Lumley* v. *Hempson* (1838), 6 Dowl. 558.
(5) *Thompson* v. *Langridge* (1847), 1 Exch. 351.
(6) *Webster* v. *Myer* (1884), 14 Q.B.D. 231; 54 L.J.Q.B. 101; 51 L.T. 560; 33 W.R. 407, C.A.; Digest (Practice) 846, *3932*.
(7) *Holtby* v. *Hodgson* (1889), 24 Q.B.D. 103; 59 L.J.Q.B. 46; 62 L.T. 145; 38 W.R. 68; sub nom. *Re Holtby*, 6 T.L.R. 24, C.A.; Digest (Practice) 611, *2502*.

Also referred to in argument:

Hamp-Adams v. *Hall*, [1911] 2 K.B. 942; 80 L.J.K.B. 1341; 105 L.T. 326; 55 Sol. Jo. 647; 27 T.L.R. 531, C.A.; Digest (Practice) 972, *5071*.

Appeal by the plaintiff from an order of Scrutton, J., at chambers, setting aside the judgment signed in the action.

In May, 1904, the plaintiff commenced this action by a specially indorsed writ claiming the sum of £281 due upon promissory notes. On May 24, 1904, upon an application by the plaintiff under Ord. 14, an order was made giving the plaintiff

leave to sign final judgment for the amount indorsed upon the writ. On July 3, 1905, the plaintiff, in pursuance of the order of May 24, 1904, signed final judgment in the action for the amount indorsed upon the writ without having given any notice to the defendants of his intention so to do. The plaintiff in 1911 served a bankruptcy notice upon the male defendant in respect of this judgment, and then commenced proceedings in bankruptcy. On Nov. 11, 1911, the defendants applied to a master at chambers to set aside the judgment, upon the ground that the judgment had been signed more than a year after the date of the order giving the plaintiff leave to sign final judgment and the plaintiff had given no notice to the defendants of his intention to sign judgment. Order 64, r. 13 provides:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."

The master dismissed the application; but on appeal, SCRUTTON, J., reversed the order of the master and set aside the judgment. The plaintiff appealed, with leave.

Harold Simmons and *J. S. Griffith Jones* for the plaintiff.
Hohler, K.C., and *Tindale Davis* for the defendants.

VAUGHAN WILLIAMS, L.J.—The plaintiff, on May 28, 1904, obtained an order giving him leave to sign final judgment under Ord. 14; and, on July 3, 1905, he signed judgment against the defendants in pursuance of that order. On Nov. 11 an application was made by the defendants to a master at chambers to set aside the judgment which had been so signed upon the ground that it had been improperly signed because the order in pursuance of which it had been signed had been made more than twelve months before—that is, that the order had been made in May, 1904, and the judgment signed in July, 1905. It was said that in these circumstances there ought to have been a month's notice given to the defendants, pursuant to the provisions of Ord. 64, r. 13, of the plaintiff's intention to proceed. Rule 13 runs in this way, so far as it is material:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed."

The whole question which we have now to decide is whether this signing of judgment in July, 1905, was a "proceeding" within the meaning of that rule.

In order to decide this matter we have had many cases cited before us which were decided upon the rules of practice before the Judicature Acts. But those cases are applicable in the present case for this reason. It is stated in CHITTY'S ARCHBOLD'S PRACTICE (14th Edn.), p. 1437, with references to Ord. 64, r. 13, as follows:

> "This rule is in practically the same words as the Rules of Hilary Term, 1853, r. 176, which, it was held, only required a notice to be given before taking a proceeding towards judgment, and which did not, therefore, apply to a motion to set aside proceedings; nor to proceedings after verdict or after final judgment; but it applied to proceedings after interlocutory judgment, as notices of inquiry, &c. Nor did the rule apply to a case of signing judgment on a cognovit, whether given before or after appearance. Under the present rule it has been held that the notice is necessary before signing judgment when the defendant had made default in appearance and no proceedings had been taken for more than a year after service of the writ, and before signing judgment on an order more than a year old."

That is what has made the earlier cases applicable to the present rule. I do not know that it is really necessary to go through all those earlier cases now, because

the whole chain of decisions is based upon the same reasoning. Really there are only two cases which can possibly be said to be inconsistent with that long chain of decisions under the old rules. I think that I cannot state the principle better than it was stated by LORD ELLENBOROUGH, C.J., in one of the earlier cases. *May* v. *Wooding* (2). He there said (3 M. & S. at p. 501):

> "The reason of the rule is this, that while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself, but when the matter has passed in rem judicatam by the verdict, the same reason does not apply. The rule of this court therefore relates merely to interlocutory stages of the cause."

Nearly all of those earlier cases to which I have referred proceed upon that one principle, that the rule only applies to proceedings toward judgment and does not apply to proceedings after judgment.

I need only refer to two cases as to which it may fairly be said that they are not completely in accordance with that long series of earlier cases. One of those cases is *Staffordshire Joint Stock Bank* v. *Weaver* (1). That was a case precisely similar to the present case. FIELD, J., at chambers there decided that a plaintiff, who has not acted upon an order for judgment under Ord. 14 for a year, can only sign judgment after a month's notice of his intention to proceed. That, then, was a complete decision in favour of the contention of the defendants here. It is to be observed, however, that no cases were there cited before the learned judge, and that no counsel appeared in the case. Indeed, FIELD, J., said ([1884] W.N. at p. 78):

> "There is no authority in support of this application, except the semble in the book of practice that has been referred to. But I must look at the language of the rule. This is a cause in which there has been no proceeding for a year from the last proceeding. Is the plaintiff, who is applying here, a party who desires to proceed? He clearly desires to proceed by signing judgment against the defendant. Then, he shall give a month's notice to the other party of his intention to proceed."

To my own personal knowledge, FIELD, J., was at that time regarded as a great authority upon all matters of practice. But I cannot believe that he would have so decided if all that series of earlier cases had been brought to his notice. Under these circumstances I think that we ought not to follow and approve that decision of FIELD, J. Then with regard to the passage in ARCHBOLD'S PRACTICE to which FIELD, J., referred, where, speaking of this rule, it is said ((13 Edn.) vol. 1 at p. 180):

> "Nor does the rule apply, it would seem, to a case of signing judgment on a judge's order allowing the signing of it."

That is not conclusive one way or the other, but is only a sort of expression of opinion which leaves the matter still in doubt.

Having got thus far, I have now to apply the rule laid down by LORD ELLENBOROUGH, C.J., in *May* v. *Wooding* (2), and established in the subsequent series of cases, and see whether it shows that the signing of the judgment after an order which has given leave to do so is such a proceeding as to bring the case within Ord. 64, r. 13. I am of opinion that such a case does not come within the operation of that rule. I think that this was not a proceeding within the rule, upon the ground that this particular step or proceeding, or whatever you like to call it, was really a step or proceeding after judgment and was in no sense interlocutory. After the long series of cases, decided upon the old rule which was practically the same as the present rule, we ought not to read the present rule as applying to this step or proceeding taken after judgment. I think, therefore, that the order of SCRUTTON, J., was wrong, and that this appeal must be allowed and the order of the master restored.

BUCKLEY, L.J.—This is an action upon promissory notes, brought by the plaintiff against husband and wife. The writ was specially indorsed and on May 28, 1904, the plaintiff obtained an order under Ord. 14 giving him leave to sign final judgment against both defendants for the amount endorsed upon the writ. Nothing further was done until July, 1905, more than one year from the last proceeding in the action. On July 3 the plaintiff signed final judgment in pursuance of the order.

The question for our decision now is whether that signing of judgment was a proceeding within Ord. 64 r. 13. That is a rule which reproduces in every material respect r. 176 of the Rules of Hilary Term, 1853. Upon that older rules, or its predecessor, there are four decisions which are all in favour of the plaintiff. They all point in the same direction. The first case is *May* v. *Wooding* (2). In that case the plaintiff obtained a verdict in Eastern Term, 1811, but no further proceedings were had until four terms afterwards, when a rule for judgment was entered and judgment was signed accordingly. The question was whether, there having been no proceedings for four terms after the verdict, the plaintiff ought to have given a term's notice before signing judgment. LORD ELLENBOROUGH, C.J., held that notice was not necessary, upon the ground that "the matter had passed in rem judicatam by the verdict" and that therefore the then existing rule did not apply. The next case was *Theobald* v. *Crickmore* (3). That case was not the same as *May* v. *Wooding* (2), but it was a similar case, and the decision was that it was not necessary to give a month's notice to proceed when the defendant, after a lapse of four terms without any proceeding, proceeded to give notice of trial and set the case down for trial. Then came *Lumley* v. *Hempson* (4), which has not so much bearing upon the present question, where it was decided that the rule which requires a term's notice where no step has been taken in the cause for more than four terms does not apply to an application to set aside proceedings, upon the ground that it was not a "proceeding to judgment." The last case is *Thompson* v. *Langridge* (5), which was a similar case to *May* v. *Wooding* (2). All those four cases go to show that under the old rule, of which the present rule is practically a reproduction, notice is not necessary before signing judgment after a verdict or an order for judgment.

There are two more decisions upon this question—namely, *Staffordshire Joint Stock Bank* v. *Weaver* (1) and *Webster* v. *Myer* (6). In the former case the decision of FIELD, J., in chambers, is directly in point, and is against the present plaintiff. If we decide this appeal in favour of the plaintiff, we must hold that that decision of FIELD, J., was wrong. The other case, *Webster* v. *Myer* (6), was not a similar case, and the decision is not against the plaintiff. The decision there was that where, on default of appearance by the defendant, the plaintiff takes no further step for a year, notice must be given under Ord. 64, r. 3, before judgment can be signed. In such a case, proceeding to sign judgment is a new step in the action which must be taken upon evidence which satisfies the proper officer that the plaintiff is entitled to sign judgment.

Perhaps I might also refer to the decision in *Holtby* v. *Hodgson* (7), in the Court of Appeal, a case where, judgment having been obtained against a married woman, garnishee proceedings were commenced to attach the amount of a verdict, which she subsequently obtained in an action, before she had signed judgment in accordance with that verdict. It was there held that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of the judgment creditor to a garnishee order. LORD ESHER, M.R., there pointed out that the entry or signing of judgment was merely a ministerial act to complete something which had been done before. *Webster* v. *Myer* (6), therefore, has no application to the present case. The decision in *Staffordshire Joint Stock Bank* v. *Weaver* (1) is, indeed, directly against the plaintiff. It was a case decided in chambers; no counsel appeared for the parties; and no authorities were cited. I have arrived at the conclusion that the decision in that case was wrong. In my opinion there was no "proceeding" by the plaintiff in the present action, within Ord. 64, r. 13, when he signed judgment in July,

1905, in pursuance of the order giving him leave to sign final judgment. This appeal must, therefore, be allowed and the order of the master be restored.

KENNEDY, L.J.—I am of the same opinion, and have very little to add to what has been already said. For a very long period of time there has been a similar rule, substantially like the present rule, that when no proceeding has been taken in a cause or matter for one year notice must be given before any further proceeding is taken. There appears to have been a similar rule of Michaelmas Term 4 Anne, which is referred to in *May* v. *Wooding* (2), and also a rule of Easter Term 13 Geo. 2, referred to in the same case. Taking *May* v. *Wooding* (2) as the starting point, it appears to have been decided nearly a century ago by LORD ELLENBOROUGH, C.J., that the intention of the rule was that notice, after one year had elapsed without any proceeding, was to be given if the matter was still in controversy. It seems to me that the sense of the thing is that the rule means a proceeding while the matter is still in controversy and something still remains to be done by the court, or an officer of the court, to authorise the party to take any step. When a plaintiff has merely to produce an order and sign judgment in accordance with that order, it seems to me that it is not a proceeding towards judgment and therefore is not a proceeding within Ord. 64, r. 13. I must refer to the case relied on by the defendants, *Staffordshire Joint Stock Bank* v. *Weaver* (1), which was decided by FIELD, J., a judge of the very highest reputation in practice cases. It was decided in chambers and no counsel appeared and no authorities were cited. It was an ex parte application. In that state of things the learned judge referred to ARCHBOLD'S PRACTICE (13th Edn.), vol. 1, p. 180, and did not act upon the semble stated therein. With the greatest respect for that learned judge, I cannot think that it is wrong for us to differ from his decision given in chambers under those circumstances. It seems to me that, both upon reason and upon the ground pointed out by LORD ELLENBOROUGH, C.J., in *May* v. *Wooding* (2), the decision of SCRUTTON, J., was wrong, and this appeal must be allowed.

Appeal allowed.

Solicitors: *Godfrey & Robertson; Percy Haseldine & Green.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

CHUTER *v.* FREETH AND POCOCK, LTD.

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Pickford and Lush, JJ.), May 18, 1911]

[Reported [1911] 2 K.B. 832; 80 L.J.K.B. 1322; 105 L.T. 238; 75 J.P. 430; 27 T.L.R. 467; 22 Cox, C.C. 573; 9 L.G.R. 1055] B

Food and Drugs—False warranty in writing—Liability of limited company—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict.*, *c.* 51), *s.* 20 (6).

By s. 20 (6) of the Sale of Food and Drugs Act, 1899 [see now Food and Drugs Act, 1955, s. 116 (2)] : "Every person who, in respect of any article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing shall on conviction be liable" to a penalty, unless he proves "that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." C

Held: a limited company incorporated under the Companies Acts was a "person" within s. 20 (6) and so could be convicted under the sub-section of the offence of giving a false warranty in writing to a purchaser from them of an article of food or drug. D

Notes. The Sale of Food and Drugs Acts, 1875, and 1908, have been repealed. See now Food and Drugs Act, 1955. Section 20 (6) of the 1908 Act corresponds to s. 116 (2) of the 1955 Act. Sections 6 and 25 of the 1875 Act correspond to ss. 2 and 115 of the 1955 Act respectively.

Applied : *R.* v. *Ascario Puck and Paice* (1912), 76 J.P. 487. Considered : *Mousell Bros.* v. *London and North Western Rail. Co.*, [1916–17] All E.R. Rep. 1101. Referred : *D.P.P.* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119; *R.* v. *I.C.R. Haulage, Ltd.*, [1944] 1 All E.R. 691. E

As to liability of a corporation as a "person," see 9 HALSBURY'S LAWS (3rd Edn.) 60–62, and for cases see 13 DIGEST (Repl.) 264 et seq. For Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91. F

Case referred to :

(1) *Pearks, Gunston and Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 18 T.L.R. 538; 20 Cox, C.C. 279; 13 Digest (Repl.) 265, *915*.

Also referred to in argument : G

Irving v. *Callow Park Dairy Co., Ltd.*, *Bacon* v. *Same* (1902), 87 L.T. 70; 66 J.P. 804; 18 T.L.R. 573; 20 Cox, C.C. 295, D.C.; 25 Digest 94, *193*.

Hawke v. *Multon (E.) & Co., Ltd.*, [1909] 2 K.B. 93; 78 L.J.K.B. 633; 100 L.T. 905; 73 J.P. 295; 25 T.L.R. 474; 22 Cox, C.C. 122; 16 Mans. 164, D.C.; 25 Digest 457, *462*.

Derbyshire v. *Mouliston*, [1897] 1 Q.B. 772; 66 L.J.Q.B. 569; 76 L.T. 624; 61 J.P. 374; 45 W.R. 527; 13 T.L.R. 377; 41 Sol. Jo. 491; 18 Cox, C.C. 609, D.C.; 25 Digest 101, *244*. H

Case Stated by the metropolitan police magistrate sitting at the South-Western Police Court.

On Nov. 18, 1910, an information was preferred by Alfred Chuter (the appellant) against Freeth and Pocock, Ltd. (the respondents) for that they on Sept. 26, 1910, in respect of an article of food—to wit, milk—sold by them to John Jones, of which a portion was purchased from John Jones in the borough of Battersea for analysis, did give to him a false warranty in writing, contrary to the Sale of Food and Drugs Act, 1899. On the hearing of the information the following facts were proved or admitted : The appellant was an inspector duly appointed by the mayor, aldermen, and councillors of the metropolitan borough of Battersea, under the I

Sale of Food and Drugs Acts, 1875 to 1907. The respondents were a limited company incorporated under the Companies Act, 1862–1910, and carried on business as wholesale milk contractors. On Sept. 26, 1910, an agent for the appellant bought a pint of milk within the borough from one John Jones, who was taking the milk round in a churn on a barrow, and was then selling the same to customers in the borough. The agent handed the pint of milk to the appellant, who forthwith notified to John Jones his intention to have the same analysed by the public analyst and divided the milk into three parts and delivered one of the three parts to John Jones, in accordance with s. 14 of the Sale of Food and Drugs Act, 1875 [repealed, see now s. 94 and Sched. 7, Part II of the 1955 Act]. The sample of the milk was duly submitted for analysis to the public analyst for the metropolitan borough of Battersea. The public analyst on Oct. 7, 1910, certified that the sample contained the parts as under: 7·5 per cent. of extraneous water, and 92·5 per cent. of milk of genuine composition but of the poorest quality in non-fatty solids. An information was therefore laid by the appellant against John Jones on Oct. 13, 1910, for that he had committed an offence against s. 6 of the Sale of Food and Drugs Act, 1875. On Oct. 21, 1910, John Jones gave notice in writing, in accordance with the requirements of s. 20 of the Sale of Food and Drugs Act, 1899, [see now s. 115 of the 1955 Act] of his intention to rely, inter alia, as a defence pursuant to s. 25 of the Sale of Food and Drugs Act, 1875, upon a written warranty dated Sept. 30, 1909, and given by the respondents. The summons against John Jones was heard before one of the magistrates of the police courts of the metropolis, on Nov. 2, 1910, and was dismissed by him upon the ground that John Jones had proved to his satisfaction that he had purchased the milk as the same in nature, substance, and quality as that demanded of him by the appellant, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the milk was otherwise, and that he had sold it in the same state as when he purchased it. An information was thereupon laid by the appellant against the respondents, as above stated. The milk from which the sample was taken was supplied to John Jones by the respondents, under a contract in writing dated Sept. 30, 1909. Such contract contained a warranty that the milk should be pure and unskimmed and free from preservatives. The warranty was false, and the respondents' servants, who supplied the milk, had not reason to believe that the statements and descriptions contained in the warranty were true.

On behalf of the appellant it was contended that the respondents had committed an offence within the meaning of s. 20 (6) of the Sale of Food and Drugs Act, 1899, upon the ground that the warranty was false and that the respondents had not proved to the satisfaction of the court that when they gave the warranty they had reason to believe that the statements or descriptions contained therein were true. On behalf of the respondents it was contended that no offence had been committed within the meaning of the section, upon the ground that the exempting clause making an innocent belief a defence to the summons implies that the offence can only be committed by a defendant who is capable of a mens rea, and a corporation, not being so capable, cannot therefore commit the offence. The magistrate, although upon the facts as above stated he would have convicted if the respondents' servants had been principals in the matter, was of opinion that, as the exempting clause of the section implied that the offence could only be committed by a person who was capable of "believing," and as a corporation, having no mind, could not exercise that faculty, it was not liable under the section, and he dismissed the information.

The Sale of Food and Drugs Act, 1875, s. 6 [see now s. 2 of the 1955 Act] provided:

> "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty . . ."

By s. 25 [see now s. 115 of the 1955 Act] :

"If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence."

The Sale of Food and Drugs Act, 1899, s. 20 (6) provided :

"Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing shall be liable [to a penalty], unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true."

Barrington Ward for the appellant.
The respondents did not appear.

LORD ALVERSTONE, C.J.—In this case the magistrate refused to convict the respondents upon the ground that being a corporation they were not capable of committing the offence under s. 20 (6) of the Sale of Food and Drugs Act, 1899, in respect of which the proceedings against them were taken. I think the magistrate has taken a wrong view of the section. The original purchaser of the milk on being summoned under s. 6 of the Sale of Food and Drugs Act, 1875, for selling an article of food to the prejudice of the purchaser, set up the defence under s. 25 of the Act, that he had bought the milk with a written warranty given by the respondents. That defence succeeded, and then further proceedings were taken under s. 20 (6) of the Sale of Food and Drugs Act, 1899, against the respondents as the original sellers of the milk, for having given a false warranty in writing on the sale of the milk. The magistrate dismissed the information upon the ground that as the person who gives the false warranty is made liable by the section to the penalty

"unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true,"

therefore the person referred to in the section cannot be taken to include a corporation, because the offence could only be committed by a person capable of "believing," and that as a corporation, having no mind, could not exercise that faculty, therefore a corporation was not liable under the section. I think that is too narrow a construction to place upon that section. It seems to me that where a vendor is capable of giving a warranty under the Act, he can be fined in respect of this offence if the warranty is not true. I see no reason why a corporation cannot give a warranty, and if they can give a warranty there is no reason why they should not be able to believe through their servants that the statements contained in the warranty are true. There has been a similar question raised as to the liability of a corporation in cases of libel and false imprisonment and other matters which, if it were the case of an individual, would involve a consideration of the state of the individual's mind, and yet it has been held that in such cases a corporation may be liable. Moreover, I think this point has been practically decided in the case of *Pearks, Gunston and Tee, Ltd.* v. *Ward* (1), by CHANNELL, J., when he gave his reasons for holding that a corporation could be liable for the offence under s. 6 of the Sale of Food and Drugs Act, 1875. When we bear in mind that these statutes were passed for the protection of the public, there is no

reason why this defence which is given in s. 20 (6) to a "person" should not also apply to a corporation. I am, therefore, of opinion that this sub-section does not by implication exclude the construction we are putting upon it. I think, therefore, that the appeal must be allowed, and the case must go back to the magistrate with a direction to convict.

PICKFORD, J.—I agree.

LUSH, J.—I agree.

Appeal allowed.

Solicitor: *Paul Caudwell.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

ARMORDUCT MANUFACTURING CO., LTD. *v.* GENERAL INCANDESCENT CO., LTD.

[COURT OF APPEAL (Farwell and Kennedy, L.JJ.), April 8, 1911]

[Reported [1911] 2 K.B. 143; 80 L.J.K.B. 1005; 104 L.T. 805; 18 Mans. 292]

Execution—Company—Voluntary winding-up before execution—Delay procured by trick.

On Feb. 24, 1911, the plaintiffs obtained judgment against the defendant company for a certain sum of money, and on the following day their solicitor wrote to the defendant company's solicitor requesting payment. The plaintiffs' solicitor was led to believe that a cheque would be sent by the defendant company within a few days, and, in consequence, he delayed issuing execution. He was not told, nor did he know, that a meeting of the defendant company had been convened for March 6 for the purpose of passing a resolution that the company be voluntarily wound-up on the ground that, by reason of its liabilities, it could not continue its business. The meeting was held and the resolution passed, and on the same day, the judgment debt not having been paid, the plaintiffs issued execution.

Held: issue of execution had been delayed by trickery on the part of the defendant company, and the plaintiffs ought to be permitted to obtain the benefit of their judgment by means of execution.

Notes. The Companies (Consolidation) Act, 1908, has been repealed. See now Companies Act, 1948. Section 140 of the 1908 Act corresponds to s. 226 of the 1948 Act.

Considered: *Re Grosvenor Metal Co., Ltd.*, [1949] 2 All E.R. 948; *Re Suidair International Airways, Ltd.* [1950] 2 All E.R. 920.

As to execution after commencement of winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 692 et seq., and for cases see 10 DIGEST (Repl.) 1078 et seq. For Companies Act, 1948, s. 226 see 3 HALSBURY'S STATUTES (2nd Edn.) 645.

Cases referred to:

(1) *Re London Cotton Co.* (1866), L.R. 2 Eq. 53; 14 L.T. 135; 12 Jur. N.S. 133; 14 W.R. 575; 10 Sol. Jo. 416; sub nom. *Re London Cotton Manufacturing Co.*, 35 L.J.Ch. 425; 10 Digest (Repl.) 902, *6122.*

(2) *Re Vron Colliery Co.* (1882), 20 Ch.D. 442; 51 L.J.Ch. 389; 30 W.R. 388, C.A.; 10 Digest (Repl.) 876, *5797.*

Also referred to in argument:

Re Taylor, Re Williams, Ex parte Railway Steel and Plant Co. (1878), 8 Ch.D. 183; 47 L.J.Ch. 321; sub nom. *Re Railway Steel and Plant Co., Ltd., Taylor* v. *Railway Steel and Plant Co., Ltd., Williams* v. *Railway Steel and Plant Co., Ltd.*, 38 L.T. 475; 26 W.R. 418; 10 Digest (Repl.) 1020, *7020*.

Re Richards & Co. (1879), 11 Ch.D. 676; 48 L.J.Ch. 555; 27 W.R. 530; sub nom. *Re Richards & Co., Ltd., Ex parte Crawshay*, 40 L.T. 315; 10 Digest (Repl.) 1020, *7021*.

Re Withernsea Brickworks (1880), 16 Ch.D. 337; 50 L.J.Ch. 185; 43 L.T. 713; 29 W.R. 178, C.A.; 10 Digest (Repl.) 1018, *7007*.

Re Thurso New Gas Co. (1889), 42 Ch.D. 486; 61 L.T. 351; 38 W.R. 156; 5 T.L.R. 562; 1 Meg. 330; 10 Digest (Repl.) 1062, *7374*.

Westbury v. *Twigg & Co.*, [1892] 1 Q.B. 77; 61 L.J.Q.B. 32; 66 L.T. 225; 40 W.R. 208, D.C.; 10 Digest (Repl.) 1081, *7482*.

Appeal by the plaintiffs from an order of BUCKNILL, J., at chambers.

In an action between the plaintiffs and the defendants tried before RIDLEY, J., and a special jury, judgment was entered for the plaintiffs for £59 8s. 8d. with costs to be taxed, and an inquiry as to what further sum of money was due by the defendants to the plaintiffs. The plaintiffs' taxed costs in this action up to and including the first trial amounted to the sum of £259 6s. 11d. On the appeal of the defendants from this judgment it was ordered that a new trial be had and that the costs of the former trial should abide the event of the new trial. The second trial took place before PHILLIMORE, J., and a special jury, when judgment was given on Feb. 24, 1911, for the plaintiffs for such sum as should be agreed between the parties or be certified to be due on taking such accounts and inquiries as should be required to ascertain the amount due to the plaintiffs under the findings of the jury and direction for judgment, and it was further ordered that the defendants should forthwith pay to the plaintiffs £259 6s. 11d. costs of the first trial of the action and also the taxed costs of the plaintiffs since the hearing of the defendants' appeal. On Feb. 25 the plaintiffs' solicitor wrote to Mr. Jonathan Edward Harris, a solicitor then acting for the defendants, requesting payment of the above sum of £259 6s. 11d. by or before March 1. On Feb. 27, Mr. Harris acknowledged the receipt of the letter and stated that he was communicating with his clients in reference thereto. On Feb. 28 the plaintiffs' solicitor wrote to Mr. Harris that he must ask him to see that a cheque was sent in the course of the following day, and on Mar. 1 a conversation took place on the telephone between the managing clerk to the plaintiffs' solicitor and Mr. Harris. According to the former, Mr. Harris said that a cheque for the said sum of £259 6s. 11d. would be sent, but that it was being delayed as the signature of another director was wanted. According to Mr. Harris, he said he had not been able to obtain a cheque, and that he understood there was some difficulty in procuring a cheque until after the arrival of a gentleman who was then, as Mr. Harris was informed, on his way from Germany. On Mar. 3 the plaintiffs' solicitor personally communicated twice with Mr. Harris, when he said he was seeing his clients that afternoon. On Mar. 4 the plaintiffs' solicitor received a letter from Mr. Harris inclosing the original of a letter, dated Mar. 3, 1911, addressed to him by his clients. The letter was as follows:

> Dear Sir.—Re Armorduct company's costs.—We regret that we are unable to send you the cheque for which you ask today, but we will endeavour to do so if possible to-morrow or Monday.—Yours faithfully, The General Incandescent Co., Ltd. W. J. Moore, Director.

On Mar. 4 the plaintiffs' solicitor wrote to Mr. Harris and informed him that unless he received payment of the costs of the first action by or before twelve o'clock on Mar. 6 he was instructed to proceed to recover the same. On Mar. 6, not having received payment of the costs, the plaintiffs' solicitor caused a writ of fieri facias

to be issued, and at 10.30 on the following morning the sheriff's officer entered into possession of the defendants' premises. The sheriff's officer was then notified that John J. Reid had been appointed as liquidator of the defendant company on the previous morning before the issue of the writ of fieri facias, and he was served with notice of an extraordinary resolution making such appointment. The extraordinary resolution, which was passed at an extraordinary general meeting of the company at ten o'clock on Mar. 6, stated that it had been proved to the satisfaction of the meeting that the company could not by reason of its liabilities continue its business, and that it was advisable to wind-up the same, and accordingly that the company should be wound-up voluntarily, and that Mr. John J. Reid be appointed liquidator for the purpose of such winding-up.

On Mar. 8 the sheriff took out an interpleader summons in which the liquidator of the defendant company was claimant. On Mar. 9, on an ex parte application in chambers by the liquidator, LAWRANCE, J., ordered the sheriff to withdraw from the possession of the goods seized by him under the writ of fieri facias and claimed by the claimants and stayed the interpleader proceedings. On Mar. 10 LAWRANCE, J., ordered that a summons be issued to vary the order made on the ex parte application and that the sheriff do resume possession of the goods and chattels seized under the writ of fieri facias meanwhile, and accordingly on the same day the plaintiffs took out a summons for an order that the order of LAWRANCE, J., be set aside or varied by directing an issue to be tried between the plaintiffs and the liquidator as claimant on the interpleader summons. On the hearing of this summons BUCKNILL, J., made an order on Mar. 16 that the sheriff do withdraw from possession of the goods seized by him under the writ of fieri facias and claimed by the liquidator, and that no action be brought against the sheriff in respect of the said seizure. The plaintiffs appealed against this order.

Section 140 of the Companies (Consolidation) Act, 1908 [see now Companies Act, 1948, s. 226] provided:

> "At any time after the presentation of a petition for winding-up, and before a winding-up order has been made, the company or any creditor or contributory may (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind-up the company to restrain further proceedings in the action or proceeding; and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

Sanderson, K.C., and *Henn Collins* for the plaintiffs.
Clauson, K.C., and *R. W. Turner* for the defendant company.

FARWELL, L.J.—This is an appeal from an order of BUCKNILL, J., at chambers. In my opinion the appellant is right. The facts of the case are, I hope, very unusual. [HIS LORDSHIP stated the facts and continued:] On a mere statement of these facts, and in the absence of any denial by Mr. Harris that he knew of the pending liquidation of the company, it is impossible to refrain from drawing the conclusion that these were tricks with the object of preventing the issue of the execution until after the resolution for the voluntary winding-up of the company had been passed. Nevertheless, the court has a discretion in the matter to allow the creditor to obtain the benefit of the judgment by means of execution, and the question is whether that discretion should be exercised in favour of the plaintiffs in the present case. I know of no case in which the court will not exercise the discretion it so has in favour of a creditor who has that right and has been prevented from exercising it either by force, as in the case of *Re London Cotton Co.* (1), or by fraud or trickery. It is said that the persons who will be really affected are

the other creditors of the company. That is true, but before the liquidation of the company the rights of the other creditors were always subject to the legal right of the plaintiffs to issue execution on their judgment. They were prevented from doing this by the fraud of the company, and if the other creditors try and prevent these plaintiffs from issuing execution, they become themselves participators in the wrong. The other creditors cannot now come in and set up the rights of third parties to take advantage of the trick of the company. It is said that the judgments in the case of *Re Vron Colliery Co.* (2) show that in the circumstances of this case leave to proceed with the execution ought not to be given to the plaintiffs. But, in my opinion, the decision in that case has nothing to do with the present case, the facts being entirely different. It is true that in the judgments in the *Vron Colliery Case* (2) doubts were thrown on earlier decisions by courts of first instance in which it had been held that the mere giving indulgence was a reason for preferring the creditor, and JESSEL, M.R., said he was not satisfied that those cases were rightly decided. It is quite unnecessary for us to express any opinion on the matter, because the present case is not a case of fair persuasion or bargain to give time, but is a case of barefaced trickery in order to hold the plaintiff's hands until the resolutions for winding-up had been passed. I do not think that JESSEL, M.R., expressly intended to overrule the earlier cases. For these reasons I am of opinion that this appeal should be allowed.

KENNEDY, L.J.—I agree.

Appeal allowed.

Solicitors: *J. T. Goddard; Marston & Robinson.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BEAUMONT. BRADSHAW *v.* PACKER

[CHANCERY DIVISION (Farwell, L.J., sitting as additional judge of the Division), January 30, 31, 1913]

[Reported [1913] 1 Ch. 325; 82 L.J.Ch. 183; 108 L.T. 181; 57 Sol. Jo. 283]

Settlement—Trusts of separate fund in will created by reference to trusts of settlement—Covenant in settlement to vest after-acquired property in trustees—Accretion of will fund to settlement fund.

A father, by a marriage settlement, gave his daughter power to raise by appointment a sum not exceeding £2,000 for her sole and separate use, with the stipulation that if she should be "at one and the same time and from the same source seised or possessed of or entitled to or empowered absolutely to dispose otherwise than by will of any real or personal property of the value of £200 or upwards for any estate or interest whatsoever . . . then and in every such case she . . . shall . . . convey and assign such real and personal property to or otherwise cause the same to be vested in the trustees". By his will he devised and bequeathed a share of the residue of his estate to his daughter "upon the same trusts and with and subject to the same powers . . . as are in [her] marriage settlement contained with respect to the funds thereby settled."

Held: (i) the provision in the will amounted to the creation of a new settlement to be written out word for word by reference to the marriage settlement and did not amount to an accretion thereto; (ii) if the daughter exercised her power of appointment under the will to raise a sum exceeding £2,000, such sum would be caught by the covenant to settle after-acquired property because the bequest in the will was "upon the same trust and . . . subject to the same

powers" as the settlement and the covenant to settle such property was neither a trust nor a power.

Notes. Considered: *Re Campbell's Trusts, Public Trustee* v. *Campbell*, [1922] All E.R. Rep. 79; *Re Hickman's Will Trusts, Re Playfair, Palmer* v. *Playfair*, [1950] 2 All E.R. 285. Referred: *Re Fraser, Ind* v. *Fraser*, [1913] 2 Ch. 224; *Re Arnell, Re Edwards, Prickett* v. *Prickett* (1924), 93 L.J.Ch. 276.

As to referential trusts, see 34 HALSBURY'S LAWS (3rd Edn.) 493 et seq., and for cases see 43 DIGEST (Repl.) 602 et seq.

Cases referred to:

(1) *Cooper* v. *Macdonald* (1873), L.R. 16 Eq. 258; 42 L.J.Ch. 533, 539; 28 L.T. 693; 21 W.R. 833; 43 Digest 607, *527*.

(2) *Trew* v. *Perpetual Trustee Co.*, [1895] A.C. 264; 64 L.J.P.C. 49; 72 L.T. 241; 43 W.R. 636; 11 T.L.R. 259; 11 R. 423, P.C.; 43 Digest 607, *525*.

(3) *Hindle* v. *Taylor* (1855), 5 De G.M. & G. 577; 25 L.J.Ch. 78; 26 L.T.O.S. 81; 1 Jur. N.S. 1029; 4 W.R. 62; 43 E.R. 994, L.C.; 43 Digest 606, *523*.

(4) *Baskett* v. *Lodge* (1856), 23 Beav. 138; 53 E.R. 54; 44 Digest 910, *7694*.

Also referred to in argument:

Eustace v. *Robinson* (1880), 7 L.R. Ir. 83; 40 Digest (Repl.) 490, **1*.

Re Walpole's Marriage Settlement, Thomson v. *Walpole*, [1903] 1 Ch. 928; 72 L.J.Ch. 522; 88 L.T. 419; 51 W.R. 587; 40 Digest (Repl.) 534, *449*.

Re Perkins, Perkins v. *Bagot*, [1893] 1 Ch. 283; 62 L.J.Ch. 531; 67 L.T. 743; 41 W.R. 170; 37 Sol. Jo. 26; 3 R. 40; 40 Digest (Repl.) 615, *1116*.

Key v. *Key* (1853), 4 De G.M. & G. 73; 1 Eq. Rep. 82; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 17 Jur. 769; 43 E.R. 435, L.JJ.; 44 Digest 1279, *11,070*.

Adjourned Summons to determine (i) whether under the devise and bequest in the will of Thomas George Beaumont of a share of his residuary real and personal estate upon trusts for the benefit of the defendants, Mabel Packer, and her issue by reference to the trusts of her marriage settlement dated April 29, 1904, Mabel Packer is entitled to raise by appointment out of such share the sum of £2,000; and (ii) in case Mabel Packer is so entitled, whether the covenant or provision contained in the said settlement that any real or personal property to which she should during the coverture therein referred to be possessed of or entitled to or to absolutely dispose of should be conveyed to or vested in the trustees of the settlement includes or applies to the power to raise by appointment the sum of £2,000, or to the said sum if and when raised by her.

The settlement dated April 29, 1904, made on the marriage of the Rev. Bernard Packer and Mabel Beaumont contained the following provisions:

"Clause 9. Notwithstanding any of the trusts and powers hereinbefore contained Mabel Beaumont whether covert or discovert may at any time or times, by deed or will, appoint that the trustees shall (but not before her shares hereby settled have fallen into possession) raise out of the trust fund any sum or sums of money not exceeding in the whole the sum of £2,000 and pay the same to Mabel Beaumont for her sole and separate use, or to her legal representatives.

"Clause 11. It is hereby agreed and declared that if Mabel Beaumont now is or during the intended coverture she shall be at one and the same time, and from the same source seised or possessed of or entitled to or empowered absolutely to dispose otherwise than by will of any real or personal property of the value of £200 or upwards for any estate or interest whatsoever in possession, reversion, remainder, or expectancy . . . then and in every such case she and all other necessary parties shall at the cost of the trust estate as soon as circumstances will admit and to the satisfaction of the trustees convey and assign such real and personal property to or otherwise cause the same to be vested in the trustees."

By his will, dated April 6, 1907, George Thomas Beaumont, after appointing trustees and bequeathing specific legacies, continued as follows: A

"I devise and bequeath all the residue of my estate unto my trustees upon trust for sale and conversion into money with full power to postpone the sale and conversion of all or any part thereof for any period however prolonged. My trustees shall stand possessed of the net residue of my estate in trust for such of my four following children—namely, my sons the said George Beaumont B and Henry Hamond Dawson Beaumont, and my daughters Alice Mary Elizabeth Allen and Mabel Packer as shall be living at my death or die in my lifetime leaving issue then living, and if more than one in equal shares, but as regards the share of each daughter of mine subject to the provisions hereinafter declared—that is to say: My trustees shall hold the shares of the residue of my estate which my daughters take under this my will upon the same C trusts and with and subject to the same powers including the powers of investment as are in their respective marriage settlements contained with respect to the funds thereby settled."

The testator died on April 15, 1908. The settlement fund consisted of upwards of £20,000 and the will fund of upwards of £40,000, and this summons was taken D out to decide whether Mabel Packer is entitled to raise by appointment out of this share of the residue under the will of her father a second sum of £2,000 or under for her sole and separate use, and whether if she does raise such fund by appointment to herself it is caught by the covenant to settle after-acquired property in the settlement.

Johnstone Edwards for the trustees of the will. E

Dighton N. Pollock for Mabel Packer.

Devonshire for the only child of the marriage, and for the trustees of the marriage settlement.

FARWELL, L.J.—This summons raises two questions, one of which is of considerable novelty. None of the cases cited before me in argument today is F exactly like the present case. In the first group of three cases there is only one fund, one document, and one set of trustees. They are cases of a gift with powers of charging, &c., followed by another gift of other property on the same trusts. In such cases there could be no question of multiplying charges upon the trust estate or trusts in the nature of charges. The case before LORD SELBORNE, L.C., *Cooper* v. *Macdonald* (1), is even stronger than *Trew* v. *Perpetual Trustee Co.* (2). G In that case the Lord Chancellor said (L.R. 16 Eq. at pp. 266, 267):

"If the annuity which a tenant for life was empowered to charge upon the specifically devised estates had been one of (or not exceeding) a fixed annual amount, I should have been of opinion that the general rule stated by LORD CRANWORTH, L.C., in *Hindle* v. *Taylor* (3) against multiplication of charges H under a trust created by reference to other trusts, would have applied; and that it would not have been competent for any child of the testator to charge one annuity of that amount on the property specifically devised and a further annuity on the share of the residuary estate; though both the residuary estate and the property specifically devised might have been made a security for a single annuity. I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of I the property charged therewith. In such a case by the addition of other property to be held on the same trusts 'and subject to the same or like powers,' &c., so as to 'correspond with' those before expressed as to the property specifically devised, as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion still holds; but the intention is, that the power, limited

A by that rule, shall be applicable to the added as much as to the original property."

The first question I have to decide is whether the provision in the will of the Rev. Thomas George Beaumont amounts to the creation of a new settlement to be written out word for word by reference to the old settlement, or does it merely amount to the creation of a fund which is to be an accretion to the old settlement. B In my opinion this provision amounts to the creation of a new settlement. I have come to the conclusion, not without difficulty, that this is a case to which the canon of construction laid down by MANNING, J. (of New South Wales), and quoted by LORD HOBHOUSE in *Trew* v. *Perpetual Trustee Co.* (2) ([1895] A.C. at p. 267) applies. That canon of construction is, that where there is a trust by reference,

C "the only safe course to adopt is to re-write the words declaring such trusts, merely substituting the second fund or property for the first."

In *Hindle* v. *Taylor* (3), LORD CRANWORTH, L.C., says (5 De G.M. & G. at p. 592):

D "It by no means necessarily follows that the words, 'such trusts as are hereinafter declared,' are to be read as if the trusts so referred to were then stated. If they had been stated, no doubt would, of course, have remained; but I incline to think that the real way of reading the bequest is, when the testator mentions the trusts of the one-fourth by reference to the other trusts, to read it as if it had come in immediately before the declaration of the other trusts."

So far, as I have said, the cases have all been cases of one testator, one will and E one set of trustees, but there is one other case which counsel for the trustees of the marriage settlement has discovered. It is the case of *Baskett* v. *Lodge* (4). This case is distinguishable from all the others in that it is a case of two different grantors and two different funds. A. B. gave the moiety of a house and other property to trustees to sell and pay a number of annuities and legacies, and the residue to six persons. C. D. afterwards devised the other moiety of the same F house to A. B.'s trustees upon the same trusts, for the benefit of the same persons, and to and for the same ends, intents and purposes as were directed by A. B.'s will of and concerning her moiety of the house. SIR JOHN ROMILLY, the Master of the Rolls, was of opinion that the intention of C. D. was to add the produce of her moiety of her property to the sister's personal estate, and that the words "to hold," &c., merely meant that it was to go in the same manner as the sister's moiety, and G so as to form part of her estate. The present case is, however, also distinguishable from this one inasmuch as the testator directs his own trustees, and not those of the settlement, to hold the funds. By so doing, I think, he clearly creates a new trust. I have come to the conclusion that Mrs. Packer has the power to appoint any sum not exceeding £2,000 from what I will call the will fund, in the same manner as she has power to appoint any sum not exceeding £2,000 from the H settlement fund. That disposes of the first point.

The next question is: If she did make any appointment under the latter settlement created by the will in respect of this latter £2,000, would such appointed sum be caught by the settlement? Counsel for the trustees of the marriage settlement, quite rightly, does not attempt to contend that any sum appointed in excess of £200 and not exceeding £2,000 in accordance with the provisions of cl. 9 of I the settlement thereof could possibly be caught by the covenant to settle after-acquired property contained in cl. 11 of the same settlement, but he does contend, and I think rightly, that different considerations arise with regard to any appointment which may be made of any sum of more than £200 and less than £2,000 which, according to my decision above, may be appointed out of the will fund. But, as LORD HOBHOUSE said in *Trew's Case* (2), the canon of construction of MANNING, J., must not be accepted in any sense which would give to it the general effect of multiplying charges. We have to look at the will to see exactly what the

bequest by reference is. There we see that the property is given "upon the same trusts and with and subject to the same powers" as are in the settlement contained. Now the covenant to settle after-acquired property is neither a trust nor a power. The will only incorporates all the trusts and powers. I accordingly hold that if Mrs. Packer does exercise her power of appointment in respect of this second sum of £2,000 arising under the will trusts, the sums so appointed will be caught by the covenant to settle after-acquired property.

Solicitors: *Blake, Heseltine, Child & Crailsheim.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

VON HATZFELDT-WILDENBURG *v.* ALEXANDER

[Chancery Division (Parker, J.), July 21, 26, 1911]

[Reported [1912] 1 Ch. 284; 81 L.J.Ch. 184; 105 L.T. 434]

Specific Performance—Sale of a lease—Agreement for sale conditional upon approval by purchaser's solicitors.

The purchaser, in certain letters, offered to buy a leasehold house on the conditions, inter alia, that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder, and the form of the contract," and that she should approve her surveyors' report on the house. On receipt of this report the purchaser sought a contribution from the vendor towards some necessary improvements. This was refused and the vendor withdrew from the contract. The purchaser sought specific performance.

Held: on the construction of the documents there was no final and binding agreement which could be specifically enforced.

Winn v. *Bull* (1) (1877) 7 Ch.D. 29, applied.

Per Parker, J.: ". . . it is a question of construction whether the execution of a further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

Notes. Distinguished: *Marten* v. *Whale*, [1917] 2 K.B. 480. Applied: *Coope* v. *Ridout*, [1921] 1 Ch. 291. Approved: *Rossdale* v. *Denny*, [1921] 1 Ch. 57. Followed: *Chillingworth* v. *Esche*, [1923] All E.R. Rep. 97. Considered: *Hillas & Co.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; *May and Butcher, Ltd.* v. *R.*, [1934] 2 K.B. 17 n.; *Sociedade Portugesa de Navios Tanques, Ltd.* v. *Hvalfangerselskapet Polaris A/S.*, [1952] 1 T.L.R. 220. Referred: *Allen* v. *Whiteman* (1920), 89 L.J.Ch. 534; *Astor Properties, Ltd.* v. *Tunbridge Wells Equitable Friendly Society*, [1936] 1 All E.R. 531; *Schwarz* v. *Clements* (1944), 171 L.T. 305; *Brilliant* v. *Michaels*, [1945] 1 All E.R. 121; *Hart* (*Inspector of Taxes*) v. *Sangster*, [1956] 3 All E.R. 52.

As to conditions of acceptance in contracts, see 8 Halsbury's Laws (3rd Edn.) 76–77, and for cases see 12 Digest (Repl.) 92 et seq.

Cases referred to:

(1) *Winn* v. *Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, *544*.

(2) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585, H.L.; 12 Digest (Repl.) 80, *440*.

(3) *North* v. *Percival*, [1898] 2 Ch. 128; 67 L.J.Ch. 321; 78 L.T. 615; 46 W.R. 552; 42 Sol. Jo. 431; 12 Digest (Repl.) 97, *568*.

Also referred to in argument:

Bristol, Cardiff and Swansea Aërated Bread Co. v. *Maggs* (1890), 44 Ch.D. 616; 59 L.J.Ch. 472; 62 L.T. 416; 38 W.R. 393; 6 T.L.R. 227; 12 Digest (Repl.) 183, *1246*.

Bellamy v. *Debenham*, [1891] 1 Ch. 412; 64 L.T. 478; 39 W.R. 257; 7 T.L.R. 199, C.A.; 12 Digest (Repl.) 89, *505*.

Crossly v. *Maycock* (1874), L.R. 18 Eq. 180; 43 L.J.Ch. 379; 22 W.R. 387; 12 Digest (Repl.) 93, *529*.

Lloyd v. *Nowell*, [1895] 2 Ch. 744; 64 L.J.Ch. 744; 73 L.T. 154; 44 W.R. 43; 13 R. 712; 12 Digest (Repl.) 96, *565*.

Hudson v. *Buck* (1877), 7 Ch.D. 683; 47 L.J.Ch. 247; 38 L.T. 56; 26 W.R. 190; 12 Digest (Repl.) 469, *3504*.

Harvey v. *Principal and Antients of Barnard's Inn* (1881), 45 L.T. 280; 29 W.R. 922; 12 Digest (Repl.) 96, *553*.

Jones v. *Daniel*, [1894] 2 Ch. 332; 63 L.J.Ch. 562; 70 L.T. 588; 42 W.R. 687; 8 R. 579; 12 Digest (Repl.) 169, *1095*.

Honeyman v. *Marryatt* (1857), 6 H.L. Cas. 112; 26 L.J.Ch. 619; 4 Jur. N.S. 17; 10 E.R. 1236, H.L.; 12 Digest (Repl.) 79, *434*.

Rossiter v. *Miller* (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 12 Digest (Repl.) 95, *548*.

Action for specific performance of an agreement for the sale of a lease.

The plaintiff in this action was Princess Von Hatzfeldt and the defendant was a Mr. Alexander who was the owner of certain leasehold premises known as No. 13, Grosvenor Square, London. The action was brought by the plaintiff against the defendant for specific performance of an alleged contract for sale contained in three letters dated April 18, 1911, April 25, 1911, and April 26, 1911, and also alleged to be contained in a draft contract submitted by the defendant's solicitors to the plaintiff's solicitors. In March, 1911, Messrs. Curtis and Henson, who are estate agents, approach the defendant with a view to selling the house, and the defendant stated he would consider an offer of £25,000. On April 15, 1911, having found the plaintiff as a prospective purchaser, Messrs. Curtis and Henson asked the defendant for a letter of authority, authorising them as his agents to accept the sum of £25,000 for the lease of No. 13, Grosvenor Square. This he did, also stating that the purchaser was to take the tenant's fixtures and fittings at a valuation as usual. The alleged agreement was contained in the following letters.

"April 18, 1911.—Messrs. Walton and Lee, 10, Mount Street, W.—Dear Sirs, —13, Grosvenor Square.—We have received a letter from our client, Mr. Granville Alexander, as follows: 'I authorise you as my agents to accept on my behalf the sum of twenty-five thousand pounds (£25,000), for the lease of No. 13, Grosvenor Square, possession and completion to be on the 11th day of August next. This is absolutely my very lowest price as I have no wish to sell, and the property is not really in the market. It is further to be understood that the purchaser is to take the tenant's fixtures and fittings at a valuation as usual.' We should be glad to hear from you with as little delay as possible.—And remain, yours faithfully, Curtis and Henson."

"April 25, 1911.—13, Grosvenor Square and stables.—Dear Sirs,—Referring to your letter to us of the 18th inst., in accordance with instructions received from our client, Her Serene Highness the Princess Hatzfeldt, we accept Mr. Granville Alexander's offer of the above property, at the price therein named —viz., twenty-five thousand pounds (£25,000). This acceptance is subject to the following conditions: (i) That the lease is from the freeholder, and has

between thirty and thirty-one years to run, and that the annual ground rent is £400; (ii) that Her Serene Highness' solicitors approve the title to and covenants contained in the lease, the title from the freeholder, and the form of contract; (iii) that Her Serene Highness approves her surveyors' report on the condition of the structure, the condition of the drains and drainage system, the heating and water supply and system, and the electric light system and arrangement, and the system and condition of the electric lift; (4) tenant's fixtures and fittings to be taken at valuation in the usual way. Her Serene Highness signifies that Sept. 29 next, owing to certain arrangements she has made, would be more agreeable to her for completion and possession than Aug. 11, if equally suitable to Mr. Alexander. It is, of course, understood that the panelling, bedroom fitments, and similar fitments, are included in the price of £25,000. We shall be glad of a confirmation of the bargain, and also to hear when Her Highness' surveyors can make their survey and examination.—We are, dear sirs, yours faithfully, Walton and Lee.—Messrs. Curtis and Henson, 5, Mount Street, W.

"April 26, 1911.—Messrs. Walton and Lee, 10 Mount Street, W.—Dear Sirs, —13, Grosvenor Square and stables.—We are in receipt of your letter of yesterday's date written on behalf of your client, H.S.H. the Princess Hatzfeldt, and we have now seen Mr. Granville Alexander thereon; that gentleman instructs us, as his agents, to confirm the acceptance of our offer for the sale of the lease of the above; and, further, that gentleman is agreeable to the date for the occupation and possession being on Sept. 29 next, instead of Aug. 11, as previously mentioned. It should be noted that the lease is for a term of 30 years from November last, and is held direct from the freeholder, and if you refer to our letter of Mar. 6 last we then mentioned about thirty years. Our client requests that you will kindly inform us of the name of the solicitors who will act on behalf of Princess Hatzfeldt, so we may place those gentlemen in communication with Mr. Granville Alexander's solicitors. Further, as it is proposed to prepare the house for occupation early next week, it is essential that your client's surveyors should immediately proceed with what is desired to be done, as after that date the house cannot be seen. We may mention that there is some further painting, &c., that was ordered and this will still be carried out, notwithstanding that Mr. Granville Alexander has undertaken to sell.—We are, yours truly, Curtis and Henson."

On May 8, 1911, Messrs. Walton and Lee, the surveyors for the plaintiff, made their report, in which they pointed out that the electric light installation required entirely rewiring, that a new kitchen range would be required, and that the system for the supply of hot water would require complete reconstruction. In all this was estimated to cost about £1,000. On May 15 Messrs. Walton and Lee wrote on behalf of the plaintiff to know whether the defendant would contribute this amount of £1,000; on May 16 the defendant wrote withdrawing from the contract. A draft agreement had been prepared by the defendant's solcitors for the approval of the plaintiff's solicitors. The plaintiff then commenced this action for specific performance of the alleged contract.

Buckmaster, K.C., and *Douglas Hogg* for the plaintiff.
Grant, K.C., and *Harry Greenwood* for the defendant.

Cur. adv. vult.

PARKER, J.—In this action the plaintiff asks to enforce specific performance of an agreement said to be contained in certain letters, to which I shall presently refer, for the sale to her by the defendant of the leasehold house, No. 13, Grosvenor Square, with the stabling. The letters in question passed between Messrs. Walton and Lee, house agents, acting for the plaintiff, and Messrs. Curtis and Henson, house agents, acting for the defendant. There is no question of their

A authority to bind their respective clients nor is there any suggestion of contract outside the correspondence. The first letter to which I will refer is that written to Messrs. Walton and Lee by Messrs. Curtis and Henson on April 18, 1911. [HIS LORDSHIP read the letter.] This seems to be a firm offer by the defendant to sell the premises in question for £25,000, the tenant's fixtures and fittings to be taken at a valuation. It is answered by Messrs. Walton and Lee on April 25, 1911, B as follows: [HIS LORDSHIP read the letter.] It seems clear that this is not an acceptance of the defendant's offer to sell, but is an offer on the part of the plaintiff to purchase the hereditaments on different terms. There follows a letter from Messrs. Curtis and Henson to Messrs. Walton and Lee dated April 26, 1911. [HIS LORDSHIP read the letter.] In my opinion this letter is an acceptance of the of the offer made in the letter of April 25. The question I have to determine is C whether this acceptance resulted in a binding contract. The defendant says it did not, and contends that upon the true construction of the letters themselves there is no binding contract, and that at any rate there is no such contract if on the principle of *Hussey* v. *Horne-Payne* (2) these letters be looked at in the light of the rest of the correspondence between the parties.

The argument on the true construction of these letters themselves depends on D the reference contained in the offer of April 25 to the form of contract being approved by the purchaser's solicitors. This no doubt shows that the approval by the purchaser's solicitors of a formal document containing the terms of the agreement between the parties for the sale and purchase of the premises in question was in the contemplation of Messrs. Walton and Lee, and if a formal document was to be approved it was no doubt also contemplated that it would E be executed. I must take it that Messrs. Curtis and Henson in accepting the terms offered by the letter of April 25 accepted them on the same footing. It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of a further contract is a condition or term of the bargain or whether it is a mere F expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored. The fact that the reference to this more formal document is in words which according to their G natural construction impart a condition is generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire. *North* v. *Percival* (3) appears to be an exception to this rule, but I doubt whether that case was correctly decided; see the earlier decision of SIR GEORGE JESSEL, M.R., in *Winn* v. *Bull* (1).

What then is the true construction of the letters said to constitutute the con- H tract? The letter of April 25, unlike the letter of April 18, is in form a conditional and not a firm offer. It is expressed to be subject to four conditions. The first condition is in the nature of a condition precedent making the acceptance dependant on the existence of a certain state of facts. That state of facts existed, and the conditions may therefore be disregarded. The third condition in effect provides that the plaintiff is not to be bound by her offer unless she approves I a report to be made by her surveyors on the drains and other matters. It also is a condition either precedent or subsequent. The fourth condition is not really a condition at all, but a term of the bargain. It is the second condition which contains the reference to the formal contract. It provides that the plaintiff's solicitors approve the title to and covenants contained in the lease, the title from the freeholder, and the form of contract. There is some authority for saying that where a purchaser stipulates that his solicitor shall approve the title of the property, such stipulation may possibly be construed as a recognition that the title

will be examined in the usual way and need not be in a condition at all. But such a construction is impossible in this case, for the plaintiff's solicitors have to approve also the freehold title, which cannot be called for on an open contract for the sale of a lease. The second condition must therefore, at any rate as to this, be treated as a real condition. It does not in terms compel the vendor to show this freehold title, but unless he does so to the satisfaction of the purchaser's solicitors he cannot hold the purchaser to her bargain. I do not think it would be in accordance with principle or sound sense to treat this second condition as in part a real condition and in part only the expression of a mere desire on the part of the purchaser. Further, having regard to the fact that the vendor's acceptance is the acceptance of an offer conditional on the execution of a more formal contract, I do not think the condition is one which the purchaser can waive as solely in her own favour. The vendor may well have allowed the condition as to the freehold title to pass in reliance on the fact that his own advisers would insert in the more formal agreement proper provisions in his favour.

My conclusion is that this case is within the principle of *Winn* v. *Bull* (1) and numerous other similar cases, and that the letters do not constitute a binding contract. I need not, therefore, consider the argument based on *Hussey* v. *Horne-Payne* (2).

Solicitors: *Guedalla & Jacobson; Cohen and Cohen.*

[*Reported by* T. De la Poer Beresford, Esq., *Barrister-at-Law.*]

COOKE *v.* RICKMAN

[King's Bench Division (Bray and Bankes, JJ.), July 12, 13, 1911]

[Reported [1911] 2 K.B. 1125; 81 L.J.K.B. 38; 105 L.T. 896; 55 Sol. Jo. 668]

Estoppel—Estoppel by conduct—Admission in action—Breach of tenancy agreement—Admission of liability by defendant—Second action on same agreement—Right of tenant to raise a defence of want of consideration for agreement.

The plaintiff brought an action in the King's Bench Division claiming rent alleged to be due to him from the defendant under a written agreement. The defendant admitted that she owed part of the sum alleged to be due, and the plaintiff signed judgment under Ord. 14 for that part. The plaintiff then brought a second action in the county court to recover further rent alleged to be owed under the agreement. The defendant contended that the agreement was unenforceable because it was made without consideration.

Held: as the defendant had admitted in the first action that she owed money under the agreement and had not then raised the defence of want of consideration she was estopped from raising it in the second action.

Humphries v. *Humphries* (1), [1910] 2 K.B. 531, applied.

Notes. Referred: *British and French Trust Corpn.* v. *New Brunswick Rail. Co.*, [1937] 4 All E.R. 516.

As to res judicata, see 15 Halsbury's Laws (3rd Edn.) 184 et seq., and for cases see 21 Digest 159 et seq.

Cases referred to:

(1) *Humphries* v. *Humphries*, [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14, C.A.; 21 Digest 178, *295*.

(2) *Howlett* v. *Tarte* (1861), 10 C.B.N.S. 813; 31 L.J.C.P. 146; 9 W.R. 868; 142 E.R. 673; 21 Digest (Repl.) 146, *96*.

Also referred to in argument:

Re South American and Mexican Co., Ex parte Bank of England, [1895] 1 Ch. 37; 64 L.J.Ch. 189; 71 L.T. 594; 43 W.R. 131; 11 T.L.R. 21; 39 Sol. Jo. 27; 12 R. 1, C.A.; 21 Digest 147, *103*.

Clarke v. *Gray*, *Marsden* v. *Gray* (1805), 6 East, 564; 2 Smith, K.B. 622; 102 E.R. 1404; 8 Digest (Repl.) 49, *308*.

Appeal from a decision, in favour of the defendant, of His Honour Judge Gye, sitting at the Newport and Ryde County Court.

By an agreement dated July 12, 1907, the defendant agreed to pay to the plaintiff the rent of certain cottages for the plaintiff's life. On Dec. 17, 1910, the plaintiff issued a writ against the defendant in the King's Bench Division claiming £196 9s. 9d., being as to £175 9s. 9d. balance due for money lent by plaintiff to defendant and interest, and as to £21 amount of rents due from defendant to plaintiff under an agreement dated July 12, 1907. Application was made by the plaintiff for judgment under Ord. 14, and the defendant swore an affidavit in which she admitted that she owed the amount claimed for money lent and interest, and also that she owed £4 6s. 4d. for rent. Judgment was signed for £180 3s. 1d., which included the sum admitted to be due for rent. On Mar. 7, 1911, the plaintiff brought an action in the county court to recover £17 6s. 1d., being further rent alleged to be due under the agreement of July 12, 1907. The agreement was produced at the hearing, and upon its face it showed no consideration for the defendant's promise to pay the rents in question. It was contended on behalf of the defendant that the agreement was not enforceable by reason of the fact that it was made without consideration. For the plaintiff it was submitted that as in the previous action the defendant had not set up the defence that there was no consideration, she was estopped from doing so at the second trial. The learned judge held that there was no estoppel, and gave judgment for the defendant and the plaintiff appealed.

Grimwood Mears for the plaintiff.

du Parcq for the defendant.

BRAY, J.—The question which arises in this case is whether the defendant is estopped from setting up as an answer to the plaintiff's claim the fact that there was no consideration for the agreement upon which the plaintiff sued. The facts were these: [His Lordship stated the facts and continued:] In my opinion there was an estoppel. The law upon the subject was discussed at considerable length in *Humphries* v. *Humphries* (1). That case was not on all fours with the present, because the point there was not whether the defence of no consideration could be set up in a second action when it had not been raised in the previous one, but whether the defence that there was no memorandum to satisfy the Statute of Frauds could be so raised. But when one looks at the judgment of Farwell, L.J., who delivered the judgment of the court, it seems to me that the case of *Humphries* v. *Humphries* (1) did in effect decide the question which we have to consider in the present case. I find this passage in the judgment ([1910] 2 K.B. at pp. 535, 536):

> "The rule laid down in *Howlett* v. *Tarte* (2) is confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to confession and avoidance of the contract."

It is admitted, and could not be contended otherwise, that a plea of no consideration or a denial of the agreement which might or might not raise the question of no consideration is not a confession and avoidance of the agreement. It is equally clear that it is raisable by traverse and not by a special plea necessitating proof on the part of the defendant, because the onus was on the plaintiff to prove that

there was a valid agreement. It therefore seems to me that the court in deciding *Humphries* v. *Humphries* (1) decided that it was only in the particular cases mentioned in the judgment that the exception relied upon in *Howlett* v. *Tarte* (2) prevailed. *Howlett* v. *Tarte* (2) was decided before the passing of the Judicature Acts, when pleading was a matter of great strictness, and there is no doubt that the rules under the Judicature Acts involve a great deal of looseness in pleading, and it is not necessary for us to say whether a plaintiff suing upon an agreement must allege in so many words that there was consideration for it, although I am inclined to think that it is not necessary, nor need we decide whether the defendant must set up in terms that there was no consideration for the agreement relied upon by the plaintiff. I desire to express no definite opinion upon either of these propositions. I have to deal with the matter according to its substance, and the substance of it seems to be that, in order to avoid the estoppel, the plea, which was not pleaded in the first action, must be a plea of confession and avoidance, or a special plea necessitating proof on the part of the defendant. The plea of no consideration does not necessitate any proof on the part of the defendant, and therefore it seems to me that, in accordance with the principle laid down in *Humphries* v. *Humphries* (1) the defendant, not having raised that plea in the first action, is estopped from doing so now. For these reasons I am of opinion that this appeal must be allowed.

BANKES, J.—I agree. The defendant's counsel has argued in this case that the judgment in the previous action does not estop the defendant from raising in the present action the defence that the agreement sued upon was made without consideration. He has presented his argument to us somewhat in this form: The rule laid down in *Howlett* v. *Tarte* (2) was that if a defendant in a second action attempts to put upon the record a plea inconsistent with any traversable allegation in the former action there is an estoppel. The writ in the first action was a specially indorsed writ, and all that it stated was that amongst other claims the plaintiff made a claim against the defendant for £21, being the amount of rent due from the defendant under an agreement of July 12, 1907. Therefore counsel for the defendant contends that, there being merely an allegation of an agreement and no allegation of any consideration for that agreement, it cannot be said that there was any traversable allegation with reference to consideration, and consequently that the defendant is not estopped in the present action from setting up the want of consideration. It has been pointed out that the rule in *Howlett* v. *Tarte* (2) was framed at a time when there was great preciseness in pleading, and it could well be ascertained under the existing rules what was or was not a traversable allegation, but under the present system there may be a difficulty in applying that rule. In one passage of FARWELL, L.J.'s, judgment in *Humphries* v. *Humphries* (1) I find this passage. He says ([1910] 2 K.B. at p. 535):

> "The allegation of the existence of the agreement raises the issue which the plaintiff has to prove, namely, the existence of that specific agreement as an agreement binding and valid at law, i.e., complying, amongst other things, with the requirements of the Statute of Frauds."

Now, I agree with counsel for the defendant to this extent, that under the existing rules of pleading, if a person sets up in his statement of claim an agreement without saying what the consideration for it was, the defendant may, if he thinks proper, take out a summons either to strike out the statement of claim or requiring particulars of the consideration. But if the defendant does not adopt either of these courses and proceeds to trial, I do not think it is open to him in a second action, brought in respect of the same subject-matter, to say that there was not a traversable allegation in the first action, because, applying the test laid down in *Humphries* v. *Humphries* (1), I think that the consideration is a matter or an issue which the plaintiff has to prove, and that, unless he proves it, he fails to prove, in the words of FARWELL, L.J., "the existence of that specific agreement as an agreement binding and valid in law." Therefore upon that ground as well

as upon the ground pointed out by BRAY, J., which rests upon a later passage in the judgment of FARWELL, L.J., I agree that in this case the judgment in the first action constituted an estoppel, and therefore that the decision of the learned judge was wrong.

Appeal allowed.

Solicitors: *M. C. Lamport*, for *Lamport, Bassitt & Hiscock*, Newport, Isle of Wight; *G. H. King & Franckeiss*, Portsmouth.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

ATTENBOROUGH & SON *v.* SOLOMON AND ANOTHER

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Atkinson and Lord Shaw), November 15, 18, 19, 1912]

[Reported [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 29 T.L.R. 79; 57 Sol. Jo. 76]

Executor—Pledge by executor and trustee in own name of article included in residuary estate—Assent by executors to dispositions in will—Right of co-executors and trustees to recover article pledged.

A testator, by his will, appointed two persons as his executors and trustees and devised and bequeathed his residuary estate to them on trust for sale and distribution. All the debts, legacies, expenses and duty were paid and the residuary account passed within the executor's year, but the residuary estate was not fully distributed. Fourteen years after the testator's death one of the executors and trustees, in his own name and for his own purposes, pledged certain silver plate, which was part of the residuary estate, without the knowledge or consent of his co-trustee and executor. The pawnbroker had no reason to believe that he was not the absolute owner of the plate and acted in good faith throughout. The pledge was not discovered until after the pledgor's death, and an action was then brought by the co-executor and trustee and the pledgor's successor as trustee to recover the plate.

Held: the executors had assented to the dispositions of the will taking effect and had thereby lost their vested right of property in the residuary estate as executors and had become, so far as the title to it was concerned, trustees under the will, and, therefore the deceased executor had had no title to the plate when he pledged it and the existing trustees could recover it from the pawnbrokers.

Notes. Applied: *Wise* v. *Whitburn*, [1924] 1 Ch. 460; *I.R. Comrs.* v. *Smith*, [1930] 1 K.B. 713. Considered: *Parker* v. *Judkin*, [1931] All E.R. Rep. 222; *Re Cunliffe-Owen*, *Mountain* v. *I.R. Comrs.*, [1953] 2 All E.R. 196; *Re Aldhous*, *Noble* v. *Treasury Solicitor*, [1955] 2 All E.R. 80. Referred: *Hewson* v. *Shelley* (1913), 82 L.J. Ch. 551; *Re De Lecuw*, *Jakens* v. *Central Advance and Discount Corpn., Ltd.* [1922] All E.R. Rep. 528; *Re Gibbs*, *Midland Bank Executor and Trustee Co., Ltd.* v. *I.R. Comrs.*, [1951] 2 All E.R. 62.

As to assents of executor, see 16 HALSBURY'S LAWS (3rd Edn.) 338 et seq., and for cases see 23 DIGEST (Repl.) 393 et seq.

Case referred to:

(1) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 3 Salk. Holt, K.B. 528; 1 Com. 133; 92 E.R. 107; sub nom. *Anon.*, Holt, K.B. 569; 2 Salk. 522; 37 Digest 2, *1*.

Also referred to in argument:

Cray v. *Willis* (1729), Mos. 184; 2 P. Wms. 529; 25 E.R. 339; 44 Digest 510, *3284*.

Re Rowe, Jacobs v. *Hind* (1889), 58 L.J.Ch. 703; 61 L.T. 581, C.A.; 23 Digest (Repl.) 397, *4675*.

Mead v. *Lord Omery* (1745), 3 Atk. 235; 26 E.R. 937, L.C.; 24 Digest (Repl.) 623, *6179*.

Forbes v. *Peacock* (1846), 1 Ph. 717; 15 L.J.Ch. 371, L.C.; 43 Digest 920, *3593*.

Re Venn and Furze's Contract, [1894] 2 Ch. 101; 63 L.J.Ch. 303; 70 L.T. 312; 42 W.R. 440; 38 Sol. Jo. 273; 8 R. 220; 23 Digest (Repl.) 314, *3803*.

Re Tanqueray-Willaume and Landeau (1882), 20 Ch.D. 465; 51 L.J.Ch. 434; 46 L.T. 542; 30 W.R. 801, C.A.; 23 Digest (Repl.) 313, *3792*.

Re Smith, Henderson-Roe v. *Hitchins* (1889), 42 Ch.D. 302; 58 L.J.Ch. 860; 61 L.T. 363; 37 W.R. 705; 23 Digest (Repl.) 469, *5408*.

Elliot v. *Merryman* (1740), Barn. Ch. 78; 2 Atk. 41; 27 E.R. 562; 24 Digest (Repl.) 637, *6286*.

M'Leod v. *Drummond* (1810), 17 Ves. 152; 34 E.R. 59, L.C.; 24 Digest (Repl.) 624, *6195*.

Doe d. Hayes v. *Sturges* (1816), 7 Taunt. 217; 2 Marsh. 505; 129 E.R. 87; 23 Digest (Repl.) 399, *4702*.

Sabin v. *Heape* (1859), 27 Beav. 553; 29 L.J.Ch. 79; 1 L.T. 51; 5 Jur.N.S. 1146; 8 W.R. 120; 54 E.R. 218; 23 Digest (Repl.) 315, *3818*.

Charlton v. *Earl of Durham* (1869), 4 Ch.App. 433; 38 L.J.Ch. 183; 20 L.T. 467; 17 W.R. 995, L.C.; 24 Digest (Repl.) 667, *6556*.

Phillipo v. *Munnings* (1837), 2 My. & Cr. 309; 40 E.R. 658, L.C.; 32 Digest 405, *839*.

Corser v. *Cartwright* (1875), L.R. 7 H.L. 731; 45 L.J.Ch. 605, H.L.; 23 Digest (Repl.) 314, *3798*.

Cundy v. *Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; sub nom. *Lindsay & Co.* v. *Cundy*, 47 L.J.Q.B. 481, H.L.; 39 Digest 534, *1454*.

Appeal from a judgment of the Court of Appeal (Lord Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), [1912] 1 Ch. 451, reversing a judgment of Joyce, J., [1911] 2 Ch. 159, in favour of the appellants, the defendants in the action.

The action was brought for an injunction to restrain the appellants, who were pawnbrokers, from selling certain silver plate, and for a declaration that they had no right or title in or to the same, and for the return thereof to the respondents. The plate belonged to the residuary estate of the testator, Moses Solomon, and had been pledged by one of the executors of the will in his own name.

Alfred Abraham Solomon and the respondent Julien Davis Solomon were executors of the will of Moses Solomon, who died on Mar. 20, 1878. His will was proved on Oct. 30, 1878, and the residuary account was sent in in March, 1879 by the plaintiff J. D. Solomon, and was duly passed. In 1892 A. A. Solomon, who had possession of the plate, pledged it in his own name with the appellants for his own purposes, without the knowledge or consent of his co-executor. He died on Jan. 22, 1907, and the respondent Richard Chadwick was appointed trustee of Moses Solomon's will, the respondent J. D. Solomon being his co-trustee. In January, 1908, the pledging of the plate with the appellants was discovered, and they declined to give it up except on payment of the amount for which it had been pawned and interest, but undertook to withdraw it from sale and retain it pending this action. It was admitted that the appellants had taken the plate in good faith, in the ordinary way of business, and with no notice that it was not the absolute property of A. A. Solomon. In May, 1911, Joyce, J., gave judgment in favour of the appellants, and held that the executors of a testator, or any of them, might pledge any part of the personal estate without any limit of time. This

A decision was reversed by the Court of Appeal and the pawnbrokers appealed to the House of Lords.

Hughes, K.C., and *W. M. Cann*, for the appellants.
Younger, K.C., *Cozens-Hardy*, K.C., and *R. Turnbull*, for the respondents.

VISCOUNT HALDANE, L.C.—The facts out of which this litigation has arisen B lie in a small compass. The question is whether certain articles of silver plate, which were pledged by one A. A. Solomon to the appellants under a contract of pawn, were validly pledged. A. A. Solomon was one of the executors of the will of Moses Solomon, which was made in 1878. The testator appointed A. A. Solomon and J. D. Solomon to be the executors and trustees; and after giving certain pecuniary legacies the testator devised and bequeathed the residue of his C real and personal estate of every kind to his trustees upon trust for sale, payment of expenses, and division of the residue into four equal parts, two of which were settled. The will was duly proved, and very shortly after, in the next year, J. D. Solomon, the other executor, put in a residuary account. In so doing, as one of two executors has authority to act for both, he bound his co-executor. The account showed the particulars of the estate of the testator and that the debts D had been paid. It concluded with a declaration in which the executor stated that the account was a true account and that he offered to pay duty upon a balance of residue mentioned "to which I am entitled and intended to retain to my own use and for the use of Alfred Abraham Solomon, Harriet Wolff, and Sarah Levy," being the beneficiaries under the will. The only other point which I need mention is that in Mr. J. D. Solomon's evidence given at the trial he said that the debts E were all paid very shortly after the testator's death. The meaning of a residuary account must of course be construed with reference to its purpose. It is not a document which is intended to have the operation of a declaration of trust; but it may be looked at as against the executor as evidence of what he regarded as being the position of the estate. I think it plain from that document that Mr. J. D. Solomon regarded the debts as having been all paid and the estate as ready F to be held upon the trusts of the will which affected it in the hands of the trustees.

Having said so much, I will conclude the history of the case. The chattels which form the subject of the appeal were articles of silver plate which belonged to the testator, and they appear to have been left in the custody of A. A. Solomon. A. A. Solomon held them as custodian for the executors and trustees, and he retained possession of them till 1892, when he improperly pawned them with the appellants. G The latter had no knowledge of his position and dealt with him as an ordinary customer. He died afterwards, and it was subsequently discovered that the plate was pawned, and the respondents, being the trustees for the time being of the will, brought an action against the appellants to recover the articles pledged as having been pledged without any title on the part of A. A. Solomon to so deal with them. The action was tried before JOYCE, J., and he decided in the appellants' H favour, taking the ground that A. A. Solomon retained the powers of an executor notwithstanding the lapse of time, and was therefore in a position to pledge. There was an appeal to the Court of Appeal, and the Court of Appeal unanimously decided that JOYCE, J.'s, judgment was wrong. FLETCHER MOULTON, L.J., based his judgment on the ground that the executor had ceased to hold the plate as executor, and that the property in it had, from the date of the residuary account, I been in the trustees, so that there was no title to deal with these chattels which existed in A. A. Solomon in 1892.

I agree with that judgment. The real point is, I think, more simple than it was regarded as being by his colleagues in the Court of Appeal, and the question is largely one of fact. The general principles of law which govern the case are not doubtful. The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator which

vests in him the plenum dominium over the testator's chattels. He takes it by virtue of his office. The will becomes operative so far as its dispositions of personalty are concerned only if and when the executor assents to those dispositions. It is true that by virtue of his office he has a general power to sell or pledge for the purpose of paying debts and getting in the money value of the estate. He is executor and he remains executor for an indefinite time. Authorities were cited to us to the effect that an executor can sell at a period long after the death of the testator, and that where it is a question of conveyancing, as for instance in the case of the sale of leaseholds by the executor, the purchaser is not entitled to make requisitions as to whether debts remain unpaid, because the executor's office remains intact and he may exercise his functions at any time. That is true as a general principle, and I have no comment to make upon it except that it is qualified by another principle, which is this: The office of executor remains, with its powers attached, but the property which he had originally in the chattels which devolved upon him, and over which his powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dipositions of the will which have become operative because of his assent.

In view of the residuary account passed as it was and in the form in which it was, in view of the evidence of Mr. J. D. Solomon, and in view of the fourteen years which had passed after the testator died before the time when Mr. A. A. Solomon made the pledge to the appellants, in 1892, I am of opinion that the true inference to be drawn from the facts is that the executors considered that they had done all that was due from them as executors by 1879, and were content when the residuary account was passed that the dispositions of the will should take effect. That is the inference which I draw from the form of the residuary account; and the inference is strengthened when I consider the lapse of time since then, and that in the interval nothing was done by them purporting to be an exercise of power as executors. If this be so, this appeal must be disposed of on the footing that in point of fact the executors assented at a very early date to the dispositions of the will taking effect. It follows that under these dispositions the residuary estate including the chattels in question, became vested in the trustees as trustees. That they were the same persons as the executors does not affect the point, or in my opinion present the least obstacle to the inference. But if that was so, then the title to the silver plate of A. A. Solomon as executor had ceased to exist before he made the pledge of 1892.

What then was the position of the appellants? By the law of England the property in a chattel must always be in one person or body of persons. When the person who owns the chattel makes a pledge of it to a pawnbroker he is not purporting to part with the full property or giving anything which is in the nature of a title to that property to the pawnee except to a limited extent. The expression has been used that the pawnee in such a case has got a special property in the chattel. That is true in this sense, that the pawnbroker is entitled to hold the chattel upon the terms that when the possession has been lawfully given to him it is not to be taken away from him, and that if default is made in the redemption of the pledge, or it may be in the payment of interest, he may go further and by virtue of his contract, assuming it to be valid, sell the chattel. But the contract of pawn is simply an illustration of that contract of bailment of which HOLT, C.J., gave the famous exposition in the well-known case of *Coggs* v. *Bernard* (1); and it rests upon this foundation, that the property remains in the bailor, and that the bailee, whether it be a bailment by way of pawn or in any other form, simply takes at the outside a right to the possession dependent on the validity of the title of the bailor with the other rights possibly superadded to which I have referred. If that be true, upon no hypothesis did the appellants get a legal title to the

property in the plate. When A. A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees. The latter were the true owners and they are now in a position to maintain an action, which under the old forms would have been an action of trover or detinue, to recover possession of the chattels free from the restrictions on the right to reclaim possession which it was sought to impose by the contract between A. A. Solomon and the appellants. The property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A. A. Solomon, but in A. A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it.

A great deal of authority has been cited to us in the course of this case. It has been said, and with truth so far as the bare proposition goes, that persons dealing with executors have not got to inquire whether the debts are paid, and must assume that their powers are operative. Two of the learned judges in the Court of Appeal appear to have felt some concern over the question of the relevancy of that proposition. But the question which goes to the root of this case is one which renders such a proposition wholly beside the point. If I am right, there is no question here of an executor acting in the execution of his powers, so far as this residue is concerned. The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned, trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs virtute officii; and their right in rem, their title of property, had been transformed into a right in personam—a right to get the property back by proper proceedings against those in whom it might be vested if it turned out that they required it, for payment of debts for which they had made no provision. That right always remains to the executors, and they can always exercise it, but it is a right to bring an action, not a right of property, and not such a right as would enable such a pledge as this to be validly made. I have therefore arrived at the clear conclusion that at the time when the pledge to Messrs. Attenborough was made A. A. Solomon had no title in virtue of which he could make it, and that the respondents are therefore entitled to succeed in their action. I move that the appeal be dismissed.

LORD ATKINSON and **LORD SHAW** concurred.

Appeal dismissed.

Solicitors: *Stanley J. Attenborough; Cox & Lafone.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

TAFF VALE RAIL. CO. *v.* JENKINS

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Moulton), October 23, 1912]

[Reported [1913] A.C. 1; 82 L.J.K.B. 49; 107 L.T. 564; 29 T.L.R. 19; 57 Sol. Jo. 27]

Fatal Accident—Damages—Loss of pecuniary advantage—Deceased not earning at time of death—Reasonable expectation of earning in future and benefit to plaintiff—Fatal Accidents Act, 1846, (9 & 10 *Vict.*, *c.* 93), *s.* 1.

In an action under the Fatal Accidents Act, 1846 (Lord Campbell's Act), it is not necessary for the plaintiff to show that the deceased had been earning money and had contributed to the support of the plaintiff before the death, provided that there was a reasonable expectation of future pecuniary advantage to the plaintiff had the deceased lived.

A father sued in respect of the death of his daughter, who was killed by the admitted negligence of a railway company. It was proved that the deceased, who was living at home, was a strong, active, intelligent girl, aged sixteen; that she was apprenticed to a dressmaking business and was not earning anything at the time of her death, but that the term of her apprenticeship would have expired very shortly after the date of her death, and that then she would have been well qualified to earn money as a dressmaker.

Held: there was evidence to go to the jury of a reasonable expectation of pecuniary advantage to the father from the life of the deceased.

Notes. Under the Fatal Accidents Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 941), the classes of dependants who may claim under the Acts has been extended and provision made for excluding certain benefits in assessing damages.

Considered: *Berry* v. *Humm*, [1915] 1 K.B. 227; *Barrett* v. *Cohen*, [1921] All E.R. Rep. 528; *Baker* v. *Dangleish Steamship Co.*, [1922] 1 K.B. 361.

As to negligence causing death, see 28 HALSBURY'S LAWS (3rd Edn.) 34 et seq., 100 et seq., and for cases see 36 DIGEST (Repl.) 208 et seq. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Cases referred to:

(1) *Dalton* v. *South Eastern Rail. Co.* (1858), 4 C.B.N.S. 296; 27 L.J.C.P. 227; 31 L.T.O.S. 152; 4 Jur. N.S. 711; 6 W.R. 574; 140 E.R. 1098; 36 Digest (Repl.) 214, *1129*.

(2) *Bourke* v. *Cork and Macroom Rail. Co.* (1879), 4 L.R.Ir. 682; 36 Digest (Repl.) 213, **2032*.

(3) *Holleran* v. *Bagnell* (1879), 6 L.R.Ir. 333; 36 Digest (Repl.) 212, **2005*.

(4) *Franklin* v. *South Eastern Rail. Co.* (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur. N.S. 565; 6 W.R. 573; 157 E.R. 448; 36 Digest (Repl.) 213, *1128*.

Also referred to in argument:

Bramall v. *Lees* (1857), 29 L.T.O.S. 111.

Duckworth v. *Johnson* (1859), 4 H. & N. 653; 29 L.J.Ex. 25; 33 L.T.O.S. 274; 5 Jur. N.S. 630; 7 W.R. 655; 157 E.R. 997; 36 Digest (Repl.) 211, *1112*.

Condon v. *Great Southern and Western Rail. Co.* (1865), 16 I.C.L.R. 415; 36 Digest (Repl.) 213, **2026*.

Hull v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 289; 36 Digest (Repl.) 212, **2006*.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS and KENNEDY, L.JJ., FARWELL, L.J., dissenting) reported 106 L.T. 715, affirming a judgment of CHANNELL, J., in favour of the respondent, the plaintiff below, at Cardiff Assizes.

The respondent was the father of one Hannah Jenkins, deceased, and he sued on behalf of himself and of Annie Jenkins, the mother of Hannah Jenkins, deceased,

for damages caused to them by her death which resulted from injuries caused by the negligence of the appellants. The appellants admitted that the death was caused by the negligence of their servants or agents, but denied that the respondent or his wife had suffered any damage. Hannah Jenkins was within a very short time of completing her apprenticeship to the dressmaking business, and she was said to be exceptionally active and competent in that business, and likely to succeed. It was also shown that if she had remained in the employment of her present employers she would have earned wages beginning at 3s. or 4s. a week, and in a short time increasing, and in course of time rising to £2 a week, and that her earnings from pursuing her business on her own account would probably be greater. She had also rendered some assistance to her mother in her mother's shop, and had made some small earnings by dressmaking work for some of her neighbours in her spare time.

The learned judge ruled that there was evidence to go to the jury on the question of damages and the jury found a verdict for the plaintiff, and assessed the damages at £75, apportioning the same £50 for the father and £25 for the mother, and judgment was given in accordance with those findings.

B. Francis Williams, K.C., and Owen Beasley for the appellants.
Alan Macpherson, for the respondent, was not called on to argue.

VISCOUNT HALDANE, L.C.—This is an appeal from the Court of Appeal refusing a new trial, and affirming the judgment given by CHANNELL, J., after the trial of the action with a common jury at Cardiff. The appellants are a railway company who are responsible for an accident by which a girl, who was a daughter of the respondent, was killed. There is no question as to the liability of the company for negligence; the real question is a different one. The action is brought under Lord Campbell's Act by the father, on behalf of himself and the mother, for damages for the loss of the daughter. We have heard a good deal of authority cited as to what the foundation of such an action is, but I do not think that there is much difficulty in coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called solatium—that is to say, damages given for injured feelings, or on the ground of sentiment—but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in the statute or in any doctrine of law which is applicable; nor do I think that it is really established by the authorities when they are examined.

That being the state of the law, what were the facts? Hannah Jenkins, the daughter, resided with her parents. They lived in Glamorganshire, at a place called Trehafod, and Hannah Jenkins, who was, I think, sixteen years of age, used to go by train every day to Pontypridd, where she was in the employment of a firm of drapers and dressmakers, and was learning the business of dressmaking. She was an unusually intelligent girl, and though she was still an apprentice she was shortly coming out of her apprenticeship, and there is evidence that she had prospects of beginning before long to earn a remuneration which might quickly have become substantial. Then there is further evidence that she came to her parent's house at night, and that from time to time she gave them some assistance in the house; certainly there is material from which the jury might think that she might have given some assistance in the shop which her mother kept, which was a greengrocer's shop. The father was beginning to fail somewhat in health, he was, at all events, not so robust as in his younger days, and the jury may reasonably have taken the view that the amount of assistance which she would have given at home to her parents would have been considerable, and also that she might have carried on her own business as a dressmaker, and have earned

money. I refer to these things not with a view to examining the details of the evidence, because I protest against putting on a court of law what is the function of a jury. There is a line of demarcation between the function of the judge and the function of the jury in cases of this kind. When once you have got it that there was evidence to go to the jury, and that there was a principle on which they could proceed of taking into account any reasonably prospective pecuniary advantage to the parents, then, unless the verdict is so perverse and against the weight of evidence that it cannot stand, it is not for the court to interfere. In this case the jury had, as it seems to me, sufficient material before them upon which to find a verdict affirming the proposition that there was prospective pecuniary advantage to the parents of which they were deprived by the daughter's death.

When we come to the question of amount, I can only say that there again I think it impossible for a court to scrutinise minutely the verdict of a jury in arriving at a conclusion. We do not know what the jury took into account, but I can conceive many things which they may legitimately have taken into account. They may have thought that the value to these ageing parents of the prospective assistance of their daughter amounted in a pecuniary point of view to £75. They may have thought that without her they would have had to employ a servant, or to have got in some assistance. They may have thought that her earnings would have amounted to such a substantial sum that the loss within even a comparatively short period would have been such as should be measured by £75. I confess myself quite unable to speculate as to what was in the minds of the jury when they gave their verdict, nor do I see any reason why they might not have come to the conclusion to which they did come. I can well conceive cases, and there are instances of them in the books, in which the verdict given ought to be set aside because it was grossly contrary to the weight of evidence, but this case does not appear to me to be one of them.

For these reasons I am unable to agree with KENNEDY, L.J., and CHANNELL, J., in questioning the view which the jury have taken. As regards the judgment of the court below, I have already indicated that in my view the real question is that which WILLES, J., defines in *Dalton* v. *South Eastern Rail Co.* (1), which was quoted to us: "Aye or no, was there a reasonable expectation of pecuniary advantage?" FARWELL, L.J., makes a somewhat severe criticism upon the finding of the jury, and he appears to hold it established that in every case there has been found as the foundation and commencement of the action that the child was actually earning money, or earning money's worth. I think, when you read his judgment as a whole, that this seems to have been his view, and that, without something of that kind, the verdict is guesswork. I cannot agree with that conclusion on the part of the learned Lord Justice, a judge for whose opinion I always entertain a very great respect. I think that in this case he has taken too narrow a view of what the question for the jury ought to be and must be. These cases go to a jury because a jury is supposed to be cognisant of the conditions and standards of life among the persons concerned in a way in which no judge can be. I am far from saying that there may not be cases of this kind in which the verdict is so perverse that it ought not to stand, but I will only say that I find no sufficient indication that this has been the state of things in the case now under consideration. For these reasons I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN.—I agree.

LORD ATKINSON.—I concur. I think that it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that it must be an inference of fact; there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that two of the facts from which the inference must be drawn are, first, earning by the deceased in the past, and, secondly, contribution by the

deceased. Those are no doubt pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can, I think, be drawn from circumstances other than and different from these. With regard to the amount of compensation, I understand a rough rule for setting aside a verdict on the ground of excessive damages where the court cannot see any reasonable proportion between the amount awarded and the injury done; but I think that in this case it is absolutely impossible to say that there was no reasonable proportion between the sum of £75 and the prospective loss which the parents of this unfortunate girl have sustained. For these reasons, as well as for those mentioned by the Lord Chancellor, I think that the verdict of the jury cannot be disturbed, and that the appeal ought to be dismissed.

LORD SHAW.—I agree with the judgments which have been delivered. The learned counsel for the appellants did not dispute that there would be a title to damages under Lord Campbell's Act to the parents of a child from whose prospective earnings they had a reasonable expectation of profit, if such reasonable expectation were destroyed by the child's death caused by the fault of the defendants. But he said that this could only happen if the person so killed in this case the daughter, was actually earning money or contributing to the support of the plaintiff, at the time of her death. That condition, so set up as precedent to the recovery of damages, is not, in my opinion, justified by law.

This is a case not at all singular; indeed, it is quite typical. A son or daughter may be educated for a business the apprenticeship to which yields money, and the wages in such a business are generally on a humble scale. He or she may, on the other hand, be educated in a trade or in a profession in which the training or apprenticeship is not one which yields any profits at all, but the reward in it afterwards is much greater, probably in consequence of the exclusion of competition by reason of the period of unpaid probation. In such a case the parents stand the charge during the whole apprenticeship or training of the child, and just as that education is about to close the life is cut off. As I said, the present case is not a singular one, but it is typical of those circumstances in which there is a reasonable expectation of profit, because it is on account of the expectation of profit, and probably of profit on a higher scale, that this mode of education, upbringing, and training of the child has been pursued. I asked counsel in vain in the course of the case to distinguish an expectation in such a situation in principle from the ordinary expectation in the case of wages being earned at the time, but I have not been able to obtain an answer; and in principle there is no answer. In the one case as in the other the reasonable expectation of profit is destroyed, and whether there was earning at the time or earning only in prospectu it does not appear to me to affect the question of principle.

But the learned counsel for the appellants did refer to two authorities from Ireland on the subject. In the two cases to which he referred, *Bourke* v. *Cork and Macroom Rail. Co.* (2), and *Holleran* v. *Bagnell* (3), dicta were pronounced which were not necessary as rationes decidendi, but are entitled to much consideration and respect. One was an observation by DOWSE, B., in *Bourke* v. *Cork and Macroom Rail. Co.* (2), in which, referring to cases of this kind, he said (4 L.R.Ir. at p. 687):

> "The plaintiff must fail, unless he established by evidence that there was in existence, at the time of the death of his son, a state of facts in connection with him, out of which a pecuniary advantage arose, or had formerly arisen, and was likely again to arise to the father, and the continuance or renewal of which pecuniary advantage to the father might have been reasonably expected had his son not been killed."

That postulates the actual receipt of income by the son and the sharing of the profit of that income by the parent. There is no actual decided case in the books to this effect, and the dictum is, in my humble opinion, erroneous. Such a

postulate does not appear to me to be in accordance with the true principle which was laid down in the case of *Franklin* v. *South Eastern Rail. Co.* (4) by POLLOCK, C.B., where he simply put the broad proposition that the basis of such an action lay in pecuniary loss actual or expected, or, according to another expression used by that very learned judge, the destruction of a reasonable expectation of pecuniary benefit. I will only say further with regard to that case that I think it a strong authority for the course which your Lordships are now pursuing, because, although in that case there was actual benefit—that is to say, there was an actual earning of income to a small extent on the part of the deceased at the time—the learned Chief Baron went out of his way to make the remark that he would not say, in determining the question of principle, that such actual benefit should be received at the time. Another dictum has been cited of LORD MORRIS, C.J., in *Holleran* v. *Bagnell* (3). He observed (6 L.R.Ir. at p. 335):

> "The loss must be a pecuniary loss, actual or reasonably to be expected, and not as a solatium."

Had the sentence stopped there we should all, I presume, have agreed with it; but he proceeded,

> "and there should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death."

With the utmost respect, I do not think that that is the law. I need not say, however, that in accordance with settled law and practice under Lord Campbell's Act the application of the principle now affirmed does require to be accompanied by this further consideration—that in all these cases, while reasonable expectation with regard to future earning is a ground for consideration, on the other hand the point of solatium, and any award on that ground, must be excluded from the verdict of the jury.

LORD MOULTON.—I concur. Putting it in plain language, the appellants by their motion for judgment ask this House to find as a matter of law that parents in such a position of life as those in this case cannot have any reasonable expectation of pecuniary advantage in the future from the earnings of an exceptionally sharp and competent girl of sixteen, who had practically finished her education as a dressmaker, unless she had actually contributed to the expenses of the family in the past. Such a proposition appears to me only to need statement in order to ensure rejection. The fact of past contribution may be important in strengthening the probability of future pecuniary advantage, but it cannot be a condition precedent to the existence of such a probability. This is especially evident where, as in the present case, the non-contribution is fully accounted for by the fact that the deceased had been devoting her time to preparing herself for skilled work in the future, to the exclusion of immediate earnings; and her not having contributed in the past does not, therefore, militate in any way against that willingness to assist her parents which the jury here might reasonably find.

Appeal dismissed.

Solicitors: *Williamson, Hill & Co.*, for *Ingledew & Sons*, Cardiff; *Billing & Co.*, for *A. J. Evans*, Pontypridd.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

WILL *v.* UNITED LANKAT PLANTATIONS CO., LTD.

[House of Lords (Viscount Haldane, L.C., Earl Loreburn, Lord Atkinson and Lord Kinnear), October 27, 1913]

[Reported [1914] A.C. 11; 83 L.J.Ch. 195; 109 L.T. 754; 30 T.L.R. 37; 58 Sol. Jo. 29; 21 Mans. 24]

Company—Dividend—Preference shares—Right to preferential dividend at rate of ten per cent.—Surplus profits after payment of preferential and ordinary dividends—Rights of preference shareholders to participate in surplus profits.

The articles of association of a company provided that subject to any priorities that might be given upon the issue of any new shares, the profits of the company declared by the board to be payable as a dividend should be distributed among the members in accordance with the amounts paid on their shares. At a general meeting of the company a resolution was passed providing that the capital of the company be increased by the creation of preference shares, the holders of which should be entitled to a cumulative preferential dividend of ten per cent. per annum, and that such shares should rank both as regards capital and dividend in priority to the other shares.

Held: the holders of the preference shares were only entitled to a cumulative preferential dividend of ten per cent. per annum, and were not entitled to rank pari passu with the ordinary shareholders against any surplus profits available for distribution after payment to both the preference and ordinary shareholders of the dividends to which they were entitled.

Decision of the Court of Appeal, [1912] 2 Ch. 571, affirmed.

Notes. Considered: *Re National Telephone Co.*, [1914] 1 Ch. 755; *Collaroy Co.* v. *Gifford*, [1927] All E.R. Rep. 346; *Re Isle of Thanet Electric Supply Co.*, [1949] 2 All E.R. 1060. Referred: *Re Fraser and Chalmers, Ltd.*, [1918–19] All E.R. Rep. 756; *Anglo-French Music Co.* v. *Nicoll*, [1921] 1 Ch. 386; *Steel Co. of Canada* v. *Ramsay*, [1931] A.C. 270; *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co.*, [1949] 1 All E.R. 1068.

As to preference shares, see 6 Halsbury's Laws (3rd Edn.) 139–140, and for cases see 9 Digest (Repl.) 639–641.

Cases referred to in argument:

Re Bridgewater Navigation Co. (1887), 39 Ch.D. 1; 57 L.J.Ch. 809; 58 L.T. 476; 36 W.R. 769; on appeal sub nom. *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391.*

Re Espuela Land and Cattle Co., [1909] 2 Ch. 187; 78 L.J.Ch. 729; 101 L.T. 13; 16 Mans. 251; 10 Digest (Repl.) 1069, *7410.*

Henry v. *Great Northern Rail. Co.* (1857), 1 De G. & J. 606; 4 K. & J. 1; 27 L.J.Ch. 1; 30 L.T.O.S. 141; 3 Jur. N.S. 1133; 6 W.R. 87; 44 E.R. 858, L.C. & L.JJ.; 10 Digest (Repl.) 1247, *8793.*

Appeal from an order of the Court of Appeal reversing and discharging the judgment of Joyce, J.

The question for decision related to the extent to which the preference shareholders of the respondent company were entitled to participate in the annual profits of the company and depended upon the construction of certain of the company's articles of association and of the resolutions of the company which were passed on July 13, 1891, creating the preference shares. The company was incorporated on Mar. 20, 1889, under the Companies Acts, 1862–1888, as a company limited by shares for (among other purposes) the purpose of carrying on the business of growers and manufacturers of tobacco and other products in the Island of Sumatra. Clause 5 of the memorandum of association provided as follows:

"The capital of the company is £400,000 divided into 400,000 shares of £1 each with power to increase. The shares forming the capital (original or increased) of the company may be divided into such classes with such preferences and other special incidents and be held on such terms as may be provided by the articles of association and regulations of the company for the time being."

The material articles of association of the company provided as follows:

"42. The board may with the sanction of a general meeting of the company from time to time increase the capital of the company by the issue of new shares. 43. Such new shares shall be of such amount, and shall be issued for such consideration, on such terms and conditions and (subject to the provisions hereinafter contained as to the consent of the holders of any class of shares where such consent is necessary) with such preference or priority as regards dividends or in the distribution of assets, or as to voting or otherwise over other shares of any class, whether then already issued or not, or as shares to be deferred to any other shares with regard to dividends or in the distribution of assets as the company in general meeting may direct, and subject to, or in default of any such direction, the provisions of these articles shall apply to the new capital in the same manner in all respects as to the original capital of the company. . . . 113. The board may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies or for equalising dividends, or for repairing or maintaining any property of the company, or for any other purposes of the company, and the same may be applied accordingly from time to time in such manner as the board shall determine, and may without placing it to reserve carry over any profits which they think it not prudent to divide. 114. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits but no larger dividend shall be declared than is recommended by the board. 115. Subject to any priorities that may be given upon the issue of any new shares the profits of the company available for distribution (having regard to the provisions hereinbefore contained as to a reserve fund) shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively. . . . 127. If upon the winding-up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital the excess shall be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

Shortly after the incorporation of the company 206,325 ordinary shares of £1 each were issued and fully paid up . The company duly commenced and carried on business, but in consequence of a severe crisis in Sumatra plantation affairs in 1891, in June of that year it became necessary to raise further capital and the directors resolved to avail themselves of the powers conferred by arts. 42 and 43 of the company's Articles of Association and to increase the capital of the company by the issue of new shares having priority as regards dividend over the original paid up shares issued by the company. Accordingly at an extraordinary general meeting of the company held on July 13, 1891, the following resolutions proposed by the directors were duly passed:

A "(i) That the capital of the company be increased to £450,000 by the creation of 50,000 new shares of £1 each:

(ii) That the new shares be called preference shares and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such preference shares rank, both as regards capital and dividend, in B priority to the other shares."

In pursuance of these resolutions the company issued 20,000 fully paid preference shares, and of these shares the plaintiff was the registered owner of 419.

On July 19, 1910, this action was commenced by the plaintiff on behalf of himself and all other preference shareholders of the defendant company against the defendant company and the defendant, H. H. Nelson, who was a director C and ordinary shareholder of the company and who by an order dated Dec. 5, 1910, was appointed to represent the ordinary shareholders of the company. The object of the action was (among other things) to obtain a declaration as to the rights of the preference shareholders in regard to the distribution of the profits under the original articles of association and the resolutions creating the preference shares, and this question was the only question that arose on this appeal. The action came D on for trial before JOYCE, J., in March, 1912, and his Lordship made a declaration that upon the true construction of the resolutions creating the preference shares and the articles of association with which the company was registered the preference shares ranked for dividend pari passu with the ordinary shares against any profits of the company available for a distribution as dividend after providing for a cumulative preference dividend of ten per cent. per annum on the preference E shares and also a dividend of ten per cent. per annum on the ordinary shares and that no valid or effectual alteration had ever been made in respect of the dividend rights attached to the preference shares. An appeal from this decision was heard in July, 1912, before COZENS-HARDY, M.R., and FARWELL and KENNEDY, L.JJ., and was allowed, the judgment of JOYCE, J., being discharged. The Court of Appeal declared that upon the true construction of the resolutions creating the preference shares and of the articles of association with which the F company was registered the holders of the preference shares of the company issued pursuant to such resolutions were entitled to receive a cumulative preferential dividend at the rate of ten per cent. per annum on the amount for the time being paid on such shares in priority to any dividend on the ordinary shares of the company and were entitled to no further share or participation in the profits of the G company whilst a going concern.

From this decision the plaintiff appealed to the House of Lords.

Sir Robert Finlay, *K.C.*, *T. B. Morison*, *K.C.*, and *A. Shaw* for the appellant.

Upjohn, *K.C.*, *Gore-Browne*, *K.C.*, and *H. E. Wright* for the respondents.

H **VISCOUNT HALDANE, L.C.**—This appeal raises a question of great interest from a business point of view, but it is difficult to see how it can be said to raise any question of general legal principle. The point in dispute is one of construction, and construction must always depend on the terms of the particular instruments; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority I has been cited in the course of the argument and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us.

The action was brought by the appellant to obtain a declaration, and this is the only substantial point before the House, that the preferential shares which have been issued were entitled to rank for dividend pari passu with the ordinary shares of the company as against any profits of the company available for distribution as

dividend after providing for a cumulative preferential dividend of ten per cent. on the preference shares and a dividend of ten per cent. on the ordinary shares. That was the claim and that was the point of controversy between the parties. To see how the question so raised ought to be answered, it is necessary to turn to the documents which constituted the company. There is nothing special in the memorandum of association, but the articles contain provisions which are very material. [His Lordship read arts. 42 and 43.] Pausing there, your Lordships will observe that the company in general meeting is to give a direction which is to be carried out by the board as to the terms and conditions on which the new capital is to be issued and as to the preference and priority with regard to dividends, distribution of assets, and so on, which may be attachable to the shares. That is the authority under which these shares were issued, and the only other articles that I propose to refer to are arts. 113, 114, and 115. Article 113 enables the board to set aside out of the profits of the company a reserve fund. [His Lordship read art. 114.] Article 115 is the article mainly relied upon by the appellant in this case. That I read as the provision which is directed to the duty of the company in the distribution of the surplus profits remaining after the reserve fund has been set aside. It prescribes that what remains should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively. But that is subject to any priority that may be given on the issue of any new shares, and it is also obviously subject—there is no controversy about its being so subject—to the paramount provisions of art. 43 which declare the powers of the company and of the board to define the terms and conditions upon which new shares may be issued; and it is to art. 42 that one must turn for the authority for the resolutions which were passed at a general meeting of the company on July 13, 1891, and which gave rise to the issue of the new shares. [His Lordship read the resolutions, and continued:]

Your Lordships will observe that that resolution gave the authority to make the bargain and defined the terms which the bargain was to contain. A shareholder comes to the company and says: "I wish to contract with you for a share in your capital and so to become a shareholder." He advances his money and the terms are contained in the bargain that is made between him and the company on the issue of the share to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of ten per cent. on the amount paid upon his share and that his preference share is to rank both as regards capital and dividend in priority to other shares. I should have thought that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced, saying: "You are to have a cumulative preferential dividend of ten per cent.," or whatsoever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point. You do not look outside a document of this kind in order to see what the bargain is, you look for it as contained within the corners of the document, and although it is quite true that art. 115 provides that

> "subject to any priorities that may be given upon the issue of any new share, the profits of the company available for distribution (having regard to the provisions hereinbefore contained as to a reserve fund) shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively"

the real question is whether the articles have been silent as to the terms of distribution. If I am right, the resolution was passed under the powers contained in art. 43, and that defined the whole terms of the bargain between the shareholders and the company, and there is no room for saying that the general provisions of art. 115 operate in a fashion in which they can only operate if the matter is not covered by express provision.

I think that Farwell, L.J., called attention to what is really a cardinal consideration in this matter. Shares are not issued in the abstract and priorities then attached to them; the issue of shares and the attachment of priorities proceed uno flatu. When you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue; and when you do find these things prescribed it appears to me unnatural to go beyond them, and to look to the general provisions of an article which is only to apply if nothing different is said. Moreover, I think that when you find—as you do find here—the word "dividend" used in the way in which the expression is used in the resolution and defined to be, "a cumulative preferential dividend," you have something so definitely pointed to as to suggest that it contains the whole of what the shareholder is to obtain from the company, and I think that is borne out by the concluding words of the resolution of July 13, 1891, to which I have just referred, namely, that the preference shares are to rank "both as regards capital and dividend in priority to the other shares." That is appropriate when the provision is for a cumulative preferential dividend at a fixed amount such as I have stated. It is not a natural expression if the rights are to be such as the appellant has asked us to infer.

This case, as I have said, is a case of importance, and if I thought that by taking time I could have come to any other conclusion than the one at which I have arrived, I would have asked your Lordships to postpone giving your opinions. But my own mind is quite clear upon the subject. I think the Court of Appeal were right and that Joyce, J., was wrong, and I, therefore, move that the appeal be dismissed with costs.

EARL LOREBURN.—I am entirely of the same opinion. The question is whether this resolution in the light of the articles means that the preference shareholders were to have simply the dividend as there described in the resolution, or does it mean that they are to receive something more because of their character of being shareholders.

I repel the idea that any light can be thrown upon the construction of this particular resolution by considering language that was used, whether by way of decision or of conjecture, in the construction of perfectly different language by other judges in different cases. There is nothing more unfortunate than the tendency which appears to influence some minds that you can attain to certainty in the interpretation of one set of sentences by considering the analogy of other different sentences. I also deprecate the idea that you can safely lay down canons of construction for the interpretation of contracts beyond the familiar canons which have been considered and laid down long ago, such, for example, as those which govern the interpretation of Acts of Parliament. In my humble opinion you must construe the language of a contract as it stands, making allowance for the use of words which are words of art or which have been actually construed as they stand by courts of law. I have no doubt in regard to this particlar resolution, that the people who took the preference shares under it knew perfectly well that they were taking shares with a preferential dividend of ten per cent. I think they would have been rather surprised, although no doubt they would have been gratified, if they had been told that they were about to receive the almost boundless additional advantages which have been held out to them in the arguments we have been hearing. This is really an attempt to add to the terms of the contract by screwing something out of the articles which the framers of the contract I do not believe ever thought of. At all events, they have stated their contract, and I think it speaks for itself upon this particular subject and ought not to be added to.

LORD ATKINSON.—I concur. I think if one had to construe the second of these resolutions one would naturally come to the conclusion that the dividend prescribed was the only dividend the shareholder was to receive. It is said that

the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that effect. I therefore think that the decision of the Court of Appeal was right and should be upheld.

LORD KINNEAR.—I am entirely of the same opinion.

Solicitors: *Coward & Hawksley, Sons & Chance; Ashurst, Morris, Crisp & Co.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

WALTERS *v.* W. H. SMITH & SON, LTD.

[King's Bench Division (Sir Rufus Isaacs, C.J.), November 8, December 3, 1913]

[Reported [1914] 1 K.B. 595; 83 L.J.K.B. 335; 110 L.T. 345; 78 J.P. 118; 30 T.L.R. 158; 58 Sol. Jo. 186]

Arrest—Arrest without warrant—Arrest by private person—Suspicion of felony—Sufficiency of "reasonable and probable cause" for suspicion—Need to prove commission of particular felony.

A private person cannot in an action for false imprisonment justify the arrest of another on suspicion of having committed a felony unless he proves that the particular felony in respect of which he arrested such person was in fact committed. It is not sufficient for him to prove that other felonies of a similar kind had previously been committed and that he had reasonable and probable cause for suspecting that the person whom he has arrested had committed those felonies.

Notes. Considered: *Christie* v. *Leachinsky*, [1947] 1 All E.R. 567; *Tims* v. *John Lewis & Co.*, [1951] 1 All E.R. 814. Referred: *Clubb* v. *Wimpey & Co.*, [1936] 1 All E.R. 69; *Diamond* v. *Minter*, [1941] 1 All E.R. 390; *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; *Dumbell* v. *Roberts*, [1944] 1 All E.R. 326.

As to arrest without warrant, see 10 Halsbury's Laws (3rd Edn.) 342 et seq., and for cases see 14 Digest (Repl.) 194 et seq.

Case referred to:

(1) *Beckwith* v. *Philby* (1827), 6 B. & C. 635; 9 Dow. & Ry. K.B. 487; 4 Dow. & Ry. M.C. 394; 5 L.J.O.S.M.C. 132; 108 E.R. 585; 14 Digest (Repl.) 195, *1601.*

Also referred to in argument:

Atkinson v. *Warne* (1834), 6 C. & P. 687, N.P.; 22 Digest (Repl.) 43, *246.*

Mure v. *Kaye* (1811), 4 Taunt. 34; 128 E.R. 239; 14 Digest (Repl.) 196, *1611.*

Stammers v. *Yearsley* (1833), 10 Bing. 35; 3 Moo. & S. 410; 2 L.J.C.P. 256; 131 E.R. 818; 43 Digest 441, *695.*

Timothy v. *Simpson* (1835), 1 Cr. M. & R. 757; 3 Nev. & M.M.C. 127; 5 Tyr. 244; 4 L.J.M.C. 73; 4 L.J.Ex. 81; 149 E.R. 1285; 14 Digest (Repl.) 198, *1636.*

Sewell v. *National Telephone Co., Ltd.*, [1907] 1 K.B. 557; 76 L.J.K.B. 196; 96 483; 23 T.L.R. 226; 51 Sol. Jo. 207, C.A.; 43 Digest 447, *757.*

Cowles v. *Dunbar and Callow* (1827), 2 C. & P. 565; Mood. & M. 37, N.P.; 14 Digest (Repl.) 195, *1599.*

Allen v. *Wright* (1838), 8 C. & P. 522, N.P.; 14 Digest (Repl.) 195, *1603.*

King and King v. *Metropolitan District Rail. Co.* (1908), 99 L.T. 278; 72 J.P. 294, D.C.; 14 Digest (Repl.) 206, *1705.*

Further Consideration by Sir Rufus Isaacs, C.J., of an action tried before him with a jury.

The action was brought by the plaintiff against the defendants to recover damages for malicious prosecution and false imprisonment. At the trial the learned judge ruled that there was not an absence of reasonable and probable cause for the prosecution, and that, therefore, the plaintiff failed as to the claim for malicious prosecution, so that the only question now was whether the plaintiff was entitled to succeed on his claim for false imprisonment.

Clavell Salter, K.C., and *Daldy* for the defendants.
St. John Hutchinson for the plaintiff.

Cur. adv. vult.

Dec. 3, 1913. **SIR RUFUS ISAACS, C.J.,** read the following judgment.—The plaintiff's action is for damages for false imprisonment and malicious prosecution. It was tried by me with a jury, to whom I submitted questions, and who made answer as follows: (i) Did the defendants take reasonable care to inform themselves of the true facts of the case?—Yes. (ii, a) Did the defendants honestly believe that the plaintiff had stolen the book called Traffic?—Yes. (ii, b) Did the defendants reasonably believe that the plaintiff had stolen moneys and stock (other than the book called Traffic) from the bookstall?—Yes. (iii) Were the defendants in instituting the criminal proceedings actuated by malice?—No. (iv) What damages for false imprisonment?—£75. I ruled that there was not an absence of reasonable and probable cause for the prosecution. Thus the plaintiff failed, and the defendants succeeded, upon the claim for malicious prosecution, and this left the claim for false imprisonment. During the trial it was contended by the plaintiff that as the defendants admitted that no felony had in fact been committed in respect of the book Traffic there was no defence to the claim based upon false imprisonment. The defendants contended that all that they need establish as legal justification for the imprisonment was (i) that an actual felony or felonies had been committed, and (ii) that they had reasonable and probable cause for suspecting the plaintiff of having committed an actual felony or felonies; in other words, it was argued for the defendants that it was not essential to their defence to prove that the felony for which the plaintiff was arrested had in fact been committed. In order to give the defendants the opportunity of raising this point of law I left question (ii, b) to the jury, which was answered in favour of the defendants. Both parties claimed judgment upon the verdict of the jury.

It was agreed by counsel for the parties that I should be at liberty to find any further facts which might become necessary. So far as they are material to the questions now raised the facts are these. The plaintiff was, and had been for some nine years, in the employment of the defendants as assistant-manager at a bookstall at the King's Cross Railway Station of the Great Northern Railway, where some five other persons were also employed under a manager. Early in 1912 it was discovered at the usual half-yearly stocktaking that there was a deficiency of £126, which pointed to dishonesty and thefts by one or more of the defendants' servants. Stock was again taken in February, when the deficiency was £154, and again in April, 1912, when it was £148. Such a deficiency was inexplicable except upon the basis that money or stock, or both, had been stolen; probably only money was taken, but it might well be that stock also had been stolen. It is clear, and indeed it was not, and could not be, disputed by the plaintiff at the trial, that a felony, or more probably a series of felonies, had been committed which caused the deficiency, and it was unlikely that they could have been committed otherwise than by a person employed by the defendants at this bookstall. The defendants in order to detect the culprit, acting upon advice, thereupon set what was called "a trap." Copies of a book called Traffic were marked and delivered to the bookstall at King's Cross. An agent of the defendants went to a shop at Staines kept by the plaintiff and his wife, where magazines and newspapers were sold,

to purchase a copy of TRAFFIC. On a later day he called, and one of the marked copies was sold to him in exchange for the price which he then paid. The book had been taken away on June 15, 1912, by the plaintiff from the bookstall without payment having been made, and without the knowledge of the manager or other assistants at the bookstall. These facts when ascertained were, on June 19, duly reported to Mr. Kimpton, a manager of one of the defendants' departments, to whom the elucidation of the mystery had been intrusted. In addition, and as the result of inquiries, it was discovered that the plaintiff in various respects had acted in contravention of the practice which regulated his employment by the defendants, and which he knew he was bound to observe, and that in particular he, with his wife's assistance, had commenced, and was carrying on, a business where newspapers and magazines and, occasionally, books were sold. All these facts were thereupon reported to Mr. Hornby, one of the members of the defendant firm. The plaintiff was asked into the room, and in answer to questions made statements which were of a very unsatisfactory character, and wholly failed to give an explanation of his possession of the book. Mr. Hornby honestly believed that the plaintiff had stolen the book, and that the plaintiff had stolen from the bookstall the money or books which had caused the deficiency, and at the end of the interview Mr. Hornby gave the plaintiff into the custody of Sergeant Budge, who had been employed in the matter as a detective officer. The plaintiff was taken to the police court and charged with stealing the book. He was committed for trial, and was eventually tried and acquitted. The defence was that in taking the book he had no felonious intent, and the jury accepted this. At the hearing before me it was admitted by the defendants that the plaintiff had not stolen the book, but had taken it away with the intention of subsequently accounting or paying for it, and no imputation now rests upon him in connection with this transaction, and no suggestion is made against him of being party to the acts of theft or dishonesty which caused the deficiency. Having regard to the facts proved, I have no doubt that the defendants had reasonable and probable cause for suspecting the plaintiff of having stolen the money or books other than the book TRAFFIC when they gave the plaintiff into custody. I further find as a fact that the plaintiff was given into custody for stealing the book TRAFFIC, and that although the defendants, when they caused his arrest, were convinced that the man who stole the book was also guilty of the other thefts, they did not cause his arrest for these other thefts, but only for that theft of which they thought they had clear evidence. Doubtless they were influenced to this course by the suspicion, and indeed conviction, in their minds that the plaintiff had committed the other thefts. It induced them to give him into custody for stealing the book, whereas otherwise they might merely have summoned him or, indeed, might not have prosecuted him.

If as a matter of law the defendants must prove that the particular felony for which the plaintiff was imprisoned had in fact been committed, they have failed in their defence, as no felony with regard to TRAFFIC had in fact been committed. If as a matter of law the defendants may justify the imprisonment by proof that at the time of the arrest of the plaintiff the felonies had been committed other than that for which he had been arrested, and that they had reasonable and probable cause for suspecting the plaintiff of having committed them, they would be entitled to succeed. That is the precise question for decision and one which, so far as I am aware, has never been expressly decided. It was strenuously argued before me by the defendants that in ordering the arrest of the plaintiff they had only caused such an interference with his liberty as was necessary to put matters in train for judicial inquiry, and that the charge subsequently formulated against the plaintiff in the legal proceedings should not be regarded in the claim for false imprisonment. I cannot accept that view, for it became quite clear during the case, and I have found, that the plaintiff was arrested for stealing the book, and I must deal with the case upon that basis. Interference with the liberty of the

A subject, and especially by a private person, has ever been most jealously guarded by the common law of the land.

At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed, although it afterwards appears that no felony had been committed, but that is not so when a private person makes or causes the arrest, for, to justify his action, he must prove, among other B things, that a felony has actually been committed: see *Beckwith* v. *Philby* (1), per Lord Tenterden, C.J. I have come to the conclusion that it is necessary for a private person to prove that the same felony had been committed as that for which the plaintiff had been given into custody. In Hawkins' Pleas of the Crown (7th Edn.), vol. 2, ch. 12, ss. 17, 18, the law is thus stated:

C "As to the fourth particular, namely, in what manner an arrest for such suspicion is to be justified in pleading . . . It seems certain that . . . regularly he ought expressly to show that the very same crime for which he made the arrest was actually committed."

In Hale's Pleas of the Crown, vol. 2, ch. 10, s. 78, third case, the law is thus stated:

D "There is a felony committed, but whether committed by B. or not, non constat, and, therefore, we will suppose that in truth it were not committed by B., but by some person else, yet A. hath probable causes to suspect B. to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable, and the reason is because if a person should be punished by an action of trespass or false imprisonment for an arrest of a man for felony under these E circumstances, malefactors would escape to the common detriment of the people. But to make good such a justification of imprisonment, 1 there must be, in fact, a felony committed by some person, for were there no felony there can be no ground of suspicion. Again, 2 the party (if a private person) that arrests must suspect B. to be the felon. 3 he must have reasonable causes of such suspicion, and these must be alleged and proved."

F In quoting as I do that statement of the law by a very distinguished and celebrated Lord Chief Justice I lay particular stress upon his reference to what it is necessary to prove as a justification of imprisonment although the language may be in this connection a little ambiguous. It is under the second head, "The party (if a private person) that arrests must suspect B. to be the felon." I take that to mean that the person must suspect B. to be the felon who has committed the felony for G which the person has arrested B., and in order that there should be no doubt about it I have considered the authorities which were quoted both in Hale's Pleas of the Crown and Hawkins' Pleas of the Crown, and I find, particularly in Pulton's De Pace Regis et Regni, at pp. 12, 13, in the edition of 1609, that the law is thus stated:

H "Suspicion only without a felony committed, is no cause to arrest another. But if a felony be done in those parts, and one doth suspect another to have committed the same felony, then he may arrest him."

That is referred to in Hawkins' Pleas of the Crown, and reference is also made to Finch's Law, which is a book written by Sir Henry Finch in the time of Charles I., and, quoting from p. 340 of an edition which was printed in 1759, I I find this as a statement of the law:

"Neither can any man arrest one for a trespass unless it be the constable; nor for a felony except himself suspect the party (though he doth it by the condonement of one that doth suspect him) and that the same felony be indeed committed."

He refers for this purpose to Year Book, 11 Edw. 4, 4, and also to Hawkins' Pleas of the Crown (7th Edn.), vol. 2, ch. 12, s. 18, the section to which I have referred.

The case which is nearest to the one which we are at present considering is in the YEAR BOOK of 27 Hen. 8 at p. 23, where the plea was that divers cattle were stolen, and the defendant suspected the plaintiff of stealing six cattle. That plea was held bad on the ground that the defendant must prove that the thing which he suspected the plaintiff of stealing was in fact stolen. It is not the precise case here, but it is the nearest, at any rate that I have been able to find. Counsel for the plaintiff also quoted DALTON'S COUNTRY JUSTICE, where it is said (1697 Edn.) at p. 448:

> "The party that shall arrest such suspected person, must have a suspicion of him himself and for the same felony, or arrest or otherwise suspicion generally is no cause to arrest another."

It was argued that the words "suspicion generally" mean that suspicion of other felonies which had in fact been committed would be no justification for arrest in a civil action. I am not satisfied that that is the true meaning to be given to those words. I think they can be quite justified by the explanation that a general suspicion of a person, although a felony had not been committed, would be enough, as indeed it would be in the case of a police constable in the circumstances to which I have adverted. But the other words are precise—that is to say, that the party who shall arrest a suspected person must have a suspicion of him and for the same felony. I doubt very much whether that statement in DALTON'S COUNTRY JUSTICE really carries the case any further. I mention it because much reliance was placed upon it by Counsel for the plaintiff.

I was also referred to a more modern authority namely, BULLEN and LEAKE'S PRECEDENTS OF PLEADING (3rd Edn.) (1868). This authority was produced by the defendants for another purpose, to which I will refer in a moment, but in the note at p. 795 I find the law thus stated:

> "A private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it"

—that means the felony for which he has been arrested. I doubt whether the two cases cited are in themselves a sufficient authority for the proposition there laid down, but I am satisfied that, as indeed one would expect to find in this very learned work, it is an accurate statement of the common law. I cannot find that any doubt has ever been expressed as to the accuracy of this proposition. I was referred by counsel for the defendants to CHITTY ON PLEADINGS, vol. 3, pp. 333 and 334, which contain a plea in bar in an action for trespass, and no doubt it is quite right to say that there the plea was in terms that the arrested person was given into custody for the purpose of setting on foot a judicial inquiry or legal proceeding, and that point was very persistently and very ably argued before me. For the reason I have already given I do not think that in this case it assists the defendants, as I am quite convinced that the dominant intention in the minds of the defendants, as was shown by the fact of the arrest, was to give the plaintiff into custody for having stolen the book, and not merely for the purpose of setting on foot a judicial inquiry or for formulating subsequently the charges upon which he was arrested. I think on reference to that plea it will be found that it does not support, or at least does not assist in, this case because you will find in the pleas in all the old books on pleading that there is such a statement as counsel for the defendants argued must be found, that is, in substance that the plaintiff had been given into custody for the purpose of setting on foot a judicial inquiry, for were it otherwise there could be no justification for the arrest, and no private person would be justified in detaining a person in his own room or in his own house merely for the purpose of detention or punishment, but his only justification, given the other circumstances to which I have referred, must be that he did it for the purpose of setting on foot a judicial inquiry. It is only by means of judicial process that the arrest can otherwise be

justified. The mere fact of arrest without setting on foot a judicial inquiry could not be justified. It is in that connection that reference was made to the pleas in Bullen and Leake's Precedents of Pleading (3rd Edn.) which I have quoted.

I have considered the authorities cited by counsel for the plaintiff, but I do not think that they really assist. It is admitted on both sides that there is no authority precisely in point; one gets close to it, no doubt, in a number of cases, but I do not think that any real assistance is derived from the consideration of authorities which are not upon the precise point to be determined. It is by reference to the earlier works on the common law, which has never been altered, that one must ascertain what is the law of the land. I cannot find that any doubt has ever been expressed upon the accuracy of the proposition of law which I have stated in the simplest language from the note in Bullen and Leake's Precedents of Pleading (3rd Edn.) at p. 795. I am bound to follow the law thus laid down, and, moreover, I am convinced on consideration that it is based upon sound principle. I should be bound to follow it whether I was of that opinion or not, although it may well be in some cases—as in this particular case—the law seems to operate somewhat harshly upon the defendants. But I have to bear in mind that the principle of law applicable to the facts in this case must be one of general application and cannot be modified, unless the law allows it, in order to meet the difficulties of a particular set of circumstances. The principle urged by the defendants' counsel would, in my judgment, be an encroachment upon the liberty of the subject as hitherto understood. It is true that very often there is a duty cast upon a person to put the law in motion in order to bring offenders to justice, and it it no doubt for reasons of public policy that some excuse, limited in character, is permissible in an action for damages at civil law for false imprisonment when a private person has wrongly caused the arrest of another. But be it observed that this concession is limited to felonies, and although a misdemeanour may have been committed, which is in truth a more serious crime than some felonies, or may be a more serious crime than some felonies, yet if a person causes a wrongful arrest, however serious the misdemeanour may be, it cannot be made the basis of any legal excuse if the person has been wrongfully arrested.

When a person, instead of having recourse to legal proceedings or applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in the judgment. In this case, although the defendants thought, and indeed it appeared that they were justified in thinking, that the plaintiff was the person who had committed the theft, it turned out in fact that they were not. The felony for which they gave the plaintiff into custody had not in fact been committed, and therefore the very basis upon which they must rest any defence of lawful excuse for the wrongful arrest of another fails them in this case. Although I am quite satisfied not only that they acted with perfect bona fides in the matter, but were genuinely convinced after reasonable inquiry that they had in fact discovered the perpetrator of the crime, it now turns out that they were wrong, and it cannot be established that the crime had been committed for which they gave the plaintiff into custody; they have failed in law to justify the arrest and there must therefore in this case be judgment for the plaintiff for the £75 damages which have been awarded with the consequent results.

Judgment for the plaintiff.

Solicitors: *Ricketts & Son; Bircham & Co.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

A

Re McEUEN. McEUEN *v.* PHELPS

[CHANCERY DIVISION (Sargant, J.), October 15, 30, 1913]

[Reported [1913] 2 Ch. 704; 83 L.J.Ch. 66; 30 T.L.R. 44; 109 L.T. 701; 58 Sol. Jo. 82]

B

Administration of Estates—Apportionment between tenant for life and remaindermen—Payments during first year of administration—Death duties, funeral and testamentary expenses, debts, legacies and annuities.

A testator by his will, dated Nov. 15, 1910, after giving certain specific legacies and annuities, bequeathed to his trustees the sum of £25,000 upon trust to invest it and to pay the income thereof to D. during her life for her separate use and after her death to pay certain specific legacies. He then declared that "all legacy and other duty payable in respect of the life interest of the said D. in the said sum of £25,000 shall be payable out of my general residuary estate in exoneration of the said sum of £25,000, but all legacy or other duty payable in respect of the legacies distributable out of the said sum of £25,000 after her death shall be paid solely out of such legacies respectively." The property undisposed of was devised and bequeathed to trustees on trust for sale and conversion, to pay out of the proceeds funeral and testamentary expenses, debts, legacies and annuities, and the duty on those bequeathed free of duty. The residue was divided into fifths, and four of these fifths were settled upon trusts under which his three children, the plaintiffs, took life interests, and their children, who were some of the defendants, took in remainder. A summons was taken out to determine the method of apportionment between capital and income of payments made during the first year of the administration of the estate. These consisted of payments of estate and legacy duty, funeral and testamentary expenses, debts, legacies and annuities. Both sides conceded that these payments should not fall exclusively on the capital, but the plaintiffs contended that the income must be ascertained as that earned by the capital down to the date of application only, while the defendants contended that it must be ascertained as the income on the capital applied for the whole year irrespective of the date of application.

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Held: the equitable adjustment in *Allhusen* v. *Whittell* (1) did not prescribe an exact form of words for use in all cases, but was to be of such a nature as to produce an equitable result between the life tenants and the remaindermen; accordingly, in the present case the amount chargeable against the life tenants in respect of the payments during the first year of administration was interest at four per cent. until the respective dates of application on the various sums of capital which would, together with such interest, make up the payments.

G

Notes. Applied: *Re Wills, Wills* v. *Hamilton*, [1914–15] All E.R. Rep. 289. Referred: *Corbett* v. *I.R. Comrs.*, [1937] 4 All E.R. 700; *Re Bradberry, National Provincial Bank* v. *Bradberry, Re Fry, Tasker* v. *Gulliford*, [1942] 2 All E.R. 629.

H

As to residuary estate settled under a will, see 16 HALSBURY'S LAWS (3rd Edn.) 379 et seq., and for cases see 23 DIGEST (Repl.) 475 et seq.

Cases referred to:

I

(1) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, *5450.*

(2) *Lambert* v. *Lambert* (1873), L.R. 16 Eq. 320; 43 L.J.Ch. 106; 21 W.R. 748; 23 Digest (Repl.) 476, *5454.*

(3) *Holgate* v. *Jennings* (1857), 24 Beav. 623; 53 E.R. 498; 44 Digest 204, *332.*

(4) *Morgan* v. *Morgan* (1851), 14 Beav. 72; 51 E.R. 214; 44 Digest 202, *316.*

(5) *Dimes* v. *Scott* (1828), 4 Russ. 195; 38 E.R. 778; 43 Digest 947, *3861.*

(6) *Caldecott* v. *Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; 11 L.J.Ch. 158; 6 Jur. 232; 62 E.R. 903; 43 Digest 617, *579.*

(7) *Barnes* v. *Bond* (1863), 32 Beav. 653; 55 E.R. 256; 40 Digest (Repl.) 753, *2398.*

Also referred to in argument:

Marshall v. *Crowther* (1874), 2 Ch.D. 199; 23 W.R. 210; 23 Digest (Repl.) 476, *5455.*

Bulkeley v. *Stephens*, [1896] 2 Ch. 241; 65 L.J.Ch. 597; 74 L.T. 409; 44 W.R. 490; 12 T.L.R. 350; 40 Sol. Jo. 458; 23 Digest (Repl.) 300, *3656.*

Summons for directions as to the mode of apportionment between capital and income of various payments in the first year of administration of a testator's estate.

A testator by his will, dated Nov. 15, 1910, after giving certain specific legacies and annuities to be paid free of all duty, bequeathed to his trustees the sum of £25,000 upon trust to invest it and to pay the income thereof to Ellen Dare during her life for her separate use, &c., and after her death to pay certain specific legacies which were set out. He then declared that

> "All legacy and other duty payable in respect of the life interest of the said Ellen Dare in the said sum of £25,000 shall be payable out of my general residuary estate in exoneration of the said sum of £25,000, but all legacy or other duty payable in respect of the legacies distributable out of the said sum of £25,000 after her death shall be paid solely out of such legacies respectively."

The testator devised and bequeathed all his real and personal estate not otherwise disposed of to his trustees upon trust to collect and get in his personal estate and convert into money such parts thereof as should not consist of money, and out of the proceeds of such sale and conversion and his ready money to pay his funeral and testamentary expenses and debts and the legacies thereby bequeathed, and to provide for the payment of the annuities thereby bequeathed and the duty on the legacies and annuities bequeathed free of duty, and to invest the residue and stand possessed thereof upon trust to divide the same into five equal parts or shares, and to hold two of such equal fifth parts or shares in trust for his son Charles Henry McEuen. As to two other equal fifth parts upon trust for his son Edward Stewart McEuen. As to the remaining equal fifth part upon trust for his step daughter Jane Graham. The testator then directed that his trustees should hold one of the equal fifth parts upon trust for his son Charles Henry McEuen absolutely and the other equal fifth part upon trust to pay and apply the income thereof to his son for his benefit until he should forfeit it as therein mentioned, and in the event of the determination of the trust during the lifetime of his son upon the trusts thereinafter declared concerning the same, and after his son's death upon trust to pay out of the income of that part the sum of £750 per annum free of duty to his son's wife so long as she should remain a widow, and subject thereto upon trust for his son's child or children with remainder over in default of children. As to the two equal fifth parts of his son Edward Stewart McEuen upon trust to pay and apply the income for the benefit of his son until he should forfeit it as therein provided, and if the trust should determine in his son's life upon the trusts thereinafter declared, and after his son's death upon trust to pay his son's wife £750 per annum free of duty so long as she remained a widow, and subject to that upon trust for his son's child or children with remainder over in default of children. The testator further gave his trustees power if they considered it desirable and advantageous in his son's interest to raise and pay him £10,000 of his share. A similar provision was also made with regard to the one-fifth share of his stepdaughter Jane Graham.

The testator died on Feb. 6, 1911. His estate was a large one, and £47,427 was paid in respect of estate duty upon it on April 1, 1911, together with interest thereon. This sum was borrowed from a bank, and £201 13s. was paid to the bank by way of interest on the loan. On July 1, 1911, an additional sum of £1,370

was paid for duty on the legacies other than the settled sum of £25,000, and some further small sums were paid on April 18 and May 20, 1911, in respect of other property. The total amount paid for duty up to July 1, 1911, amounting to about £48,898. On July 1, 1911, the sum of £25,000 was set apart to provide for Ellen Dare's trust legacy, and other sums were paid in respect of legacies, debts, funeral, and testamentary expenses. The executors in the administration of the estate having paid these sums, paid and transferred certain moneys and securities in part satisfaction of the fifth share of residue given to C. H. McEuen absolutely, and purchased securities in part satisfaction of the other four-fifths which were settled. They also paid certain sums on account of the income thereof to the three tenants for life of the residue. It having been suggested that the income account under which these payments were made had been prepared upon wrong principles and that certain amounts had been credited to income which should have been credited to capital so that the beneficiaries had received over payment in respect of the income of their settled shares of residue, this summons was taken out for the determination of the following questions: (i) whether upon taking the account of the share of income during the year ending Feb. 6, 1912 (being one year from the testator's death), due to C. H. McEuen and Jane Graham respectively in respect of the one-fifth share of the testator's residuary estate of which they were respectively tenants for life, and to E. S. McEuen in respect of the two-fifth shares of the residue of which he was tenant for life, there should be debited against such shares of income interest at £4 per cent. upon the capital sum which would, with such interest, make up the sum paid in respect of estate duty upon the estate of the testator calculated during the whole year from the date of his death, or only during the respective periods from the date of his death until the respective times when such duty was in fact paid; and (ii) whether upon taking such account of the shares of income as aforesaid there should be debited against such income interest, at such rate as aforesaid, upon the capital sums which would with such interest make up the amount of the debts of the testator, the funeral and testamentary expenses, and the legacies given by the said will, and the legacy duty thereon when given free of duty, and the £25,000 thereby bequeathed upon trust for Ellen Dare, and the legacy duty in respect of Ellen Dare therein, calculated during the whole year from the date of the testator's death, or only during the respective periods from the date of such death until the times when such debts, funeral and testamentary expenses, legacies and duties were respectively paid, and such sum of £25,000 was set apart to meet the said bequest.

Romer, K.C., and *E. Knowles Corrie* for the plaintiffs.
Grant, K.C., and *H. J. H. Mackay* for the defendants.
Whinney for other defendants having the same interest.

Cur. adv. vult.

Oct. 30, 1913. **SARGANT, J.**—The originating summons in this case seeks directions as to the true method of apportioning between capital and income certain large payments which have been made during the first year of the administration of the testator's estate. The payments are divided in the summons into two sets, namely, first, those which have been made for estate duty, including interim interest thereon; and, secondly, those which have been made for debts and funeral and testamentay expenses, and for legacies, including legacy duty on such of them as were given free of duty. It is not desired that accounts should be taken or precise figures ascertained by the court, but merely that the true principle of apportionment should be settled, since it is anticipated that when once that has been done a friendly adjustment of the accounts can readily be arrived at.

The testator died on Feb. 6, 1911. By his will his residue is divided into fifths, and four of these fifths are settled upon trusts under which his three children, the plaintiffs, take life interests, and their children who, or some of whom, are defendants, take in remainder. The estate is a large one, and its administration

has already involved the payment of some £49,000 for estate duty, of which some £47,450 was paid on April 1, 1911. Debts and funeral and testamentary expenses amounted together to some £1,300 in respect of which £900 or thereabouts was paid early in May, 1911. And besides a trust legacy of £25,000, which was set apart on July 1, 1911, there were other legacies to an aggregate of some £14,000, of which sum £10,000 was paid by June 1, 1911, and the remainder by the middle of November. It is conceded on both sides that neither set of payments ought to be thrown exclusively on the capital, but that in each case some income should be taken as employed for that purpose; the dispute between the parties is as to the amount of income to be so applied. The defendants (by which I mean the defendants other than the defendant trustees) say that the income must be ascertained or calculated as the income on the capital applied for a whole year, irrespective of the actual date of application. The plaintiffs say that the income must be ascertained as that earned by the capital applied down to the date of application only. The rate at which income should be ascertained has been accepted as being four per cent. per annum, inasmuch as the estate has on an average yielded income at almost precisely that rate.

As a matter of strict fairness, and independently of all questions of authority, practice, and convenience, it is pretty obvious that the plaintiffs' method is the preferable one. For it would result in giving the tenants for life the income, and no more than the income, of the capital ultimately available for the remaindermen; while the defendants' plan would, in respect of every application of capital in the course of the first year, deprive the tenants for life during the residue of that year of the income on such a part of the capital ultimately available as was equal to the sum applied. In the present case, for instance, in respect of the first payment of £47,450 for estate duty, the tenants for life would not only during the remainder of the first year make in respect of the subtraction of that sum a loss of income corresponding with the ultimate loss of capital by the remaindermen; but they would also make a special loss of income by the charge against them of four per cent. on £47,450 from April 1, 1911, to Feb. 6, 1912; while the remaindermen would not only suffer no corresponding loss, but would actually have their primary loss of £47,450 reduced to the extent of the special charge thus made against income. And the same considerations apply to all the items making up the two sets of payments now in question. To make the matter even more clear, assume that a testator leaves a gross estate of £102,000, with estate duty, debts, &c., amounting to £52,000, and that the executors do (however impossible this may in fact be) clear off all these liabilities the day after the death, with the result that the residue is at once ascertained at £50,000 and earns during the year at four per cent. a sum of £2,000. According to the defendants' theory, the £52,000 of liabilities must be deemed to be discharged out of £50,000 capital and £2,000 income. The result will be that the tenant for life has to give up the whole income earned by the remaining £50,000 during the first year, and gets no income at all during that year, and further that the capital ultimately available for the remaindermen is increased to £52,000. The result is startling, but not so startling as would be the case if the debts immediately discharged had been, say, £60,000 or £70,000; for then on the same principle the income of the tenant for life during the first year would be a minus quantity. On the other hand, if the plaintiff's method of calculation is adopted, the tenant for life would both for the first year and for every subsequent year, be entitled to income on £50,000, and this would be the sum ultimately available for the remaindermen. It would be easy to suggest other cases in which the method suggested by the defendants would work equally obvious hardship and injustice. But nothing would be gained by merely multiplying instances.

In the course of the argument the defendants' counsel had to recognise to some extent the anomalies in administration that would result from their method. And ultimately they were forced to rely mainly on the contention that the matter was

concluded by the authority of *Allhusen* v. *Whittell* (1) and *Lambert* v. *Lambert* (2), or at all events that their view of the effect of these two cases had been so universally accepted in the profession and adopted in the administration of estates that it was impossible now to disregard or modify it, however severe the injustice it might produce in any particular case. After repeated examination of the case of *Allhusen* v. *Whittel* (1) I am unable to accept the defendants' view of it. In my opinion, that case was founded on the broad, equitable principle, that where residue was limited to persons in succession, their successive enjoyment should be an enjoyment of the same fund; and that, for effecting that result, the court was at liberty, and indeed bound, to enter into a sort of equitable book-keeping or adjustment. In the particular case in question three-fourths of the first estate, which formed the main asset of the second estate, was eaten up by the payment of very large legacies which would not in the ordinary course be, and I gather were not, paid before the end of the first year from the first testator's death. And the book-keeping that was directed was primarily for the purpose of preventing the tenant for life of the second estate from receiving in respect of part of the first year from the first testator's death the income of capital prospectively applicable at its close for legacies, and so getting an income during that period which would be at a rate three or four times greater than the income of any subsequent period. But while the income receivable in respect of part of the first year was thus prevented from being more than in any subsequent year, there is not a word in the reasoning of the judgment, as I read it, to suggest that the income for that part of the first year should be any less than that for any subsequent year. The exact method of book-keeping directed by the terms of the order in *Allhusen* v. *Whittell* (1) worked perfectly in that case, and would work equally well in any case where, as there, the capital subtracted from the gross estate before the ascertainment of residue is not subtracted before the end of the first year. But I can see no warranty in that case for applying the method in precisely the same hard-and-fast terms to a case where the subtractions from the estate occur at periods substantially anterior to the close of the first year. This is still clearer when it is observed that *Allhusen* v. *Whittell* (1) was professedly founded on earlier decisions, such as that in *Holgate* v. *Jennings* (3), which itself was founded on *Morgan* v. *Morgan* (4) and *Dimes* v. *Scott* (5) and did not, as I understand it, profess to carry the principle of *Holgate* v. *Jennings* (3) any further. That principle was that the intermediate income of what is eaten up before the ascertainment of residue cannot itself be income of residue or payable, as such, to a tenant for life of residue. *Allhusen* v. *Whittell* (1) merely affirmed that principle and gave expression to it in a form of words entirely suitable to meet that particular, and in many respects typical, case. It did not, in my judgment, prescribe an exact form of words for use in all cases, however dissimilar.

Great stress was laid by the counsel for the remaindermen on the decision in *Lambert* v. *Lambert* (2). I think it was the case there that some debts had been paid before the expiration of the year, and, if so, the decree, in following the exact form in *Allhusen* v. *Whittell* (1) would produce a certain amount of inequality between tenant for life and remainderman to the prejudice of the former. But there is nothing in the report to show that the debts so paid were large, or the resulting inequality serious, and the very short judgment of Bacon, V.-C., was not directed to that aspect of the case at all. The decision in the case was that the rule stated in *Allhusen* v. *Whittell* (1) did not require any modification, because the rate of interest earned by the estate happened to be unusually high (something like thirteen per cent. on average). And, indeed, in *Lambert* v. *Lambert* (2) the learned judge was not deciding what form of order ought to be made. That had already been done by the order on further consideration of July 8, 1872. He was only working out the consequences of the actual terms of that particular order. Nor can I find that text writers are by any means unanimous in treating *Allhusen* v. *Whittell* (1) as establishing a fixed form of words which must be slavishly followed

in every administration where residue is settled. This may be the effect of the footnote in Williams on Executors (9th Edn.), vol. 2 at p. 1246. But in Jarman on Wills (6th Edn.), vol. 2 at p. 1230, and Seton on Decrees, Judgments and Orders in Equity (7th Edn.), vol. 2 at p. 1620, the effect of *Allhusen* v. *Whittel* (1) is much more broadly and correctly stated, while from White and Tudor's Leading Cases (7th Edn.), vol. 1 at p. 89, and Lewin on Trusts (12th Edn.) at p. 337, little assistance can be obtained, since the rule is stated in both works in both the more general and the more precise way, as if they were identical. In Gover on Capital and Income (2nd Edn.) at p. 132, while the rule is stated as contended for by the defendants, the following remarks are immediately afterwards made—namely:

> "The above rule is, however, inconsistent with the principle enunciated by Knight Bruce, V.-C., in *Caldecott* v. *Caldecott* (6), that the funeral and testamentary expenses, and the debts and legacies (as to principal) must be borne by capital—the interest upon the debts and legacies by the life tenant: see also *Barnes* v. *Bond* (7); and, as there is often considerable difficulty in applying the rule in practice, it is not always followed."

And in that useful work Chandler on Trust Accounts (2nd Edn.) at pp. 89–91, there is an elaborate working out of an apportionment between capital and income which appears to me to be fair and correct, and which throws on income a proportion of debts, legacies, and other payments calculated with reference to the intermediate income only of the capital employed, and not with reference to the income of that capital during the whole year. I adopt the following observation on p. 90 of that work, and particularly that part of it which I have placed in italics:

> "Wherever the income arising from any asset applied in paying debts, funeral and testamentary expenses or legacies is itself, in fact, exhausted in paying debts, funeral and testamentary expenses or legacies, the income so applied should be carried over to the capital account with explanatory entries, and *to this extent the rule will have been fully complied with and no further adjustments will be necessary.*"

Further, on the many occasions when I have heard the rule discussed amongst practitioners at the Chancery Bar, I have found the prevailing opinion to be that the rule in the set terms in which the order was drawn up in *Allhusen* v. *Whittell* (1) is not applicable indiscriminately, and would work grave injustice in cases where large sums have been expended in clearing the estate at considerable intervals prior to the end of the first year.

On the whole I come to the conclusion that the court is not bound, either by authority or any general course of practice, to any more precise rule than this—namely, that the book-keeping referred to by Wood, V.-C., is to be of such a nature as to produce an equitable result between tenant for life and remainderman; and I consider that for this purpose the court should be as careful to see that the tenant for life is not unduly penalised as it was in *Allhusen* v. *Whittell* (1) to see that the tenant for life was not unduly benefited. Accordingly, I propose to make a declaration in accordance with the second alternative in each of the first and second heads of the summons. I should add that, though I adopt this alternative in this case as that one of the two alternatives which is the preferable one, and also as an alternative which will work fairly between the parties, I do not by any means wish to lay down that this is the only method available, or that extremely elaborate and minute calculations must be gone through, in every case. If, for instance, a particular asset of a testator, such as part of a sum of Consols or of an amount on deposit with a bank, were applied with the intermediate interest on it in the discharge of the whole or the bulk or some one large item of the liabilities of the estate at any time during the first year, as, say, three months or six months after the death, the executors might well, in my judgment, leave the matter there

to that extent, as MR. CHANDLER suggests. The capital and interest of the asset would merely have disappeared in the course of ascertaining residue, without leaving any proper subject-matter for adjustment. Or in cases where the average income of the estate is quite low, there would be no appreciable ground for complaint if the capital of the estate duty itself were charged against capital, and the interest on it were charged against income, instead of dividing the total sum paid between capital and income with reference to the exact rate of interest yielded by the estate as a whole, or by the particular asset used to pay the duty. There may also be other methods of carrying out the equitable book-keeping referred to in *Allhusen* v. *Whittell* (1) which will give their fair relative rights in the same residuary fund to both tenant for life and remainderman; and some methods may be more appropriate in some cases and other methods in other cases. The actual accountancy will not be difficult so long as the true object is borne in mind. Further, it must not be overlooked that the equitable adjustment dealt with in *Allhusen* v. *Whittell* (1) is not really more applicable to the first year after the death than to any other subsequent period, in cases where the administration extends beyond the end of the first year. For instance, I notice that in this case at the end of the first year it was anticipated that a large further payment would still have to be made for estate duty. When this payment is made, the total paid for capital and interest will have to be apportioned between capital and income on the basis of a calculation of interest beyond the first year and down to the subsequent date of payment.

I am relieved by counsel for the plaintiffs of the task of deciding a small further point which was mentioned in the course of argument—namely, whether any adjustment should be made as between capital and income of a sum of £2,500 which will come back to the estate on the death of the tenant for life of the settled legacy of £25,000, this legacy having been given free of duty so far as her life interest extended, and no further, and the revenue authorities having claimed and obtained an immediate payment of legacy duty on the capital sum. He assents, and, as far as I can see, rightly assents, to the view that this sum carries interest in favour of the successive owners of residue only as from the time when it comes back to the estate, and accordingly he does not claim for his clients any adjustment in respect of it.

The terms of the declaration, I think, would be to this effect: that in respect of the payments for estate duty, legacies, debts, and so on, the amount which will be chargeable against the tenants for life during the first year will be interest at four per cent. until the respective dates of payment on the various sums of capital which will, together with such interest, make up the various sums paid; and the costs will be as between solicitor and client out of the residue.

Solicitors: *Russell Cooke & Co.; Biddle, Thorne, Welsford & Gait.*

[*Reported by* T. DE LA P. BERESFORD, ESQ., *Barrister-at-Law.*]

Re ACKERLEY. CHAPMAN *v.* ANDREW

[CHANCERY DIVISION (Sargant, J.), March 6, 13, 1913]

[Reported [1913] 1 Ch. 510; 82 L.J.Ch. 260; 108 L.T. 712]

Power of Appointment—Special power—Exercise—Need of expression or indication of intention to exercise—Sufficiency of reference to power or property subject thereto.

In order to exercise a special power of appointment there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it. A reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose, but where two powers exist with reference to the same property it may be that a reference to the property will not indicate any intention to exercise more than one of the powers.

A testatrix had a contingent general testamentary power of appointment over certain property in which she took a life interest and also a special power to appoint the income of the property to her husband during his life. By her will, dated Dec. 18, 1911, she purported to "give, devise, appoint, and bequeath all my estate, property, and effects whatsoever and wheresoever both real and personal which I have power to dispose of by my will" to her husband absolutely.

Held: the will operated in the husband's favour to exercise the special power in the wife of appointing the income to him as well as the contingent general power of appointment by will.

Notes. Distinguished: *Re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1944] 2 All E.R. 462. Considered: *Re Welford's Will Trusts, Davidson* v. *Davidson*, [1946] 1 All E.R. 23. Referred: *Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E.R. 566; *Re Latta's Settlement, Public Trustee* v. *Latta*, [1949] 1 All E.R. 665; *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co.* v. *Parker*, [1957] 2 All E.R. 252.

As to exercise by will of special powers of appointment, see 30 HALSBURY'S LAWS (3rd Edn.) 255 et seq., and for cases see 37 DIGEST 454 et seq.

Cases referred to:

(1) *Higgins* v. *Dawson*, [1902] A.C. 1; 71 L.J.Ch. 132; 85 L.T. 763; 50 W.R. 337, H.L.; 44 Digest 549, *3672*.

(2) *Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620; 76 L.J.Ch. 54; 95 L.T. 581; 37 Digest 451, *540*.

(3) *Re Richardson's Trusts* (1886), 17 L.R.Ir. 436; 37 Digest 432, *o*.

(4) *Re Teape's Trusts* (1873), L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799; 21 W.R. 780; 37 Digest 451, *541*.

(5) *Bailey* v. *Lloyd* (1829), 5 Russ. 330; 7 L.J.O.S.Ch. 98; 38 E.R. 1051; 37 Digest 447, *508*.

(6) *Cowx* v. *Foster* (1860), 1 John. & H. 30; 29 L.J.Ch. 886; 2 L.T. 797; 6 Jur. N.S. 1051; 70 E.R. 649; 37 Digest 450, *536*.

(7) *Ferrier* v. *Jay* (1870), L.R. 10 Eq. 550; 39 L.J.Ch. 686; 23 L.T. 302; 18 W.R. 1130; 37 Digest 451, *537*.

(8) *Re Sharland, Re Rew, Rew* v. *Wippell*, [1899] 2 Ch. 536; 68 L.J.Ch. 747; 81 L.T. 384; 37 Digest 450, *533*.

Also referred to in argument:

Re Mayhew, Spencer v. *Cutbush*, [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 49 W.R. 330; 45 Sol. Jo. 326; 37 Digest 452, *542*.

Kent v. *Kent*, [1902] P. 108; 71 L.J.P. 50; 86 L.T. 536; 18 T.L.R. 293; 46 Sol. Jo. 247; 37 Digest 435, *405*.

Banks v. *Banks* (1853), 17 Beav. 352; 1 W.R. 511; 51 E.R. 1070; 37 Digest 452, *547*.

Re Mills, Mills v. *Mills* (1886), 34 Ch.D. 186; 56 L.J.Ch. 118; 55 L.T. 665; 35 W.R. 133; 37 Digest 447, *506*.

Cooke v. *Cunliffe* (1851), 17 Q.B. 245; 21 L.J.Q.B. 30; 15 Jur. 1076; 117 E.R. 1274; 37 Digest 450, *531*.

Re Williams, Foulkes v. *Williams* (1889), 42 Ch.D. 93; 58 L.J.Ch. 451; 61 L.T. 58, C.A.; 37 Digest 437, *427*.

Re Cotton, Wood v. *Cotton* (1888), 40 Ch.D. 41; 58 L.J.Ch. 174; 37 W.R. 232; 37 Digest 451, *539*.

Roake v. *Denn* (1830), 4 Bli. N.S. 1; 1 Dow. & Cl. 437; 5 E.R. 1; sub nom. *Denn* d. *Nowell* v. *Roake*, 6 Bing. 475 H.L.; 37 Digest 458, *595*.

Adjourned Summons to determine whether a special power given by a will had been exercised by the donee of the power by her will, she having not only a contingent general testamentary power of appointment over a property in which she took a life interest, but also a special power of appointing the income of the property to her husband during his life.

W. E. Tyldesley Jones for the trustees.

Martelli, K.C., and *R. H. Hodge* for the plaintiff.

Alexander Grant, K.C., and *R. J. White* for the infant daughter of Mrs. Chapman.

Cur. adv. vult.

Mar. 13, 1913. **SARGANT, J.,** read the following judgment.—This is an originating summons taken out for the purpose of obtaining a declaration that by the will dated Aug. 18, 1911, one Lilian Sarah Chapman, deceased, who was the wife of the plaintiff, Arthur Chapman, exercised a special power conferred upon her by the will of Margaret Ackerley, deceased, of appointing the income of her share in the estate of the said testatrix in favour of the plaintiff, and that by virtue of such exercise the plaintiff is beneficially entitled during his life to the income of the said share. The will by which the power in question was created is dated Dec. 21, 1908, and contained a gift of the residuary estate of the testatrix upon trust as to one moiety thereof for her daughter the said Lilian Sarah Chapman, then Lilian Sarah Andrew, with subsequent directions for the settlement of the share. Under this settlement the income of the share was to be held for the daughter during her life, and after her death the capital thereof was to be held, subject to the appointment of any life interest to any future husband of the daughter as thereinafter mentioned, upon trusts for the children or child of the daughter living at her death who being sons or son should attain the age of twenty-one years, or being daughters or daughter should attain that age or marry, and for issue of any deceased child as therein mentioned, with a proviso that if no child or issue should attain a vested interest under that trust, the shares should be held in trust absolutely for such persons or person as the daughter should by her last will or by any codicil thereto appoint, and in default of and subject to any such appointment absolutely for the testatrix's son, the defendant George Reid Ackerley. And the testatrix thereby empowered her daughter, notwithstanding any of the trusts thereinbefore contained, from time to time or at any time while not under coverture by any deed revocable or irrevocable and whether covert or sole by will or codicil to appoint to or for the benefit of any future husband to whom she might be thereafter married and who might survive her during the residue of his life or any less period all or any part of the annual income of her share.

The testatrix Margaret Ackerley died not long after the date of her will, and it was proved on Mar. 2, 1909. Mr. Andrew, the first husband of Mrs. Chapman, died on Feb. 11, 1910. The only issue of the first marriage of Mrs. Chapman was a daughter, Margaret Ackerley Andrew, who was born on Feb. 13, 1898, and is still an infant. She is one of the defendants to this action. On Dec. 31, 1910, the

testatrix's daughter was married to the plaintiff, and she died on Dec. 25, 1912, without having had any further child, and leaving a will, dated Aug. 18, 1911, under which the present question arises. By this will she appointed the plaintiff to be the guardian of her infant child during his life and after his death appointed another person in his stead, and the will proceeds in the following terms:

> "I give, devise, appoint, and bequeath all my estate, property, and effects whatsoever and wheresoever both real and personal which I have power to dispose of by my will to my said husband Arthur Chapman absolutely, and I appoint the said Arthur Chapman sole executor of this my will."

It is conceded that this will undoubtedly exercises the general power of appointment which the testatrix had over the settled property in default of any child or issue attaining a vested interest therein. The point for decision is whether it also exercises in favour of the plaintiff the special power given to Mrs. Chapman by her mother's will of appointing a life interest in the settled fund to any future husband. The settled fund is of considerable value, producing an income of some £600 per annum. Some evidence has been filed to show that the property actually owned by Mrs. Chapman was of small value and mainly consisted of chattels. But such evidence seems to be inadmissible for the purpose of ascertaining the presence or absence of an intention to exercise the power (THEOBALD ON WILLS (7th Edn.), p. 127, and cases there cited, particularly *Higgins* v. *Dawson* (1)), and I have arrived at my conclusions altogether apart from this evidence.

It is often said that in order to exercise a special power there must be either (i) a reference to the power, or (ii) a reference to the property subject to the power, or (iii) an intention otherwise expressed in the will to exercise the power: THEOBALD ON WILLS (7th Edn.) p. 248; *Re Weston's Settlement*, *Neeves* v. *Weston* (2). This is, no doubt, a good practical way of stating the rule. But, when more closely examined, the first two alternatives are seen to be in reality only particular examples of the rule embodied in the third alternative as, indeed, is implied in the use in that alternative of the word "otherwise." And accordingly I should prefer to state the rule thus—namely, that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it, and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. I say "in general" because, for instance, where, as here, two powers exist with reference to the same property, it might well be that a reference to the property would not indicate any intention to exercise more than one of the powers.

It is now necessary to consider the particular will in this case. On doing so, the first thing that strikes one is that the mind of the testatrix is addressed primarily to the power and not to property. Indeed, there is in terms no gift at all of of property owned by the testatrix. And I am inclined to think that her own absolute property would pass under this will only by virtue of the fact that property which she owned was necessarily by virtue and as an incident of such ownership property over which she had a power of disposition. Further, the will indicates a strong general intention to benefit the plaintiff as far as possible—an indication which would not, in my opinion, be satisfied by the mere appointment to the plaintiff of a contingent reversionary interest in the fund in case his step-daughter should not attain a vested interest therein. And, lastly, there is not here, as in many cases, any presumption against the exercise of the power, such as arises from the trusts declared being in part for persons or purposes not within the power. Counsel for the infant daughter of Mrs. Chapman in his argument against the exercise of the power laid some stress on the intention of Mrs. Ackerley to provide primarily for her grandchild, and on the improbability that Mrs. Chapman should have intended to leave her only daughter penniless—that is, without any income—during the life of her step-father. But the answer to this is clear.

The grandmother authorised in express terms the creation of such a limitation as that which is objected to. And so far as Mrs. Chapman is concerned, her mind when she made her will was obviously directed towards her husband rather than her daughter, and she may well have considered that Mr. Chapman would provide properly for her daughter out of the income of the Ackerley fortune. It is noticeable that he was appointed her guardian. But the main stress of the argument was based on the rule quoted from FARWELL ON POWERS (2nd Edn.) p. 183 that

> "general words of appointment will be a sufficient reference to a limited power, if the donee have no other, and if the appointee be an object of the power."

and on the contention that the whole of the words of Mrs. Chapman's will are completely satisfied by referring them to her own property and her general power of appointment over the ultimate interest in the trust property in question, and that some of these words, notably the word "my" and the word "absolutely," are hardly property applicable to the life interest which Mrs. Chapman was entitled to appoint to her second husband; and, further, a decision by CHATTERTON, V.-C., in *Re Richardson's Trusts* (3) is relied on as completely covering the present case. In my opinion, however, *Re Richardson's Trusts* (3) is very different, because there the words were "give, devise, bequeath, and appoint," so that they dealt primarily and mainly with ownership and only secondarily, if at all, with power; while here the words are, as above pointed out, primarily, if not exclusively, directed to power. Further, as regards the quotation from FARWELL ON POWERS (2nd Edn.) p. 183, there are, in my opinion, present in this case sufficient indications to show that the testatrix was intending to exercise this special power as regards the use of the word "absolutely," this may easily be referable to the desire of the testatrix to show that her husband was to take unconditionally, and in fact the appointment, if operating under the special power, would be absolute in the sense of giving the fullest estate that could be created under the power: see *Re Teape's Trusts* (4). And as regards the use of the word "my," it is conceded that here the word is applied to an interest over which Mrs. Chapman had a general power of appointment only, and it may almost, if not quite, as properly be applied also to an interest over which she had a special power only. But in any case the word "my" is easily applied to property or interests in property in which the appointor had herself a life interest. Since the close of the argument I have consulted that learned and accurate, if somewhat neglected, work—CHANCE ON POWERS—and the following two passages seem to me singularly appropriate (Vol. 2, p. 90, para. 1649):

> "Commonly there can be no doubt of an intention to execute a power where a party speaks of all 'the' property which he has power to dispose of, whatever may be the case, if the words are all 'my' property. Cases may, however, arise, particularly on limited powers, where, though the donee has a power of disposition to a certain extent, still he is not authorised to make the dispositions actually appearing in the instrument containing the words referred to; and then the question will occur, whether the general expressions are not to be confined. In respect to the use of the word 'my,' however inaccurate this may be as applied to many cases, it clearly cannot prevent an instrument operating as an execution of a power, provided the intention be plain."

(Ibid. para. 1650):

> "In most cases involving the question under consideration, the testator has a life interest in the lands, so that in one sense they are his, though, as such an interest is not disposable by will, they are not his with reference to the contemplated dispositions. Where a testator has a devisable interest in the estate, as a reversion or partial interest, it seems that, in some cases, even though there are no other lands, the interests in question may be sufficient to answer the words, so as to prevent the power being held to be exercised; this may depend on circumstances, and particularly on the nature of the limitations."

Since these two passages were penned there have been two decisions of *Bailey* v. *Lloyd* (5) and *Cowx* v. *Foster* (6) which show how little importance is to be attached to the word "my" in such a connection as the present, and are strong authorities in favour of the exercise of the power here. And, besides these cases, *Ferrier* v. *Jay* (7) and *Re Sharland* (8) tend in the same direction, and, indeed, are stronger cases than the present, since there were difficulties there in the way of holding the power to be exercised which are not present here. The last two cases were what counsel for the infant daughter of Mrs. Chapman has conveniently called the "two power" cases. And in *Bailey* v. *Lloyd* (5) and *Cowx* v. *Foster* (6) the appointor, in addition to the special power, owned a remote interest in the property the subject of the power. Accordingly I am satisfied that the special power was exercised here, and I propose to make a declaration in accordance with the first part of the declaration asked by the summons. The costs of all parties as between solicitor and client will come out of the capital of the fund.

Solicitors: *Julius A. White; Brunskill & Alton; Woodcock, Ryland & Parker.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re MITCHELL. FREELOVE *v.* MITCHELL

[CHANCERY DIVISION (Parker, J.), December 4, 1912]

[Reported [1913] 1 Ch. 201; 82 L.J.Ch. 121; 108 L.T. 34; 57 Sol. Jo. 213]

Will—Debt owing to testator—Forgiveness—"I forgive all debts owing to me"—Exclusion of moneys payable under guarantee.

By his will the testator forgave his nephew "all debts" owing by the nephew to the testator up to the time of his decease and "all interest and arrears thereon." At the date of the will the testator held various promissory notes from the nephew, and he was also surety under a guarantee given to a bank whereby he had guaranteed payment of all sums due to the bank from the nephew. At the testator's death the nephew owed money to the bank and the guarantee still subsisted.

Held: the words in the will "all debts" did not include the equitable right of the testator, as surety, to an indemnity against the bank from his nephew, the principal debtor, but meant moneys actually due and owing, and, accordingly, the forgiveness in the will did not extend to the moneys which the testator's estate might have to pay under the guarantee.

Quære: whether a surety's equitable right to be indemnified by the principal debtor creates a debt before the surety has been called on to pay anything under the guarantee.

Notes. Referred to: *Re Beavan, Davies, Banks & Co.* v. *Beavan* (1913), post; 83 L.J.Ch. 109; *Re Fenton (No. 1), Ex parte Fenton Textile Association*, [1930] All E.R. Rep. 15; *Re A Debtor (No. 627 of 1936)*, [1937] 1 All E.R. 1; *Re A Debtor (No. 66 of 1955), Ex parte The Debtor* v. *Trustee of the Property of Waite*, [1956] 2 All E.R. 94.

As to the enforcement of the surety's indemnity in equity, see 18 HALSBURY'S LAWS (3rd Edn.) 537, 538. For cases on the rights of a surety before satisfaction of his debt see 26 DIGEST (Repl.) 128 et seq. As to a release of debts in a will see 34 HALSBURY'S LAWS (2nd Edn.) 236 n.

Summons to determine whether on the true construction of a will a clause therein forgiving all debts owed to the testator by his nephew included money payable by

the testator as surety under a guarantee of bank advances made to the nephew. The clause (cl. 13) provided:

"I bequeath to my nephew John Joseph James Mitchell £2,000, and I forgive all debts owing to me from him up to the time of my decease and all interest and arrears thereon, and I bequeath to him the same and all documents which I shall hold by way of security for the same, but upon condition that he shall not be entitled to receive or retain the amount that shall be due from me to him up to the date of my death whether for goods sold or upon any other account."

Wilfred Hunt for the trustees of the will.

Romer, K.C., and *T. J. C. Tomlin* for Mrs. Mitchell, a trustee and one of the beneficiaries under the will.

T. A. Herbert for other beneficiaries.

Grant, K.C., and *J. G. Wood* for the trustees of a deed of assignment executed by John Joseph James Mitchell for the benefit of his creditors.

Case referred to:

(1) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318; 26 Digest (Repl.) 130, *915.*

Also referred to in argument:

Ferguson v. *Gibson* (1872), L.R. 14 Eq. 379; 41 L.J.Ch. 640; 26 Digest (Repl.) 124, *869.*

Re Harrison, Latimer v. *Harrison* (1886), 32 Ch.D. 395; 55 L.J.Ch. 687; 55 L.T. 150; 34 W.R. 736; 23 Digest (Repl.) 378, *4470.*

Re Giles, Jones v. *Pennefather*, [1896] 1 Ch. 956; 65 L.J.Ch. 419; 74 L.T. 21; 44 W.R. 283; 40 Sol. Jo. 257; 23 Digest (Repl.) 378, *4480.*

Re Binns, Lee v. *Binns*, [1896] 2 Ch. 584; 65 L.J.Ch. 830; 75 L.T. 99; 40 Sol. Jo. 654; 26 Digest (Repl.) 127, *891.*

Re Akerman, Akerman v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163.*

Wooldridge v. *Norris* (1868), L.R. 6 Eq. 410; 37 L.J.Ch. 640; 19 L.T. 144; 16 W.R. 965; 26 Digest (Repl.) 131, *921.*

Lacey v. *Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 22 W.R. 586; sub nom. *Lacy* v. *Hill, Crowley's Claim*, 30 L.T. 484; 26 Digest (Repl.) 132, *936.*

Re Paine, Ex parte Read, [1897] 1 Q.B. 122; 66 L.J.Q.B. 71; 75 L.T. 316; 45 W.R. 190; 13 T.L.R. 13; 41 Sol. Jo. 30; 3 Mans. 309; 5 Digest (Repl.) 920, *7588.*

Re Blackpool Motor Car Co., Ltd., Hamilton v. *Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; 70 L.J.Ch. 61; 8 Mans. 193; 43 Digest 963, *4031.*

PARKER, J.—In this case I have to put a construction upon cl. 13 of the will of the testator, who died on July 7, 1911, the will itself being dated Nov. 16, 1907. The words of the clause are as follows: [His Lordship read it, and continued:] At the date of the will the circumstances of the case were as follows: The testator held various promissory notes given to him by his nephew John Joseph James Mitchell, some of which appear to be barred by the Statute of Limitations, but one of which was not so barred—namely, a note for £1,000. It appears that in 1904 the nephew John Joseph James Mitchell had borrowed money from his bank, and the testator had in the first instance deposited with the bankers certain securities or title deeds of his own to secure the advances to the nephew, and a day or two after he entered into the guarantee which was of a continuing nature and guaranteed to the bank all sums due by the nephew to the bank, provided that the testator's liability under the guarantee should be limited to £4,000. Some years afterwards a second guarantee was given which is substantially to the same effect, the reason for giving it appearing to be that the testator placed some additional security

with the bank for the purpose of covering his liability on the guarantee, and at the date of the death there was money due from the nephew to the bank and the latter guarantee was still subsisting, the title deeds deposited, together with the security deposited, remaining in the hands of the bank. The question I have to decide is whether the clause in the will to which I have referred can be construed as a gift to the nephew of £4,000 in aid of the money due by the nephew to the bank. That, of course, depends upon what construction I put upon the words "all debts" contained in the clause in question.

I have heard a good deal of argument on the nature of the right which a surety has against the principal debtor, and I may say at once that it appears to me that until the surety is called upon to pay and does pay something under his guarantee there is no debt or right at law at all; a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor, and he may come into equity either before or after he has paid something by virtue of the guarantee. That, I think, has long been well-known law, and it, at any rate, is made reasonably clear by the case recently before SWINFEN EADY, J. (*Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (1)). I have also had various cases cited to me as to the position of an executor who had entered into a guarantee of the sort in question with regard to his right of retainer, and those authorities do not appear to me to be entirely consistent. Fortunately, I have not actually to decide the point in this case, which really is a question of construction of this particular clause in the will, but in the cases which I have had cited to me there are expressions which seem to imply that there is in equity a debt due from the person who is guaranteed to the guarantor even before the guarantor had paid any money under the guarantee. That, I think, is merely a mode of expressing what the rights in equity are. There can be no doubt there is the right to come to equity for the purpose of obtaining the indemnity even before the money has been paid under the guarantee. It is possible to call that right an equitable debt, but as a matter of fact it does not appear to me to carry the matter any further by using that term. The right is really not a debt; it is a right to come for the purposes of indemnity to a court of equity. If I look at the particular words used here, it appears to me that what the testator is really considering is debts in the proper sense of the word—that is to say, moneys actually due and owing, capable, too, of carrying interest if such is the bargain between the parties, and not contingencies which may ripen at some future date, by reason of a number of events which may happen, into what subsequently may become a debt at law or in equity in the ordinary sense of the word. It does not appear to me they are meant to include contingencies of this sort. It might be, for instance, at the date of the death the testator had been called upon to pay and had actually paid money under the guarantee. In that case there would be no doubt that that would be a debt due from the principal debtor to the surety. On the other hand, he might not have been called upon to pay and might not have paid anything, and it does not follow at the date of the death he must necessarily be called upon to pay or must necessarily pay anything; it might happen the principal debtor might pay off the banker's liability, and in that case there would be no debt at all.

I hold, therefore, that in the present case the words "all debts" do not include any equitable right which the surety may have had at the death to come into equity to obtain indemnity, and I do not think that the conclusion is disturbed in any way by the argument I have heard from Mr. Grant and Mr. Wood to the effect that the object of the clause was to make a clean sweep of all transactions between the testator and his nephew in order that the nephew might take £2,000 clear and the other bequests given by the will. The truth is that in these matters, when a surety gives his contract of guarantee to the bank, he contemplates promissory notes that he might be called upon to pay, but the payment will be made by the principal debtor, and if the payment is made by the principal debtor it never ripens into a debt at all. I do not think the testator in this case intended

to include such matters as that in the release which he gave, and, that being the case, it appears to me that the release must be confined to the indebtedness of the nephew in the stricter sense of the word—that is, so far as I have heard the facts, the moneys due upon the promissory notes—and does not include anything with reference to the guarantee. The clause in the will does not extend to moneys which the testator's estate may have to pay under the guarantee.

Solicitors: *Mackrell & Ward*, for *Ernest Vinter*, Cambridge; *P. J. Rutland; F. J. Perks*, for *F. Bates*, Haverhill.

[*Reported by* T. Beresford, Esq., *Barrister-at-Law.*]

BARNARD-ARGUE-ROTH-STEARNS OIL AND GAS CO., LTD., AND OTHERS *v.* FARQUHARSON

[Privy Council (Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson and Sir Charles Fitzpatrick), July 12, 18, 31, 1912]

[Reported [1912] A.C. 864; 82 L.J.P.C. 30; 107 L.T. 332; 28 T.L.R. 590; 57 Sol. Jo. 10]

Sale of Land—Conveyance—Reservation to vendors—"Minerals and all springs of oil"—Exclusion of natural gas found with oil.

Landowners made a grant by deed of the fee simple of 100 acres "excepting and reserving to the [landowners] all mines and quarries of metals and minerals and all springs in and under the said land . . . with liberty of ingress, egress and regress to and for the [landowners] in order to search for, work, win and carry away the same, and for those purposes to make and use all needful roads and other works. . . ." Natural gas which impregnated certain strata of the land and was found with the oil (itself pumped up separately), but was not volatilised rock oil, nor an exhalation of the oil, nor in solution in it, was formerly regarded as a dangerous and destructive element to be got rid of as best it could, but since the grant of the land had become commercially valuable.

Held: the reservation did not include natural gas, which was not one of the reserved "minerals," an expression susceptible of limitation or expansion according to the intention with which it was used; here clearly it did not cover all minerals, nor "springs of oil," having regard to the separate pumping of the oil and the improbability of an intended reservation of what was a dangerous nuisance at the date of the grant.

Notes. Considered: *Borys* v. *Canadian Pacific Rail. Co.*, [1953] 1 All E.R. 451. Referred to: *A.-G.* v. *Salt Union*, [1917] 2 K.B. 488; *Australia Commonwealth* v. *Hazeldell*, [1921] 2 A.C. 373; *Western Minerals, Ltd.* v. *Gaumont*, [1953] 1 S.C.R. 345.

As to reservations in a sale of land see 11 Halsbury's Laws (3rd Edn.) 434 and 34, ibid. 349; and for cases see 17 Digest (Repl.) 388 and 34 Digest 603.

Case referred to:

(1) *Glasgow Corpn.* v. *Farie* (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 34 Digest 604, *12*.

Also referred to in argument:

Ontario Natural Gas Co. v. *Smart* (1890), 19 O.R. 591; on appeal (1891), 18 O.A.R. 626.

Hext v. *Gill* (1872), 7 App. Cas. 699; 41 L.J.Ch. 761; 27 L.T. 291; 20 W.R. 957, L.JJ.; 34 Digest 606, *41*.

A *Symington* v. *Caledonian Rail. Co.*, [1912] A.C. 87; 81 L.J.P.C. 155; 106 L.T. 193; 56 Sol. Jo. 87, H.L.; 34 Digest 609, *73.*

Caledonian Rail. Co. v. *Glenboig Union Fireclay Co.*, post p. 307; [1911] A.C. 290; 80 L.J.P.C. 128; 104 L.T. 657; 75 J.P. 377, H.L.; 34 Digest 606, *36.*

Great Western Rail. Co. v. *Blades*, [1901] 2 Ch. 624; 70 L.J.Ch. 847; 85 L.T. 308; 65 J.P. 791; 17 T.L.R. 693; 45 Sol. Jo. 707; 34 Digest 608, *50.*

B *Great Western Rail. Co.* v. *Carpalla United China Clay Co.*, [1910] A.C. 83; 79 L.J.Ch. 117; 101 L.T. 785; 74 J.P. 57; 26 T.L.R. 190; 54 Sol. Jo. 150, H.L.; 11 Digest (Repl.) 162, *358.*

North British Rail. Co. v. *Budhill Coal and Sandstone Co.*, [1910] A.C. 116; 79 L.J.P.C. 31; 101 L.T. 609; 26 T.L.R. 79; 54 Sol. Jo. 79, H.L.; 34 Digest 607, *43.*

C *Re Todd, Birleston & Co. and North Eastern Rail. Co.*, [1903] 1 K.B. 603; 72 L.J.K.B. 337; 88 L.T. 366; 19 T.L.R. 249; sub nom. *Re North Eastern Rail. Co. and Todd, Birleston & Co.*, 67 J.P. 105, C.A.; 11 Digest (Repl.) 162, *357.*

Church v. *Inclosure Comrs.* (1862), 11 C.B.N.S. 664; 31 L.J.C.P. 201; 8 Jur. N.S. 893; 142 E.R. 956; 11 Digest (Repl.) 74, *960.*

D *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100, H.L.; 11 Digest (Repl.) 162, *353.*

A.-G. for Isle of Man v. *Mylchreest* (1879), 4 App. Cas. 294; 48 L.J.P.C. 36; 40 L.T. 764, P.C.; 34 Digest 608, *52.*

Tucker v. *Linger* (1883), 8 App. Cas. 508; 52 L.J.Ch. 941; 49 L.T. 373; 48 J.P. E 4; 32 W.R. 40, H.L.; 17 Digest (Repl.) 51, *593.*

Dunham v. *Haggerty* (1885), 110 Penn. 560.

Silver v. *Bush* (1906), 213 Penn. 195.

Monypenny v. *Monypenny* (1861), 8 H.L. Cas. 114; 31 L.J.Ch. 269; 11 E.R. 671, H.L.; 17 Digest (Repl.) 264, *684.*

F **Appeal** against a judgment of the Court of Appeal for Ontario (Moss, C.J., Garrow, Maclaren and Magee, JJ.), dated Nov. 20, 1911 (reported 25 O.L.R. 93), affirming (Meredith, J., dissenting) the judgment of the Chancellor of Ontario (Boyd, C.) (reported 22 O.L.R. 319), and dismissing the appeal of the appellants.

The chief issue raised by the pleadings was whether the appellants had any right to search and bore for oil and natural gas on lands belonging to the respondent G under and by virtue of the words of the reservation and exception contained in the deed of bargain and sale to the late Charles Farquharson set out in the judgment. It was found that oil and natural gas had a common origin. They were both known as hydro-carbons, and belonged to the petroleum series. The whole of this series was scientifically classified under the head of carbonaceous minerals, and had been so classified before the date of the respondent's deed. It was admitted on H behalf of the respondent that in drilling for oil or gas exactly the same methods were used. When oil was first reached it was always under some pressure of gas which tended to raise the oil towards the surface. Whenever oil was found gas also was found, but there was not necessarily oil where there was gas. It was impossible to bore down to the oil without releasing a considerable quantity of gas. If the gas was artificially confined in the strata from which the oil was being I pumped, the pressure of the gas would prevent the valve of the pump working, and keep back the supply of oil. Formerly, when the gas was found to have a commercial value, it was allowed to escape, but more recently by means of special appliances for casing the tubes in the bore hole the gas was drawn off, either in combination with oil which was forced up by it or alone. It was not suggested that the appellants worked or used gas except in the case of an oil well. In all cases they appeared to have got up both, never gas alone. The trial judge came to the conclusion that the appellants were entitled by virtue of the reservation

to search and bore for oil in or under the lands, but that the wording of the reservation did not include the right to search and bore for natural gas, and that this latter right belonged to the land or surface owner. The appellants appealed to the Court of Appeal for Ontario, there being no cross-appeal on the part of the respondent in regard to the oil, and that court dismissed the appeal, MEREDITH, J., dissenting. The appellants appealed to the Privy Council.

Sir R. Finlay, K.C., Hellmuth, K.C. (the latter of the Canadian Bar) and *Rowlatt* for the appellants.

Danckwerts, K.C., and *MacInnes, K.C.* (the latter of the Canadian Bar), for the respondents.

July 31, 1912. **LORD ATKINSON.**—This is an appeal against a judgment of the Court of Appeal for Ontario, dated Nov. 20, 1911, affirming the judgment of the Chancellor of Ontario and dismissing the appeal of the appellants. The Canada Company, the principal appellant, the other appellants being merely its licensees, was incorporated by a charter of King George IV, dated Aug. 19, 1826, granted in exercise of the powers vested in His Majesty by a statute of the Imperial Parliament passed in the sixth year of his reign, entitled

> "An Act to enable His Majesty to grant to a company to be incorporated by charter to be called the Canada Company certain lands in the province of Upper Canada, and to invest the company with certain powers and privileges and for other purposes."

By patent issued by the Province of Canada dated Oct. 12, 1841, the Crown granted to this company a large tract of land in what now has become the province of Ontario, comprising, amongst others, lot No. 6 in the eighth concession of the township of Tilbury East in the county of Kent, saving and reserving to the Crown all gold and silver that might be found on the lands granted. By deed dated Jan. 22, 1867, this company granted to one Charles Farquharson the fee simple in the southern half of the lot No. 6 comprising 100 acres more or less. This deed contained an excepting clause, which ran as follows:

> "Excepting and reserving to the said company, their successors and assigns, all mines and quarries of metals and minerals and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned."

The sole question for the decision in the present case is what is the true construction of this clause. Does it or does it not except from the grant the natural gas which impregnates certain underlying strata of these lands? The case does not require that their Lordships should lay down a definition of minerals, nor even draw the line between what are and what are not minerals. The only question for decision is what, having regard to the time at which this instrument was executed, and the facts and circumstances then existing, the parties to this deed intended to express by the language they have used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language. In one sense natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. It is obvious, however for several reasons, that in this clause of the grant, the word "minerals" is not used in this wide and general sense; first, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, viz., "metals," and "springs of oil in or under the said land"; secondly, because

A the words "all mines and quarries of metals and minerals," coupled with the words "search for, work, win, and carry away the same," do not seem to be applicable to a thing of the nature of this gas, obtainable in the way in which it is obtained; thirdly, because of the nature of the relation which exists between this gas and rock oil, or "the springs of oil in or under the said land," excepted in the grant and of the function which the gas performs in winning, working, or obtaining the B oil from these springs; and, fourthly, because of the state of knowledge at the date of this deed and the way in which gas of this kind was then regarded and treated. As LORD WATSON said in *Glasgow Corpn.* v. *Farie* (1) (13 App. Cas. at p. 657):

> "The words 'mines' and 'minerals' are not definite terms; they are susceptible C of limitation or expansion according to the intention with which they are used."

It is clearly established by the evidence that this gas is not volatilised rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their D Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum, and that, when this stratum is tapped by a pipe or boring leading to the surface, the gas in its escape to the upper air helps to bring up to the surface with it some of the oil. In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a E stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases when the pressure under which the case is pent up in the earth is relieved, a pump has to be used to pump up the oil.

Again, it was proved at the hearing before the Chancellor by the Chief Com- F missioner that oil mining leases only began to be made by the Canadian Company in 1863. At the date of this deed, Jan. 22, 1867, the winning of mineral oil through wells was a comparatively new industry. This natural gas, according to the witness, Mr. W. H. Dowd, did not become commercially valuable till 1880, and, according to the evidence of Mr. Coste and others, the accuracy of which does not appear to have been questioned, though gas might be found without the presence G of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as best it could be. It did not begin to be utilised till 1890, more than twenty years after the date of the deed. The inference to be drawn from this evidence appears to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in 1867, and for many years after, as a dangerous nuisance, never occurred to the H parties to the deed of Jan. 22, 1867.

If, in the attempt to exclude from the grant and preserve to the granting company what was then esteemed a valuable subject of property believed to be in the soil parted with—viz., oil—a term was used which in its widest sense would cover this then worthless produce, gas, the parties never intended, their Lordships think, to use that term in this wide sense.

I It has been strongly insisted on in argument on behalf of the appellants that it will be impossible for the company to take advantage of this exception and win and carry away oil from these springs unless they are held to be entitled to the gas also. The gas is now separated from the oil where they well up together, by a drip tank, and conducted into some receptacle from which it can, when needed, be drawn, but they contend that this could not be done if the ownership of the two substances was divided. No doubt some inconvenience might be caused. That, however, can hardly affect this question of construction. The company are clearly

entitled to search and work for oil in these springs of oil, and to win and carry it away from them provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned. But, however that may be, their Lordships are on the whole of opinion that on the only question raised for their decision, the construction of the excepting clause in the company's deed of Jan. 22, 1867, the decision appealed from was right and should be affirmed, and this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors: *Freshfields; Blake & Redden.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

LIVERPOOL CORPORATION *v.* CHORLEY UNION ASSESSMENT COMMITTEE

[HOUSE OF LORDS (Viscount Haldane, L.C., the Earl of Halsbury, Lord Atkinson and Lord Shaw), November 21, 22, 1912, February 3, 1913]

[Reported [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 29 T.L.R. 246; 57 Sol. Jo. 263; 11 L.G.R. 182; 1 B.R.A. 72]

Rates—Rateable occupation—Gathering ground of water undertaking—Use solely for sporting and afforestation—Trespassers warned off—Sporting tenant required to burn heather and maintain shooting structures—Aim to prevent pollution of water.

A corporation purchased a large area of agricultural land and moorland comprising the gathering ground of water for the reservoirs of their water undertaking, and in order to reduce the risk of pollution of the water demolished or caused to be left unoccupied certain farmhouses and buildings on part of the land, abolished rights of pasturage and turf cutting, and limited use of the part to sporting and afforestation, for which considerable areas were planted with trees. They rigorously warned off trespassers and required the lessee of the right of sporting over the moorland, who was separately rated for the right, under covenant to burn each year a portion of the ling or heather to their satisfaction, and to maintain butts and stands and walls in good and substantial repair.

Held: the corporation were in beneficial occupation of the gathering ground for rating purposes, by reason both of its commercial use of collecting pure and unpolluted water which they might vend in their business and of its use as a game preserve by the lessee of the right of sporting as their agent.

Notes. Applied: *Hackney Borough Council* v. *Metropolitan Asylums Board* (1924), 131 L.T. 136. Considered: *L.C.C.* v. *Hackney Borough Council*, [1928] All E.R. Rep. 614. Applied: *Solihull Corporation* v. *Gas Council*, [1961] 1 All E.R. 542. Referred to: *London Corpn.* v. *Associated Newspapers*, [1915] A.C. 674; *Back* v. *Daniels*, [1924] All E.R. Rep. 789; *Bertram* v. *Wightman*, [1936] 2 All E.R. 487; *Townley Mill Co. (1919), Ltd.* v. *Oldham Assessment Committee*, [1937] 1 All E.R. 11; *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corpn.* (1943), 168 L.T. 81; *Hampstead Borough Council* v. *Associated*

Cinema Properties, Ltd., [1944] 1 All E.R. 436; *Re London and North Eastern Rail. Co.'s Appeal*, [1946] K.B. 27; *Arbuckle Smith & Co., Ltd.* v. *Greenock Corpn.*, [1960] 1 All E.R. 568.

As to actual occupation and beneficial occupation for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 16 et seq., 22, and for cases see 38 DIGEST (Repl.) 479, 487.

Cases referred to:

(1) *R.* v. *Battle Union* (1866), L.R. 2 Q.B. 8; 8 B. & S. 12; 36 L.J.M.C. 1; 15 L.T. 180; 12 Jur. N.S. 996; 15 W.R. 57; sub nom. *Meyrick* v. *Battle Union*, 31 J.P. 19; 38 Digest (Repl.) 588, *677*.

(2) *Kenrick* v. *Guilsfield Overseers* (1879), 5 C.P.D. 41; 49 L.J.M.C. 27; 41 L.T. 624; 44 J.P. 202; 28 W.R. 372; 38 Digest (Repl.) 588, *679*.

(3) *R.* v. *Mersey and Irwell Navigation Co. of Proprietors* (1829), 9 B. & C. 95; 4 Man. & Ry. K.B. 84; 2 Man. & Ry. M.C. 106; 7 L.J.O.S.M.C. 70; 109 E.R. 36; 38 Digest (Repl.) 549, *417*.

(4) *Doncaster Union Assessment Committee* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1894), [1895] A.C. 133, n.; 71 L.T. 885; 10 T.L.R. 567; 6 R. 280, H.L.; 38 Digest (Repl.) 496, *144*.

(5) *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 11 T.L.R. 132; 11 R. 98, H.L.; 38 Digest (Repl.) 470, *7*.

(6) *Mersey Docks* v. *Cameron*, *Jones* v. *Mersey Docks* (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur. N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, *395*.

(7) *Greig* v. *Edinburgh University* (1868), L.R. 1 Sc. & Div. 348; 32 J.P. 627, H.L.; 38 Digest (Repl.) 553, *436*.

(8) *L.C.C.* v. *Erith Parish* (*Churchwardens, etc.*) *and Dartford Union Assessment Committee*, *West Ham Parish* (*Churchwardens, etc.*) v. *L.C.C.*, *St. George's Union Assessment Committee* v. *L.C.C*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C.* v. *Erith Overseers*, *L.C.C.* v. *West Ham Union*, *L.C.C.* v. *St. George's Union* (1891–93), Ryde, Rat. App. 382, H.L.; 38 Digest (Repl.) 481, *47*.

(9) *Winstanley* v. *North Manchester Overseers*, [1910] A.C. 7; 79 L.J.K.B. 95; 101 L.T. 616; 74 J.P. 49; 26 T.L.R. 90; 54 Sol. Jo. 80; 8 L.G.R. 75, H.L.; 38 Digest (Repl.) 506, *200*.

(10) *R.* v. *London Corpn.* (1790), 4 Term Rep. 21; 100 E.R. 872; 38 Digest (Repl.) 476, *10*.

(11) *R.* v. *St. Luke's Hospital* (1760), 2 Burr. 1053; 1 Wm. Bl. 249; 97 E.R. 703; 38 Digest (Repl.) 540, *361*.

(12) *R.* v. *St. Bartholomew's the Less* (*Inhabitants*) (1769), 4 Burr. 2435; 98 E.R. 276; sub nom. *St. Bartholomew's Hospital* (*Governors*) *Case*, 1 Bott, 131; 38 Digest (Repl.) 469, *2*.

(13) *Anon.* (1702), 2 Salk. 527; 91 E.R. 448; 38 Digest (Repl.) 539, *355*.

(14) *Smith* v. *New Forest Union Assessment Committee* (1889), 60 L.T. 927; 53 J.P. 661, D.C.; affirmed 61 L.T. 870; 54 J.P. 324; 6 T.L.R. 31; sub nom. *Crowther-Smith* v. *New Forest Union* (1886–90), Ryde, Rat. App. 311, C.A.; 38 Digest (Repl.) 480, *39*.

(15) *R.* v. *St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing* v. *St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; (1871–85), Ryde, Rat. App. 188; 38 Digest (Repl.) 469, *5*.

(16) *R.* v. *Melladew*, [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 23 T.L.R. 207; 51 Sol. Jo. 169; 5 L.G.R. 177; 2 Konst. Rat. App. 530, C.A.; 38 Digest (Repl.) 477, *15*.

(17) *Borwick* v. *Southwark Corpn.*, [1909] 1 K.B. 78; 78 L.J.K.B. 121; 99 L.T. 841; 73 J.P. 38; 7 L.G.R. 10, D.C.; 38 Digest (Repl.) 477, *16.*

(18) *Harter* v. *Salford Overseers* (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 11 Jur. N.S. 1036; 13 W.R. 861; 122 E.R. 1313; 38 Digest (Repl.) 619, *877.*

Also referred to in argument:

Hare v. *Putney Overseers* (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 29 W.R. 721, C.A.; 38 Digest (Repl.) 480, *38.*

Bootle Overseers v. *Liverpool Warehousing Co.*, *Same* v. *Webster* (1901), 85 L.T. 45; 65 J.P. 740; 17 T.L.R. 550, D.C.; 38 Digest (Repl.) 477, *14.*

Lambeth Overseers v. *L.C.C.*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; 46 W.R. 79; 13 T.L.R. 527; sub nom. *St. Mary, Lambeth (Churchwardens and Overseers)* v. *L.C.C.*, 61 J.P. 580, H.L.; 36 Digest (Repl.) 351, *13.*

Appeal against an order of the Court of Appeal (VAUGHAN WILLIAMS, BUCKLEY and KENNEDY, L.JJ.) reported [1912] 1 K.B. 270, affirming an order of a Divisional Court (LORD ALVERSTONE, C.J., HAMILTON and AVORY, JJ.) reported [1911] 1 K.B. 1057, which had reversed a decision of quarter sessions for the county of Lancaster on a Case Stated.

Liverpool Corporation, the appellants, owned certain land, which was occupied by their reservoirs and works, at Rivington, and received into the reservoirs the water flowing from an adjoining gathering ground, which consisted of agricultural land and moorland. They acquired by purchase this tract of land and pulled down the farmhouses, abolished certain rights of pasturage and turf cutting, and limited the user of the land to purposes of sporting and afforestation in order to diminish the risk of pollution of the water supply. They planted a portion of the land with trees, converted other portions into nurseries for young trees, and let the sporting rights over the land to a lessee for a term of years, but did not exercise any other acts of occupation. The assessment committee having decided that the appellants were in such beneficial occupation of the land as rendered them liable to the poor rate, the appellants appealed to quarter sessions. Quarter sessions allowed the appeal, subject to the opinion of the High Court on a Special Case Stated.

The questions asked by the Special Case for the opinion of the court were whether on the evidence before them the following decisions of quarter sessions were right in law: (i) that the appellants were not in rateable occupation of the land with the exception of the parts used by them for the plantations and nurseries; (ii) that the plantations and nurseries should be assessed under s. 4 of the Rating Act, 1874, at 2s. per acre and 15s. per acre respectively; (iii) that the price paid by the appellants for the gathering ground was no evidence of the rateable value of the land used for plantations and nurseries. The corporation now asked that the decision of the Court of Appeal should be reversed and the order of quarter sessions restored.

Balfour Browne, *K.C.*, *Macmorran*, *K.C.*, and *Oulton* for the appellants.

Danckwerts, *K.C.*, *Ryde*, *K.C.*, and *Gordon Hewart*, *K.C.*, for the respondents.

Their Lordships took time for consideration.

Feb. 3, 1913. The following opinions were read.

VISCOUNT HALDANE, L.C.—I have had the advantage of reading the opinion which has been prepared by LORD ATKINSON. I fully concur in its conclusions, and I do not propose to add anything.

LORD ATKINSON.—The judgment of the Court of Appeal in this case, dated Dec. 21, 1911, from which this appeal has been brought, affirmed a judgment of the Divisional Court, dated Jan. 25 of the same year. The matter came before the Divisional Court by way of appeal, on a Case Stated, from a decision of quarter

A sessions of the county of Lancaster sitting at Preston. The main question for decision in that appeal was whether the appellants are liable to be rated for the relief of the poor under the Poor Relief Act, 1601, s. 1, as the occupiers of a tract of open moorland, about 859 acres in extent, of which they are the owners in possession, the same forming part of the gathering ground for the supply of water to their waterworks at Rivington, in the township of Withnell, in that county. B Quarter Sessions held that they were not so rateable on the ground that they were not in occupation of the moor. The Divisional Court and the Court of Appeal held, on the contrary, that they were in such beneficial occupation of it as rendered them liable to be rated in respect of it. Subsidiary questions were raised as to the amount on which they, if rateable for this tract, should be rated, and also as to the amount on which they should be rated for a plantation, 306 acres in extent, C another portion of their gathering ground, of which they were admitted to be the owners and beneficial occupiers under the Rating Act, 1874, s. 3, and a further question as to the admissibility of the price paid for certain of their lands as evidence of their rateable value.

The appellants are the owners of the Rivington waterworks, in and by which they carry on the commercial business of vendors of water. The commodity which D they sell is collected for them in a vast gathering ground 10,000 acres in extent. Owing to the configuration of this tract, the rain water which falls on it flows towards their reservoirs in natural channels. The appellants availed themselves for several years of this source of supply, though the gathering ground did not belong to them; but, in order to have more absolute control over this catchment area, and thereby enable them to protect from pollution the more effectually the E water gathered in it, thus render the water better, purer, and presumably more saleable, they purchased in the year 1898, at very considerable cost, the whole tract of 10,000 acres. Part of this tract they let to tenants who are rated in respect of the occupation of their holdings. The appellants are themselves rated in respect of their reservoirs and works, and as they have devoted the planted area to two uses, first, to the use of collecting water for them, and, secondly, to the F use of producing timber for them, they have also devoted the moorland to two uses, first, the gathering of water, and, secondly, the use of harbouring, feeding, and rearing game. The moor is a grouse moor. They have, by lease bearing date Mar. 16, 1906, leased the sporting rights over it and the plantations together with some other lands to a tenant at a rent of £300 per annum. Later on I shall deal with some of the terms of this lease, and the nature of the rights which it confers. G The appellants, however, insist that, notwithstanding the second use to which they thus devote the moorland, lucrative though it be, they are not liable to be rated as being in beneficial occupation of it. The changes which the appellants made in their treatment of and mode of dealing with this moor and their other lands after they had purchased them are described in paras. 5 and 6 of the Case Stated, which ran as follows :

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"(5) The said land when bought by the appellants consisted partly of agricultural land with farmhouses and buildings on it, and more largely of moorland. In order to reduce the population and the cattle on the said land, and so diminish the risk of the pollution of the water flowing therefrom, the appellants demolished, or caused to be left unoccupied, certain farmhouses and buildings I thereon, and abolished certain rights of pasturage and turf cutting which had previously been enjoyed thereon, and limited the user thereof to purposes of sporting and afforestation in manner hereafter appearing. (6) They had planted 297½ acres of the said land with trees for the purpose of improving the shooting, and had utilised 8½ acres as a nursery for young trees, and they had inclosed the said planted area in a ring fence. The remainder of the said land, 859 acres, was moorland already inclosed by a fence when the appellants bought it. They had made a few grips in the said planted area for the purpose of adapting it

for plantations. The water from the said grips flowed naturally, like the rest of the water from the land, to the waterworks of the appellants."

In order to prove that an owner in possession of such an extensive tract as this has entered into actual occupation of it, one is not obliged to prove the doing of some physical act on every portion of it. One must have regard to the kind of occupation of which the tract is reasonably susceptible. Acts done on one portion of it may furnish strong evidence of his having entered into, and being in actual occupation of, other portions of it, or of the whole tract. The fencing off and planting of nearly 300 acres of this tract, and the demolition of farmhouses and other buildings erected upon other portions of it, go strongly to prove, in this case, that the appellants had entered into actual occupation of the whole tract. But as regards the moorland there is much more. The gamekeeper of the lessee, acting with the authority of the appellants, regularly warns trespassers off the moor. Since the purchase the trespassers have been more rigorously excluded than theretofore.

Before the passing of the Rating Act, 1874, the right of sporting over land granted by the owner of the lands was not rateable under the statute of Elizabeth, not being a "hereditament": *R.* v. *Battle Union* (1). Now it is rateable though granted in gross and severed from the occupation of the land: *Kenwick* v. *Guilsfield Overseers* (2). It was stated that the lessee is rated under this statute in respect of the sporting right granted to him. He has no estate or interest in this moorland itself, but his lease contains covenants binding him to burn each year a portion of the old ling or heather growing on the moor, in the manner therein described, to the satisfaction of the appellants, and also binding him to keep and maintain shooting butts and stands and walls (presumably on the moor) in good and substantial repair to the satisfaction of the agent of the corporation. The appellants have thus appointed a person to dispose yearly of some of the heathery produce of the moor, and to repair and maintain certain physical structures upon it. If the lessee keeps his covenant and does those things, he does them not by virtue of any estate or proprietary interest which he has in the land or right over it, but as the agent of the appellants. The physical acts thus required to be done by him should consequently, if done, be, for the purpose of this question of occupancy, treated as their acts. Presumably the lessee has performed his covenant during the five years for which his lease has run. If so, the appellants have, through him as their agent, been dealing physically with the produce of this land in such a way as to increase the value of the right of sporting over it. This latter right is, in its true legal nature, a right springing from, and incident to, the occupation of the land. In *R.* v. *Battle Union* (1) Cockburn, C.J., says (L.R. 2 Q.B. at p. 13):

> "Now the right to take game upon land is an incident to the occupation of the land. If the land is let without any reservation, or any previous granting away of the right, it follows as a necessary consequence of the right of occupation."

So that, if the appellants themselves had, through their agents (they could not do it otherwise), exercised the right of sporting over this moor before they granted the lease, they would undoubtedly be held to be in beneficial occupation of the moor. To use the language of s. 6 (2) of the Rating Act, 1874, the appellants have severed the right of sporting from the occupation and let it. The lessee, however, does not become the occupier of the moor, and I am quite unable to see on what principle the maintenance and keeping in repair of the structures upon the moor, and the dealing each year in the manner described with the heather growing upon it, does not, under the circumstances, amount to a user of the land by the appellants and a proof of their occupancy of it, notwithstanding the lease of the sporting rights.

As an illustration of how slight a user of land by its proprietor in possession will be held sufficient to render him liable to be rated as the beneficial occupant of it (the land), I may refer to the decision in *R.* v. *Mersey and Irwell Navigation Co.*

(3), apparently approved of in this House in *Doncaster Union Assessment Committee* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (4): (see the speech of LORD DAVEY in *Holywell Union* v. *Halkyn Drainage Co.* (5), [1895] A.C. at p. 132 and the footnote on the following page). In the first-mentioned case the undertakers, the respondents, were empowered by statute to deepen and straighten the bed of portions of the Rivers Irwell and Mersey so as to make them navigable. The exclusive right (a most valuable one) of navigating the portions of these rivers where those works were effected was conferred on them, subject only to this, that the riparian owners of land abutting on the streams had also the right of navigating the rivers, but only with pleasure boats. The respondents had acquired for the purpose of this navigation certain towing paths and locks in respect of which they were admittedly rateable. The point at issue was whether they were also rateable as occupiers of the subaqueous soil, the bed of the river. They were held not to be so, because they were not the owners of the bed and soil, but only entitled to an easement over it. It was quite clear, however, from the judgments of BAYLEY and PARKE, JJ., that had they been owners of the bed and soil they would have been held to be rateable as the occupiers of it though the only way in which they used the soil was by navigating the waters lying above it.

In *Jones* v. *Mersey Docks* (6) BLACKBURN, J., in delivering the opinion of the judges, said (11 H.L. Cas. at p. 462):

> "It is clear that there can be no valid rate unless the occupation be of value, and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value, which is the sense in which the phrase is used in many cases cited at the Bar, it is clear that a beneficial occupation is essential to the foundation of the rate."

LORD CAIRNS, L.C.'s speech in *Greig* v. *Edinburgh University* (7) is to the same effect; and LORD HERSCHELL, L.C., in commenting in *London County Council* v. *Erith Parish Churchwardens, etc.* (8) on this passage from BLACKBURN, J.'s, judgment said ([1893] A.C. at p. 585):

> "The learned judge, in my opinion, did not, and could not, have meant that it is essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is, I think, rateable whenever its occupation is of value."

That principle has been pointed out and acted on in many subsequent cases, and yet in the argument of the case before your Lordships it has not been steadily kept in view. Indeed, with all respect to the learned judges who commented on the decision of your Lordships' House in *Winstanley* v. *North Manchester Overseers* (9), I am not quite sure that the distinction between the kind of occupation of land which, however well established, is not rateable, and the kind of occupation which is rateable, has not, by one of them at least, been rather lost sight of. For instance, LORD ALVERSTONE, C.J., is reported to have expressed himself thus in the present case ([1911] 1 K.B. at p. 1066):

> "On behalf of the respondent it was contended that the proposition laid down by LORD ATKINSON in giving judgment in *Winstanley* v. *North Manchester Overseers* (9) that owners in possession are prima facie occupiers is to be understood in the literal and bald way in which it is there stated, and that it governs the present case, and therefore that the owner of land in possession of the land as owner, if he does not allow anybody else to occupy it, is in rateable possession of it."

But this House never affirmed, or purported, or intended to affirm any such proposition as that the owner of land, not houses, is to be held to be prima facie in rateable occupation of it in such circumstances.

The passage cited from the report in *Winstanley's Case* (9) ([1910] A.C. at p. 14), based as it was on the opinions of BULLER, J., in *R.* v. *London Corpn.* (10) (4 Term.

Rep. at p. 27), and LORD HERSCHELL, L.C., in *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (5) ([1895] A.C. at p. 121) had reference solely to the first of the three questions into which it was stated that the question for decision resolved itself. These questions were: (i) Does the appellant occupy the cemetery for which he is rated? (ii) If he does, is his occupation a thing of value? (iii) What is the measure of that value? It is quite obvious that, according to the authorities already cited, the appellant would not have been rateable if the second question were answered in the negative, though the first question were answered in the affirmative. I have read all the judgments delivered in the present case, as well as the authorities cited in them, and I have failed to find anything to lead me to the conclusion that the guarded and limited proposition laid down by LORD HERSCHELL, of which the proposition laid down by me in the *Winstanley Case* (9) was but a literal reproduction, is, when properly understood, unsound.

There is, however, much beyond that prima facie presumption in the present case. The appellants relied much on a judgment of Lord Mansfield in *R.* v. *St. Luke's Hospital* (11). There London Corporation had leased certain lands to several lessees for the purpose of having erected on them a hospital for the reception of lunatics. The hospital was erected, and at the time when it was rated it was occupied exclusively by the insane patients and the staff which attended on them. It was sought to rate one of the members of the staff as the person in beneficial occupation of the entire hospital. LORD MANSFIELD in delivering judgment said that the material point in the case was: Who can be named and charged as occupier? He then proceeded to show that the lessees could not be so treated,

> "as they were the nominal trustees bound to use the premises as a hospital and for no other purpose,"

that one of their servants could not be so treated, and, of course, that the lunatics could not be so treated. The case was accordingly decided on the ground that there was no occupier who could be rated. That was the only point decided. This appears clearly not only from the language used by LORD MANSFIELD in the case itself, but also from the judgment subsequently delivered by him in *R.* v. *St. Bartholomew's the Less* (*Inhabitants*) (12). During the argument of the hospital case, however, an anonymous case was cited to him (*Anon.* (13)), in which HOLT, C.J., laid it down broadly

> "that hospital lands were chargeable to the poor as well as others, for no man by appropriating them to a hospital can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon his neighbours."

It was this proposition with which LORD MANSFIELD was dealing when he made use of the language upon which so much reliance was placed. This pronouncement of LORD MANSFIELD was entirely unnecessary for the decision of the case. It must be taken in connection with the statement of the law to which it refers. It does not touch the present case, and is, I think, in no way in conflict with the proposition already referred to as to prima facie occupation laid down by LORD HERSCHELL.

The next authority cited on behalf of the appellants was *Smith* v. *New Forest Union Assessment Committee* (14) reported very briefly in the Court of Appeal and in the Divisional Court. The facts which appear from these reports were as follows: Smith, the person whom it was sought to rate, had purchased a plot of building ground with the intention of building on it. It was uninclosed when he bought it; he never himself inclosed it, cultivated it, or built on it, let it, or used it any way. The cattle of a neighbour, without his knowledge or permission, frequently strayed over it and ate any grass which they found on it. He caused a bill to be affixed to a tree growing on the plot stating that it was to be let, but he never succeeded in letting it. The fixing of this notice was the only physical

act which he did on it, and the question asked of the Divisional Court by the justices in the Case Stated was this: Was Smith, under the circumstances, an occupier of this plot of ground within the meaning of the Poor Relief Act, 1601? That question was answered in the negative. It was obvious that he, if in occupation of the plot at all, was not in such beneficial occupation of it as would render him rateable, and it is somewhat difficult to discover whether or not this was the precise ground of decision. LOPES, L.J., says:

> "To constitute occupation under the statute of Elizabeth there must be an enjoyment of the property capable of being beneficial. There is no evidence of any such here."

LORD ESHER, M.R., said: "He was never in such occupation as to be rateable under the statute of Elizabeth." I do not think that the decision is in any way applicable to the present case, or in conflict with the law as laid down by LORD HERSCHELL.

But the authorities mainly relied on by the appellants were those which deal with the non-rateability of vacant houses. I find great difficulty in reconciling these one with the other, from the statement of the law laid down by LUSH, J., in *R.* v. *St. Pancras Assessment Committee* (15) down to the decision in *R.* v. *Melladew* (16) and *Borwick* v. *Southwark Corpn.* (17) and still greater difficulty in discovering any intelligible principle on which the decisions are founded, or any principle applicable equally to vacant houses and to property like that which it is sought to rate in this case. BLACKBURN, J., in *Harter* v. *Salford Overseers* (18) says that the exemption of vacant houses from rateability is a good rough rule which may work well in practice, but that he could never understand the reason why a vacant house should not be rated if there is no furniture in it. During the argument LORD HALSBURY suggested a possible construction of the statute of Elizabeth which would afford a quite intelligible reason for the practice which is followed. It was, as I understand it, this: The statute of Elizabeth enumerates "houses" as well as "lands" in the list of properties the occupiers of which are to be rated for the relief of the poor. In one sense a house is merely land with the bricks, mortar, and the other building materials of which the house is composed resting on it, and in that sense there would be no difference in the legal nature of the hereditament whether these materials were heaped together on the ground in an unformed mass or were built and fashioned into a house. The word "land" would include the site and the superincumbered materials in both cases. This, however, is plainly not the sense in which the word "house" is used in the statute, since it is mentioned as a separate and different kind of property from land. When the statute, therefore, enacts that the occupier of a house shall be rated it must mean that the person to be rated shall occupy the house as a house; i.e., that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses are reasonably devoted to; and that, as a vacant house is not used for any of these purposes, it is not occupied as a house within the meaning of the statute.

However that may be, I do not think that the cases dealing with the rateability of vacant houses are applicable to such a property as this moor, which, through the operations of nature, unaided by man, produces each year products such as grass, heath, and bracken, useful and valuable to man, and in this case rears and harbours game on it in addition, thus differing in almost every aspect from a vacant house, which produces nothing, and is used for no purpose whatever. Counsel for the appellants urged that occupation includes possession, plus use. He admitted, however, that, if the appellants had built an embankment across the mouth of a valley on this moorland and flooded the valley, thereby turning it into a reservoir to supply their lower works, they would properly have been held to be in beneficial occupation of the lands on which the water rested in the valley. I am quite unable

to discover any principle on which these lands could be distinguished on this point from those upon which the rainwater falls, and over which it runs on its way to its resting place.

The lands of each kind all help to this same end, and serve in different ways to effect the same ultimate purpose, viz., to feed the appellants' works with a supply of pure and unpolluted water for their commercial gain. Accepting, then, for the moment, the definition of counsel for the appellants, I am clearly of opinion that each of the uses to which the appellants devote this moorland, the commercial use of collecting for them water which they in their business vend, as well also its use as a game preserve of the kind described, and certainly those two uses combined, are sufficient to turn the appellants' admitted possession of the moor into their beneficial occupation of it, which renders them rateable in respect of it. For all the foregoing reasons I think that the order of the Court of Appeal was rightly made and should be affirmed, and this appeal be dismissed.

THE EARL OF HALSBURY and **LORD SHAW** concurred.

Appeal dismissed.

Solicitors: *F. Venn & Co.*, for *E. R. Pickmere*, Town Clerk of Liverpool; *Crowders, Vizard, Oldham & Co.*, for *Stanton & Sons*, Chorley.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re A SOLICITOR. Ex parte THE LAW SOCIETY

[King's Bench Division (Darling, Hamilton, and Bankes, JJ.), November 8, 1911]

[Reported [1912] 1 K.B. 302; 81 L.J.K.B. 245; 105 L.T. 874; 28 T.L.R. 50; 56 Sol. Jo. 92]

Solicitor—Professional misconduct—Financing debt-collecting company to obtain business—Receipt by solicitor of commission on amount recovered—Champerty—Solicitors Act, 1888 (51 *& 52 Vict., c.* 65), *ss.* 12, 13.

The conduct of a solicitor in his profession must be judged by the rules of his profession and by the standard which the vast majority of honourable members of the profession make, not only for their brethren but also for themselves. If, in the pursuit of his profession, he does something which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the Disciplinary Committee of the Law Society to hold that he has been guilty of professional misconduct.

Allinson v. *General Council of Medical Education and Registration* (1), [1894] 1 Q.B. 750, applied.

Upon a complaint of professional misconduct against a solicitor the Disciplinary Committee of the Law Society found that the solicitor had been cognisant of and party to the formation of a debt-collecting company, that he financed the company and controlled its affairs with a view to its being made an adjunct or instrument for the collection of business for him as a solicitor, that through the agency of the company he systematically solicited debt-collecting business without disclosing his connection with the company, and that in all cases where legal proceedings would have to be taken he was to receive as a commission a percentage on, and varying with, the amount

recovered, and in addition to such commission he also tried to obtain costs from the defendants in the actions so brought.

Held: (i) upon the facts so found the solicitor was guilty of professional misconduct; (ii) as the solicitor had an interest in the amount he would recover from a debtor he was in that respect, guilty of champerty.

Notes. The procedure laid down in the Solicitors Act, 1888, on an application for striking a solicitor off the roll or ordering his suspension from practice for misconduct was altered by the Solicitors Act, 1932, ss. 4, 5. See now Solicitors Act, 1957, ss. 46, 47 (37 HALSBURY'S STATUTES (2nd Edn.) 1090–1093).

Considered: *Rajasooria* v. *Disciplinary Committee* (1955), 99 Sol. Jo. 256. Referred to: *Re A Solicitor* (*No. 2*) (1924), 93 L.J.K.B. 761; *Myers* v. *Elman*, [1939] 4 All E.R. 484.

As to the professional discipline of solicitors, see 36 HALSBURY'S LAWS (3rd Edn.) 219 et seq., and for cases see 42 DIGEST 394 et seq.

Cases referred to:

(1) *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217, C.A.; 34 Digest 544, *24*.

(2) *Re Attorneys and Solicitors Act*, *1870* (1875), 1 Ch.D. 573; 45 L.J.Ch. 47; 24 W.R. 38; 42 Digest 130, *1245*.

Also referred to in argument:

Gundry v. *Sainsbury*, [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 26 T.L.R. 321; 54 Sol. Jo. 327, C.A.; 42 Digest 126, *1207*.

Application to strike the name of a solicitor off the roll upon the report of the committee of the Law Society appointed under the Solicitors Act, 1888, s. 12.

The application was made by C. H. Heddon, a solicitor, of Harrogate, that the respondent, a solicitor of Harrogate, might be required to answer the allegations contained in the affidavit (filed therewith) which accompanied the application, and that his name might be struck off the roll of solicitors, or that he might be suspended from practice as a solicitor, or that such other order might be made as the court should think right, on the ground that the matters of fact stated in the affidavit constituted professional misconduct on the part of the respondent in his capacity of solicitor.

The charges made were: (i) That the respondent procured the formation of "Patten's Agency Ltd.," being a company formed (inter alia) to undertake the recovery of debts for its subscribers, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor. (ii) That, whether the respondent procured the formation of the company or not, he, with the like view, from its inception financed and controlled it. (iii) That the respondent commenced and carried on certain actions for the recovery of debts placed in the hands of the company for collection upon terms which were champertous and improper. (iv) That the respondent by the agency of the company systematically solicited debt-collecting business, and that he did so without disclosing his connection with the company. The committee having heard the application at the Law Society's Hall, London, on Mar. 9 and 30, 1911, made a report in which they found (i) that the respondent was cognisant of and party to the formation of the debt-collecting company called "Patten's Agency, Ltd.," that he financed that company and controlled its affairs, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor; (ii) that by the agency of the company the respondent systematically solicited debt-collecting business, and that he did so without disclosing his connection with the company and with a view to procuring for himself the business of recovering the debts; (iii) that the terms upon which the respondent by the agency of the company solicited debt-collecting business, and upon which he is proved to have conducted the proceedings in the two actions

mentioned in this report, were champertous. On each and all of those findings and on the facts appearing in this report the committee reported that the respondent had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

Tyrrell Paine for the Law Society.
Bairstow, K.C., and *A. H. Marshall* for the complainant.
Cecil Dwyer for the respondent.

DARLING, J., stated the findings of the committee and continued: I think that those findings are entirely supported by the evidence. The kind of business which was carried on by this Patten's Agency, Ltd., was practically a business designed solely for the advantage of this respondent. He undoubtedly had a very considerable financial interest in it. Patten was merely a nominee of his, who held shares which were bought and paid for by the respondent, and held to his advantage, and undoubtedly they were held and practically the agency existed for the purpose of bringing business to the respondent which he would conduct as a solicitor. This is found by the Law Society to be professional misconduct. I do not think I need attempt to add anything to the definition which was given in *Allinson* v. *General Council of Medical Education and Registration* (1). In that case LOPES, L.J., said ([1894] 1 Q.B. at p. 763):

> "The Master of the Rolls has adopted a definition which, with his assistance and that of my brother DAVEY, I prepared."

A definition could not be more authoritative than one drawn up by such an authority as that, and adopted after careful consideration by those three learned judges. It was:

> "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'."

Applying that, it comes to this, that the Law Society are very good judges of what is professional misconduct as a solicitor, just as the Medical Council are very good judges of what is professional misconduct as a medical man. I see no kind of reason for coming to any other conclusion than that to which the Law Society have come—that that method of obtaining business is not such as this court can possibly countenance, and, therefore, the society were perfectly right in saying with regard to that matter that there was professional misconduct.

But there was also something else. The terms on which he conducted the business were such that they amounted to champerty in law. Champerty, as the word implies, was common in times when there was little property of any value except land, and most of the early litigation was about land and the bargain was that which resulted in the partition of a field. What was recovered was "champs partis" between the solicitor and the person who claimed it. One got so much and another got so much, and that was forbidden because it led to speculative litigation, and the harrassing of people who ought to feel secure in their rights for the benefit of lawyers and other speculative parties. This case absolutely comes within the definition of champerty as it was given in *Re Attorneys and Solicitors Act, 1870* (2), where JESSEL, M.R., after giving judgment on several other points, said this (1 Ch.D. at p. 575):

> "I may, however, say, for the guidance of the parties, that the agreement is, in my opinion, pure champerty, as it gives to the solicitor, in the event of success, what is equivalent to a tenth part of the property to be recovered."

In this case this solicitor had a distinct interest in the amount which he would recover. His commission for bringing the action was to be governed by the

amount recovered. The percentage was fixed, but the amount would be governed by the amount recovered. Besides, it is perfectly plain upon the uncontradicted facts which were laid before the Law Society that he tried to get the costs out of the defendants in addition to the commission which he would receive from this debt-collecting agency, which was practically a thing carried on in his own office, and with his own money. He would receive something from the plaintiffs, and what he could get from the defendants as well. To my mind that must be champerty.

I, therefore, come to the conclusion that the respondent was guilty of professional misconduct in all the respects in which he has been found guilty of it by the committee of the Law Society. How did he meet the case? He met the charge, they have said, by statements which they could not accept. As he made those statements on oath it amounts to this, that on oath he said what the Law Society firmly believed to be untrue, and I myself am quite convinced that he did on oath swear to that which he knew to be absolutely false. The fact being that this society was constructed in his own office for his own benefit and that he put money into it and in the name of a nominee, he permitted himself in an affidavit to swear this:

> "I have no financial interest in Patten's Agency, Ltd., other than as a creditor. I am not a shareholder, and the F. W. Patten referred to does not hold shares in such company as my nominee. . . . As I have no financial interest in the said company the said letter has been ignored and none of the items enumerated therein have been carried out, neither have I acted upon the said letter."

The letter was this, signed by the respondent, and addressed to the "Manager, Messrs. Patten's Agency, Ltd.":

> "2, Princes' Square, Harrogate, July 25, 1910.—Dear Sir,—As my money is being used for the purpose of exploiting this company, I must insist for the proper conduct of its affairs as follows: An audit of the accounts to date. Periodical audits at my pleasure. All cheques to be countersigned or earmarked by me before payment. All books, papers, &c., to be kept at the company's office, and open to my inspection, or any person authorised by me at any time. No order for expenditure to be given without my consent.—Yours faithfully,"

and he signed it. It is impossible to reconcile that with the statement in this affidavit. That was written before the conduct in question; the affidavit was made to excuse his conduct. Counsel, who argued his case with very great ability, has attempted to give an explanation as to that. It is not his fault that so far as I am concerned I cannot accept it. It seems to me that it is a very grave blot on the conduct of this respondent that after writing such a letter as that he could have permitted himself to make an affidavit containing the passages that I have read.

HAMILTON, J.—But for the fact that it would appear that decisions very closely bearing on such circumstances as these have not yet been given, I should not have thought it necessary to say more than that I concurred with the judgment just given. The Law Society's committee has reported three things upon the facts set out in the case, supplemented in the course of the argument before us in one or two respects in favour of the respondent solicitor. The first two relate to the character of his connection with the debt-collecting company; the third relates to the terms upon which, in connection with that company, he carried on litigation. It is enough to say that the facts entirely warrant as conclusions of fact the findings which the committee have found.

It appears to me to be neither necessary nor desirable to endeavour to define what connection a solicitor may legitimately have with debt-collecting societies, or societies for the mutual protection of their members; still less is it necessary to offer, as we were, to a certain extent, invited to do, any criticism of the debt-collecting societies with which solicitors are not connected, or to endeavour to

draw, from the terms which they charge and the system which they follow, any conclusion that can be of any guidance in the present case, because it is obvious that the conduct of a solicitor in his profession must be judged by the rules of his profession, and by the standard which the vast majority of honourable members of an honourable profession make, not only for their brethren, but also for themselves. Still, it appears to me to be quite clear that it is inconsistent with the proper conduct in his profession of a solicitor that he should do what was done in this case—namely, to so connect himself with a so-called debt-collecting society incorporated and registered under the Companies (Consolidation) Act, 1908, but, as the fact is found, controlled in its affairs by him, as to make it an adjunct or instrument for the collection of business which, in cases where it would be profitable to do so, he would in due course take to court. It is inconsistent with the honourable conduct of his profession that he should take business of that sort from clients without disclosing his connection with the company, which is the device under which he is carrying on this system, and it is inconsistent with professional conduct that he should do it upon the terms with regard to costs which are shown to have been the practice in this case, and which are referred to in the circular as to the charge of a percentage commission on the amount recovered only, followed certainly by an endeavour, and doubtless often a successful endeavour, to get costs from the litigant on the other side, who thinks it better to pay what he is asked to pay than to dispute his liability as to a matter of costs. Furthermore, when upon this inquiry, an inquiry which I think it right to add seems to me to have been perfectly properly initiated by the complainant, and as to which I can see no trace or justification for any suggestion that it originated in rivalry or ill-will, the respondent is endeavouring to defend himself by speaking on oath, the statement that he did make, the last part of which was: "The said F. W. Patten does not hold shares in such company as my nominee," is now admitted to be false. He makes his case worse, though it is no separate item of professional misconduct. It is a matter which ought to be mentioned, and with censure in this court, that he clearly has perjured himself before the Law Society.

BANKES, J.—I only desire to add that, in the view which I take of the findings of the committee, it is involved in their findings that they must have come to the conclusion that this "Patten's Agency, Ltd.," was, if not a mere sham, at any rate a mere creature of the solicitor. I come to that conclusion because in their first and second findings they have expressed themselves in this way. They say that the solicitor

> "financed that company, and controlled its affairs, and that he did so with a view to its employment by him as an adjunct to his business as a solicitor,"

and in the next paragraph they say:

> "That by the agency of the company the respondent systematically solicited debt-collecting business."

I have no hesitation in saying that, given those circumstances, I am of opinion that the finding of the committee was thoroughly justified by the facts. I desire only to say in addition that I do not wish to express an opinion as to how far a solicitor may or may not legitimately associate himself with a genuine debt-collecting agency. That question does not arise here, and upon that question I express no opinion. We are confining our judgment entirely to the facts as brought before the committee in this particular case, and the conclusion that they came to on those facts.

DARLING, J.—The conclusion to which court has come is that the respondent has been guilty of professional misconduct, and with regard to his punishment we have been told that he is not at this moment practising, having disposed of the business which he had. But, apparently, he has still a certificate with which he

might practise. There is nothing before us to show us if he has finally retired from practice or not, and we think it should be put out of his power to practise for some time, even if he should desire to do so. The order of the court is that the respondent be suspended for twelve months, and pay the costs of the inquiry and of this motion, including the costs of the complainant in attendance upon the hearing of this motion.

Order accordingly.

Solicitors: *S. P. B. Bucknill; A. W. Gilling*, Harrogate; *Miles, Hair & Co.*, for *C. H. Heddon*, Harrogate.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

IN THE ESTATE OF CRIPPEN

[Probate, Divorce and Admiralty Division (Sir Samuel Evans, P.), January 30, February 6 and 13, 1911]

[Reported [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 27 T.L.R. 258; 55 Sol. Jo. 273]

Intestacy—Administration—Grant—"Special circumstances"—Wife murdered by husband—Power of court to pass over husband's legal personal representative—Court of Probate Act, 1857 (20 *& 21 Vict., c.* 77), *s.* 73.

A wife died intestate, survived by her husband who was later convicted of her murder and hanged. Prior to his execution he made a will appointing a certain person his executrix and universal legatee. A relative of the deceased wife claimed a grant of administration of her estate, but the husband's executrix claimed to be entitled to administration as executrix of the deceased husband.

Held: the fact that the husband had been convicted of his wife's murder was sufficient "special circumstances" within the Court of Probate Act, 1857, s. 73, to justify the court in passing over his legal personal representative and granting administration of the wife's estate to her relative.

Per Sir Samuel Evans, P.: No person can obtain or enforce any rights resulting to him from his own crime; neither can his representative claiming under him obtain or enforce any such rights.

Notes. The Court of Probate Act, 1857, s. 73, was repealed as to deaths after 1925 by the Administration of Estates Act, 1925, s. 56, and Sched. II, Part I, and replaced as to deaths after 1925 by Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by Administration of Justice Act, 1928, s. 9.

Applied: *In the Estate of Hall, Hall* v. *Knight and Baxter*, [1914] P. 1. Considered: *In the Estate of G., M.* v. *L.*, [1946] 1 All E.R. 579. Referred to: *Beresford* v. *Royal Insurance Co.*, [1938] 2 All E.R. 602; *Re Callaway, Callaway* v. *Treasury Solicitor*, [1956] 2 All E.R. 451; *Pigney* v. *Pointers Transport Services, Ltd.*, [1957] 2 All E.R. 807.

As to grants of administration under the discretionary powers of the court, see 16 Halsbury's Laws (3rd Edn.) 224 et seq., and for cases see 23 Digest (Repl.) 168 et seq. For Court of Probate Act, 1857, s. 73, see 9 Halsbury's Statutes (2nd

Edn.) 692–693. For Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by Administration of Justice Act, 1928, s. 9, see ibid. 777–779.

Case referred to:

(1) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 44 Digest 226, *504*.

Motion for a grant of letters of administration of the estate of Cunigunda (otherwise Cora) Crippen, deceased, to the attorney of Theresa Hunn, the sister of the deceased, and passing over the executrix of the husband of the deceased, Hawley Harvey Crippen.

Mrs. Crippen died on or about Feb. 1, 1910, at 39, Hilldrop Crescent, London, intestate, her total personalty amounting in value to about £175 consisting mostly of jewellery and furs. The deceased had no relations except her husband, her sister (the present applicant), and five brothers and sisters of the half-blood. The husband was convicted of the murder of his wife on Oct. 22, 1910, and on Nov. 23 following he was executed. On Nov. 8 he made a will, and under this will one Ethel Le Neve was appointed executrix and universal legatee.

Willis for the applicant.
Grazebrook for the respondent.

Feb. 13, 1911. **SIR SAMUEL EVANS, P.**—By this motion an application is made for a grant of letters of administration of the estate of Cunigunda (otherwise Cora) Crippen, deceased, to the attorney of her sister, Mrs. Hunn. The deceased met her death on Feb. 1, 1910. She died intestate, leaving her husband, Hawley Harvey Crippen (now deceased), surviving her. He made a will dated Nov. 8, 1910, appointing Ethel Le Neve his executrix and universal legatee. This executrix opposes the application which is now being made, and claims that the grant of letters of administration should be made to her as the personal representative of Hawley Harvey Crippen, deceased.

The circumstances can be shortly stated. On Oct. 22, 1910, Hawley Harvey Crippen, upon an indictment charging him with the wilful murder of his wife, the deceased intestate, was found Guilty, and was sentenced to death. He appealed to the Court of Criminal Appeal, but on Nov. 5, 1910, his appeal was dismissed, and the verdict and sentence were affirmed. Three days after, that is, on Nov. 8, 1910, he made his will, appointing Ethel Le Neve executrix and universal legatee. On Nov. 23, 1910, the sentence of death was carried out, and he was duly executed for the murder of his wife. By s. 73 of the Court of Probate Act, 1857, this court has a discretion (which, of course, must be judicially exercised) by reason of special circumstances to appoint such person as the court shall think fit to be the administrator of the personal estate of a deceased intestate in lieu of the person who would otherwise be by law entitled to the grant of letters of administration. In the present case a man who has been convicted of the wilful murder of his wife has appointed a person his executrix and universal legatee who claims, as executrix, to administer the murdered wife's estate, and, as legatee to be entitled to the murdered wife's property. These are surely "special circumstances." I, therefore, pass over, and decline to appoint, the executrix, and I appoint the applicant as attorney of the deceased woman's sister to be the administrator of the deceased woman's estate on the sister's behalf.

If I am right in this exercise of the discretion of the court, nothing remains which it is necessary for me to decide upon this motion. But it has been argued before me, on behalf of the executrix, Ethel Le Neve, that I am bound to give to her the grant of letters of administration, because the conviction of her testator not only does not prove that he was guilty of the murder, but it could not be admissible at all against him as evidence of the commission of the crime. [This second point no longer calls for report, having been overruled by the Court of

Appeal in *Hollington* v. *Hawthorne & Co.*, [1943] 2 All E.R. 35.] It is clear that the law is that no person can obtain or enforce any rights resulting to him from his own crime; neither can his representative claiming under him obtain or enforce any such rights, and *Cleaver* v. *Mutual Reserve Fund Life Association* (1) is an authority for this proposition. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.

Solicitors: *Roberts, Seyd & Co.; Hopwood & Sons.*

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

PENA COPPER MINES, LTD. *v.* RIO TINTO CO., LTD.

[Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 28, 1911]

[Reported 105 L.T. 846]

Conflict of Laws—Contract—Injunction—Contract made in England in accordance with English law—Agreement to submit to arbitration under English Act—Proceedings commenced in foreign court in breach of contract—Jurisdiction to restrain foreign proceedings.

The High Court has discretionary jurisdiction to restrain the commencement or continuation of proceedings in a foreign court if those proceedings are in breach of a contract made in this country.

A contract provided that it should be "construed and take effect as a contract made in England and in accordance with the law of England," and that the rights, duties, or liabilities of the parties should be referred to arbitration in accordance with the provisions of the Arbitration Act, 1889, [repealed] the award of the arbitrators to be a condition precedent to any liability of either party. One party commenced proceedings in the Spanish courts for alleged breach of contract in breach of the agreement to refer disputes to arbitration.

Held: an injunction to restrain the continuation of the proceedings in the Spanish courts could be granted by the High Court in the exercise of its discretionary jurisdiction.

Hamlyn & Co. v. *Talisker Distillery* (1), [1894] A.C. 202, applied.

Notes. The Arbitration Act, 1889, has been repealed. See now the Arbitration Act, 1950.

As to law governing contracts, see 7 Halsbury's Laws (3rd Edn.) 72 et seq., and for cases see 11 Digest (Repl.) 420 et seq. As to restraint of proceedings, see 7 Halsbury's Laws (3rd Edn.) 170 et seq., and for cases see 11 Digest (Repl.) 542 et seq.

Cases referred to:

(1) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 11 Digest (Repl.) 423, *724*.

(2) *Carron Iron Co.* v. *Maclaren* (1855), 5 H.L. Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 11 Digest (Repl.) 547, *1543*.

(3) *Lord Portarlington* v. *Soulby* (1834), 3 My. & K. 104; 40 E.R. 40, L.C.; 11 Digest (Repl.) 546, *1534*.

(4) *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur. N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 470, *318*.

Appeal from the Chancery Division (SWINFEN EADY, J.) against the granting of an interim injunction whereby the plaintiffs, the Pena Copper Mines, Ltd., sought to restrain the defendants, the Rio Tinto Co., Ltd., from continuing or proceeding with certain proceedings commenced by them in Spain against the plaintiffs, or from commencing further proceedings in breach of an agreement to submit disputes to arbitration.

The Pena Copper Mines, Ltd. (hereinafter called the Pena Co.) was a limited company incorporated under the Companies Acts and owned and worked the Pena Mines in Spain. The Rio Tinto Co., Ltd. (hereinafter called the Rio Tinto Co.) was also a limited company incorporated under the Companies Acts and owned and worked the Rio Tinto Mines in Spain, which were neighbouring mines to those owned and worked by the Pena Co., and also owned and worked a railway running from the mines to the port of Huelva. By an agreement dated Oct. 20, 1898, and made between the Rio Tinto Co. of the one part and the Société Anonyme Peninsular (hereinafter called the Société), a company which was incorporated according to the laws in force in Belgium, of the other part, provision was made for the construction of a new branch from the Rio Tinto Co.'s railway to the Société's mines, at the expense of the Société, for the working of such branch railway by the Rio Tinto Co. and for the conveyance for the Société over that branch to the junction with the Rio Tinto Co.'s railway and thence to Huelva of certain ores consisting of pyrites and precipitate as therein mentioned, and for the payment to the Rio Tinto Co. in respect of such conveyance of the tariff in the agreement mentioned. The rate to be charged for the carriage of pyrites and precipitate was to be 6 pesetas for each ton and the agreement provided that all moneys payable by the Société to the Rio Tinto Co. in respect of such rates should be paid in London on or before the 25th day of the month succeeding the month of conveyance in sterling at the fixed rate of exchange of £1 per 30 pesetas. The agreement contained the following material clauses:

"24. This contract is to be construed and take effect as a contract made in England and in accordance with the law of England, and the Société hereby submits to the jurisdiction of the High Court of Justice in England and hereby appoints Messrs. Matheson & Co., of No. 3, Lombard Street, in the city of London, and their successors for the time being in business and every clerk for the time being of that firm or of their said successors to be the agent in London for the Société for the purpose of accepting service on behalf of the Société of any writ, notice, order, judgment, or other legal process or document in respect of any matter arising out of this contract and such appointment shall not be revocable, and service of any such document on such appointee shall be deemed to be good service on the Société for all purposes, and the Société hereby elects to be domiciled at the head office for the time being of the said firm or of their said successors.

"25. Whenever any doubt, difference, or dispute shall hereafter arise between the parties hereto or any persons or corporation claiming through or under them respectively or between any of such parties, persons, or corporations touching this agreement or the construction thereof, or the rights, duties, or liabilities of any such party, person, or corporation, the matter in difference shall be referred to two arbitrators, one to be appointed by each party, or their umpire, pursuant to and so as with regard to the mode and consequences of the reference and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act, 1889 [repealed] or any then subsisting statutory modification or re-enactment thereof, and the award of the arbitrators or umpire, as the case may be, shall be a condition precedent to any liability of either party in respect of any matter in difference or any right of action against either party in respect of any such matter in difference."

The Pena Co. was incorporated on Sept. 19, 1910, and immediately after its incorporation the rights of the Société under the agreement of Oct. 20, 1898, were with the assent of the Rio Tinto Co. assigned to the Pena Co., and ever since such assignment the agreement had been acted upon by the Pena Co. and the Rio Tinto Co. as if the Pena Co. had been an original party thereto in the place of the Société. It has been the ordinary practice of the Rio Tinto Co. to render monthly accounts to the Pena Co. in respect of the conveyance of ore over the Rio Tinto Co.'s railway, and those accounts had been paid by the Pena Co. with consistent regularity.

In March, 1910, proceedings were commenced in the Chancery Division of the High Court by the Rio Tinto Co. against the Pena Co. claiming an injunction restraining the Pena Co. from committing any breach of the agreements on the part of the Société contained in the agreement of Oct. 20, 1898, and claiming damages for alleged breaches of the agreement. The action was tried before PARKER, J., and was dismissed with costs. The Rio Tinto Co. appealed against the decision of PARKER, J., and, by unanimous decision of the Court of Appeal given on July 14, 1911, the appeal was dismissed with costs. The Rio Tinto Co. within a few days of the judgment of the Court of Appeal caused to be delivered at the office of the general manager of the Pena Co. a communication in the Spanish language which purported to protest against alleged infringements of the agreement of Oct. 20, 1898, alleging that the minerals transported by the railway were not such minerals as were entitled to the above-mentioned tariff of 6 pesetas a ton, and a claim was made for 6,355,866·93 pesetas, a sum equivalent to about £235,000 sterling, alleged to be due in this respect. The Pena Co. subsequently received telegraphic information that the demand contained in this communication had been followed by an actual commencement of proceedings in the local Spanish courts having for their object the recovery from the Pena Co. (and notwithstanding the arbitration clause contained in the agreement of Oct. 20, 1898) payment of the above-mentioned sum. The Pena Co. were willing to refer to arbitration, under the provisions of cl. 25 of the agreement of Oct. 20, 1898, any question involved in the communication above referred to. Under these circumstances the Pena Co. commenced this action against the Rio Tinto Co. claiming by their writ of summons that the Rio Tinto Co., its directors, solicitors, advocates, officers, and agents might be restrained from continuing or prosecuting proceedings commenced by the Rio Tinto Co. in Spain or from commencing any further or other proceedings in that country directed to obtaining an order for payment of moneys alleged to be due under or damages for breach of or otherwise concerning the agreement of Oct. 20, 1898, which contained a provision to the effect that whenever any doubt, difference, or dispute should arise touching the same or the construction thereof, or the rights, duties, or liabilities thereunder the matter in difference should be referred to arbitration as therein mentioned. The Pena Co. then gave notice of motion for an interim injunction in the terms of the writ of summons. On Oct. 20, 1911, the motion came on to be heard before SWINFEN EADY, J., who, with the consent of the parties, treated the application as if it were the trial of the action, and granted an injunction in the terms of the writ. The defendants appealed.

Grant, K.C., and *Morres Nichalls* for the defendants.
Martelli, K.C., and *Chetham Strode* for the plaintiffs.

COZENS-HARDY, M.R.—This is an appeal from the judgment of SWINFEN EADY, J., who granted an interim injunction restraining the defendants—the Rio Tinto Co., Ltd.—from continuing or prosecuting, except under the award that I shall have presently to refer to, certain proceedings commenced by the defendants against the plaintiffs in Spain or from commencing any further or other proceedings in that country against the plaintiffs directed to obtaining an order for payment of moneys alleged to be due under or damages for breach of or

otherwise concerning an agreement dated Oct. 20, 1898. That agreement, as I shall call it, may be said to be between the plaintiffs and the defendants in this action. In fact the plaintiffs in this action are the successors of a Belgian company who were one of the parties to that agreement. But it is admitted that for all purposes the plaintiffs in this action have succeeded to the rights and duties of the Belgian company under that agreement. It was one for the construction and working of a certain railway over which certain goods—particularly pyrites and precipitate—were to be carried. The line was worked by the Rio Tinto Co., and they were to receive a lower rate for pyrites and they were to receive a higher rate for goods which did not fall within that term. A dispute has arisen, involving a very large sum of money, as to whether the Rio Tinto Co. cannot claim a sum of, roughly, a quarter of a million pounds from the Pena Co. on the ground that the full rate has not been paid on what the Pena Co. called pyrites, but which the Rio Tinto Co. now say are not pyrites. That, of course, really turns on the construction of this agreement and as to what was the contract therein, which by cl. 24 of the agreement is to be "construed and take effect as a contract made in England and in accordance with the law of England." It is a contract in the English language, and it is to be construed and to take effect as a contract made in England and in accordance with the law of England. As the other party to that agreement was a Belgian company, there is consequential provision for service upon the Belgian company at the office of Messrs. Matheson & Co. in London. All that portion is, of course, out of place now that both the parties who are subject to the rights and obligations of the contract are English companies. Then comes cl. 25, which runs as follows: [His Lordship read that clause as above set out, and continued:] Now, what do those clauses mean? Language, I think, can scarcely be more clear than that which is used in cll. 24 and 25. There is a plain bargain between the parties that their rights should be governed by English law, and that any dispute should be determined in one way only—namely, by reference to arbitration, the award of the arbitrator being a condition precedent to any liability of either party.

But then we have been told that even if that be so, and if there be an implied negative and not an express negative—I think there is probably an express negative, but there is certainly an implied negative—still there is no jurisdiction to restrain the action which the Rio Tinto Co. have brought in Spain. Counsel for the defendants, with some courage, asserted boldly that there was no jurisdiction and that the Spanish action ought to be allowed to go on until the defendants to that action—that is to say, the Pena Co.—had put in a plea which he says would be admitted according to Spanish law and which might then have the effect—I rather gather from his view—of rendering further proceedings in Spain nugatory and void. I can see no foundation at all for that. The jurisdiction of the Court of Chancery acting in personam is too well known and too plain to admit of any contest. It is beyond all doubt that this Court has jurisdiction to restrain the Rio Tinto Co. from commencing or continuing proceedings in a foreign court if those proceedings are in breach of contract. And I would also mention here, in order that it may not be supposed that I have forgotten it because it does not apply to the circumstances of this case, that the same remark applies in regard to jurisdiction if in the absence of any breach of contract the proceedings are vexatious. But to contend that as regards any breach of a clear contract made between the plaintiffs and the defendants the court cannot restrain the defendants—who have contracted that they will not sue in a foreign court—from so suing is a proposition to which I think no sanction ought to be given by this court and which is certainly quite unwarranted by any authority that I am aware of. Strange to say, the authority—the only authority—which counsel for the defendants cited seems to me to be an authority which is clearly fatal to him. That is *Hamlyn & Co.* v. *Talisker Distillery* (1), where there was an English contract containing an arbitration clause with an unnamed

arbitrator. The action was brought in Scotland, and there was a plea raising a question of law according to the Scottish system by which the defendants pleaded no jurisdiction and that the action was excluded by the clause of reference. The House of Lords held that although the arbitration clause was invalid according to the law of Scotland—there being no named arbitrator—yet it being an English contract to be governed by English law the clause excluded the jurisdiction of the Scottish courts. LORD HERSCHELL, L.C., deals with the matter in this way ([1894] A.C. at p. 210):

> "The question which has to be determined is whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scottish courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail."

LORD WATSON really says that the opposite contention would involve this, that if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case either of them could avoid the reference by an action before the Scottish court if the other happened to be temporarily resident in Scotland or to have a personal estate in that country. I may say, therefore, that I have no doubt whatever that the court has jurisdiction to grant the injunction which is asked for in the present case. I agree entirely with the judgment of SWINFEN EADY, J., as to which I do not think it necessary to add anything to what I have already said, beyond this, that with reference to the observations which have been made by counsel for the defendants on the point of discretion, the learned judge has, as I presume, dealt with that.

Assuming that we have jurisdiction, I can really scarcely imagine a case in which that discretion ought to be exercised more plainly than it is here. Here is an English contract in the English language to be construed according to English law. On the question of discretion, to ask me to say that it is better that the proceedings relating to that contract should be tried in a Spanish court where the English language is not probably known or where we cannot presume any knowledge of the English law, is to ask me to assent to a proposition for which I can see no foundation. In my opinion therefore, this appeal fails and must be dismissed with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion; but I must confess that I have seen in the course of the argument difficulties of a not unsubstantial kind which were not finally solved, so far as I was concerned, until I was referred by counsel for the defendants to *Hamlyn & Co.* v. *Talisker Distillery* (1) in the House of Lords.

The difficulties I refer to were as follows. Of course, the courts of law are for the purpose of enforcing contracts between parties. But it by no means follows that that part of the court which at the moment has the power of granting injunctions which operate in personam will always interfere so as—if I might use the phrase—specifically to enforce a contract. In a great number of cases the parties are at liberty to commit a breach subject to liability to damages in the courts of law for having thus broken their contract. Now, an arbitration clause in England in an English contract—I am now speaking without any complications as to a foreign country at all—was always regarded by the courts of law and courts of equity in England as one which would not be specifically enforced, but as to which, if a person broke the contract, the other party must content himself with damages,

I do not believe that any case will be found where the obligation was specifically enforced by equity before the Judicature Acts and certainly not since the Judicature Acts. It was therefore a clause which so far as actual performance is concerned was one of imperfect obligation; but as regards damages of course it ranked exactly the same as all the other clauses of the contract. That being so, it did seem to me not obvious that when the courts would not enforce that arbitration clause so as to restrain an English action that they should enforce it to restrain a foreign action.

I do not think that that difficulty can be solved unless you go back a little to consider the reason why the courts would never enforce by injunction an arbitration clause. It was because it was held to be contrary to public policy to oust the jurisdiction of the courts of the country. The consequence was that any clause which gave such a right to go to arbitration and such a duty to go to arbitration that it amounted to ousting the jurisdiction of the courts of law was invalid, and therefore equity would not enforce it. Of course, that practically reduces the arbitration clauses—the ordinary arbitration clauses—to nullities. You could not even plead an arbitration pending as answer to an action on a contract. It was not until the award had actually been delivered, actually published, that the rights of action under the contract ceased. To remedy that, a very practical method was brought in by statute, first under the Common Law Procedure Acts, then, subsequently, under the Judicature Acts, whereby by a certain proceeding an obligation to go to arbitration could be indirectly enforced. If you made the application immediately after writ and before the defendants had done anything to appear, you might apply that the action should be stayed. The parties could not be compelled to go to arbitration. They cannot now; but an appeal to the courts can be stopped, and that indirectly enforces the arbitration clause. Therefore the status of an arbitration clause in England is that it will not be specifically enforced, but by proper proceedings you can prevent the other party from appealing to the English courts in respect of any matter which by contract ought to be decided by arbitration. I had, therefore, a doubt whether—seeing that the arbitration clause is not capable of being specifically enforced by the courts in England except by this indirect method which is closely bound up with our own judicial procedure and does not proceed from the ordinary powers and duties of the court to interfere so as to compel the performance of contracts—the court would have jurisdiction to restrain actions in foreign courts. If it would not restrain actions in its own courts, why should it restrain actions in foreign courts? But I am satisfied that the decision in *Hamlyn & Co.* v. *Talisker Distillery* (1) shows that the right to enforce an arbitration clause in a contract between parties who submit to or are under the English law was regarded there by the House of Lords as being in effect a right to have the matters go to arbitration. Formally I say that it is not so; substantially I say that it is, and I think you cannot read the decision—I need not read the particular passages which have been referred to by the Master of the Rolls—without seeing that the learned Lords consider that a Scottish court could not act so as to deprive the contracting party of his right thus to ask the courts in England indirectly to enforce the right to go to arbitration. That being so, I am satisfied that if instead of the action in *Hamlyn & Co.* v. *Talisker Distillery* (1) in the Scottish courts there had been an action such as the present brought to restrain the Scottish plaintiffs from going on with that action, their Lordships who gave the decision in that case would have held that it was their duty to restrain the plaintiffs from going on with that action. That being so, I think that we are bound to follow that precedent.

In the present case by bringing an action in the Spanish court the Rio Tinto Co. are depriving the Pena Co., the plaintiffs in the present action, of the right to apply to our courts to prevent this dispute from being decided in any other way than by arbitration. Therefore we ought to exercise our powers in personam to prevent that line of conduct taking effect which is certainly contrary to their

A contractual duties. Of course if it was a question of discretion—and it certainly is —I agree with what the Master of the Rolls has said, to the effect that this is a case in which certainly we ought to exercise our discretion. For these reasons, I am certainly of opinion that this appeal ought to be dismissed with costs.

FARWELL, L.J.—I agree. I think that counsel for the defendants' ingenious B argument was really founded, if I may say so, on a confused recollection of the law as it stood before the Common Law Procedure Act, 1853. There is no doubt of the jurisdiction to restrain actions in foreign courts. I have not had time, of course, to look up the authorities here. But the well-known case of *Carron Iron Co.* v. *MacLaren* (2), which was decided in 1855, is decisive on this point. LORD CRANWORTH, L.C., commences his speech by saying (5 H.L. Cas. at pp. 436, 437):

C "The ground of the application of the appellants was that they, as a foreign corporation (for this purpose, at least, foreign) were not affected by any of the rules of the Court of Chancery, and that they ought to be allowed to prosecute their own remedy as they might think fit. There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts, wherever the circum- D stances of the case make such an interposition necessary or expedient. The court acts in personam, and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction."

Before that, somewhere, I think about the year 1834, there was the case of LORD E *Portarlington* v. *Soulby* (3), and there the Lord Chancellor said (3 My. & K. at p. 108):

"In truth nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person or the party on whom this order is made being F within the power of the court."

That being so, it is clear that there has always been jurisdiction to restrain foreign actions. It is equally clear that there was no equity to support a bill in Chancery to restrain a person from instituting proceedings at common law in England if the equity alleged in the bill was a sufficient ground of defence. At common law G such a bill would be demurrable for want of equity, and if the defence was the common law defence which would be set out it is clear that an action would lie for breach of covenant to refer, and you would have your remedy in damages. In the case of *Scott* v. *Avery* (4) LORD CRANWORTH, L.C., says (5 H.L. Cas. at p. 847):

"There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect H of that right of action. Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration."

I The contract in that case was very much in the same words as we have here. Then he goes on to say (ibid. at p. 849):

"Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that 'the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit'."

The Lord Chancellor states as a negative statement that no breach can occur under the contract until after a reference had been made to arbitration.

It is plain in English law that if the present action had been an action before the Common Law Procedure Act, 1853, no bill could have been filed to restrain such an action because there was a good defence at law. But it is equally plain to my mind that, construing the contract here as the learned Law Lords construed the contract there, there are several negative words which would have enabled the Court of Chancery in the old days and this court now to grant an injunction restraining the action in the foreign courts. The general principle of public policy was never extended to actions other than actions the parties to which were within the jurisdiction in this country. And it does not follow that we should regard rules administered in other courts as properly applicable between persons who have submitted to the jurisdiction of the English courts. That being so, I think that there is nothing in the argument which we have heard, although I admit that a certain amount of ingenuity was required for the invention of it.

Appeal dismissed.

Solicitors: *Freshfields; Budd, Johnson & Jecks.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

JENKINS *v.* GREAT WESTERN RAIL. CO.

[Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), December 11, 1911]

[Reported [1912] 1 K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882]

Child—Negligence—Trespasser—Railway—Child injured on line—Leave and licence to play on company's land.

The plaintiff, who was an infant about three years old, lived with his parents in a row of houses adjacent to a highway. On the opposite side of the highway was the defendants' railway on the same level as the highway and separated from it by a wooden rail fence. Inside the fence and about 2½ ins. from it was a pile of railway sleepers on which children used to play, and beyond the sleepers was the main railway line. The infant plaintiff strayed on the line and was knocked down and injured by a passing train. The jury found that the plaintiff got on the line over or through the fence separating the highway from the railway; that the defendants' servants knew that children were in the habit of playing on the sleepers, but did not know that they were in the habit of getting on the main line; that the fence was not reasonably fit for separating the railway from the highway having regard to the proximity of the houses; and that the children were in the habit of getting on the pile of sleepers over or through the fence by leave or licence of the defendants but to nowhere else.

Held: in the circumstances of the case the leave or licence given by the defendants to the children to play on the land was confined to the pile of sleepers and did not extend to making the defendants liable for a child straying beyond the sleepers on the line; there was no duty on the company to fence off the sleepers from the rest of the land and they were, therefore, not liable.

Cooke v. *Midland Great Western Railway of Ireland* (1), [1909] A.C. 229, distinguished.

Notes. The Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832) lays down a "common duty of care" which an occupier of premises owes to all his "visitors," i.e., those people who would at common law be treated as his invitees or licensees. The law as to liability for persons trespassing on land is not affected by the Act, but s. 2 (3) provides that the common duty of care is to be determined with regard to the relevant circumstances of the case which "include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor—so that . . . in proper cases . . . (a) an occupier must be prepared for children to be less careful than adults."

Considered: *Clinton* v. *Lyons*, [1912] 3 K.B. 198. Referred to: *Latham* v. *R. Johnson & Nephew, Ltd.*, ante p. 117; *Bint* v. *Lewisham Borough Council* (1945), 175 L.T. 128.

As to standard of care in relation to children, see 28 HALSBURY'S LAWS (3rd Edn.) 16–19, and for cases see 36 DIGEST (Repl.) 114 et seq.

Case referred to:

(1) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

Also referred to in argument:

Schofield v. *Bolton Corpn.* (1910), 26 T.L.R. 230; 54 Sol. Jo. 213, C.A.; 36 Digest (Repl.) 114, *567*.

Appeal from a decision by BANKES, J., in an action tried by him with a special jury at Swansea Assizes.

The plaintiff, who was an infant about three years of age and sued by his father as his next friend, was alleged to have suffered damage by reason of alleged breaches of statutory duty and negligence of the defendants. The plaintiff lived with his parents in a house which was one of a row adjacent to a highway, much frequented, it was alleged, by young children living in the neighbourhood. On the opposite of the highway was the defendants' railway on the same level as the highway and separated therefrom by a wooden rail fence which was alleged not to be a sufficient or proper fence and was not adequate for the protection of young children using the highway. In the fence also was a gate (opening inwards) to enable carts and other traffic to get to the defendants' sidings from the highway, which gate had bars so far apart as to form, it was alleged, no protection for young children and which gate was alleged to be habitually left open, and the opening so caused in the fence was not in any way guarded. Inside the fence and about 2½ ins. therefrom was a pile of railway sleepers. About 2 p.m. on May 2, 1911, the plaintiff left the house without the knowledge of his parents and proceeded along the highway and through the gateway (the gate being, it was alleged, open and the opening unguarded) or through the fence or gate and on to the defendants' railway, and whilst there a train belonging to the defendants and driven by their servants was, it was alleged, negligently driven against the plaintiff, causing him serious injuries in respect of which damages were claimed against the defendants. Particulars of the alleged breaches of statutory duty and/or of negligence were given, and were as follows:

> The defendants by reason of the gate being open, and left open, and also by reason of the fence and the gate being constructed with rails or bars so far apart that young children could easily get through, neglected to make and maintain sufficient fences for separating their railway from the adjoining highway, as required by s. 68 of The Railway Clauses Consolidation Act, 1845. The defendants were negligent in constructing and maintaining the gate so that it opened inwards instead of outwards towards the highway as required by the statute. The defendants were negligent in allowing the gate to remain and be open (thereby inviting the plaintiff to walk on to their railway) without

the gate being properly and adequately protected or guarded, and also that the fence and gate were constructed with rails and bars so far apart that young children could easily get through them and on to the railway. The defendants' servants were well aware prior to the accident that young children were in the habit of swinging on the gate and playing about the gateway and passing through the same and also of getting through the gate and fence on to the defendants' premises adjoining their line, and the defendants were negligent in that they did not provide such gate and fence and protection as was sufficient to prevent the plaintiff from getting on to their railway and being injured. The defendants' servants in charge of the train neglected to keep a look-out, and to stop the train, and to give warning of its approach, and the defendants' signalman (who observed the plaintiff on the railway before he was injured) neglected to take steps to stop the approaching train.

On July 20, 1911, the action came on for trial before BANKES, J., and a special jury at the Swansea Assizes. On the findings of the jury judgment was entered for the defendants by BANKES, J. The plaintiff now applied for judgment or a new trial on appeal from the verdict and judgment.

Ellis Griffith, K.C., D. Villiers Meager, and *J. G. Pease* for the plaintiff.
B. Francis-Williams, K.C., A. Clive Lawrence, and *J. Davies Williams* for the defendants.

COZENS-HARDY, M.R.—This is an appeal from the judgment of BANKES, J., and the verdict of a special jury on the South Wales Circuit. I think that the question can scarcely be better dealt with than it was by the learned judge after the findings of the jury had been given.

It is necessary that I should state very shortly the admitted facts: The plaintiff, a child, was about three years old. The child's parents lived in a house close by a branch of one of the main lines of the Great Western Rail. Co. On the northern side of the main line there is what is called a relief line, or an avoiding line. Beyond that there is a siding which is shown on the plan before us with some carriages on it. Beyond that in one particular place there is a pile of sleepers which are within a distance of 2½ ins. from the fence, that space being, of course, obviously insufficient for a child of about three years of age to get through. The fence, of which we have a plan, is a fence which was in perfectly good repair. It is a fence with rails 3 ins. thick, narrower at the bottoms—4 ins. at the bottom, next 4½, next 5, next 9, and next 10. On the north side of that fence there is the public road. The child got on to the main line of the railway and was knocked down and seriously injured, and in respect of that a claim for damages is brought. The jury were asked a series of questions by the learned judge. The jury found that the child got on to the railway over or through the fence separating the high road from the railway. That, of course, was obviously right. The jury also found in answer to question ii (a) that the railway servants knew that children were in the habit of playing on the pile of sleepers—that is, the pile of sleepers which I have mentioned as being within 2½ ins. of the fence itself. They added this:

"But did not know that children were in the habit of getting on to the main line, and we cannot agree about the siding line, that is the line of rails next the fence and the main line. The evidence in our opinion does not bring home knowledge to any particular servant."

Then came question ii (b), which was this:

"If the evidence, in your opinion, does not bring home knowledge to any particular servant, do you think that some of the defendant company's servants must have known?"

That I should have thought was, with great respect to the learned judge, a doubtful question, and the answer, which was in the affirmative, also seems to me to be doubtful. A considerable number of witnesses were called—namely, the local officials whose duty it was to be at this spot. They were all examined and cross-examined, and have negatived the knowledge, and the only suggestion was that there were two gangers employed by the railway company who occupied some of these cottages, and they were not called. Then question iii was as follows:

> "Was the said fence a reasonably fit fence for the purpose of separating the railway from the high road, having regard to the proximity of the houses on the opposite side of the road?"

To that the jury answered "No." Question iv ran thus:

> "Were children in the habit of getting on to the line over or through the said fence by the leave or licence of the defendant company?"

The answer was:

> "Children were in the habit of getting on to the pile of sleepers over or through the said fence by the leave or licence of the defendant company, but to nowhere else."

Then came questions v and vi, to which I need not refer, because the jury negatived any negligence on the part of the driver and other persons in charge of the train as to which those questions sought answers. Then there is finally question vii, which is a sort of summing-up question in these terms:

> "Were the defendants, having regard to all the circumstances, including your answer to question ii, guilty of negligence in not taking some sufficient means of preventing children getting on to the line?"

The jury answered "Yes."

Taking those findings in a way most favourable to the plaintiff, it seems to me that they amount to this: The railway authorities must be taken to have known that children did get on to the pile of sleepers, which were, in fact, adjacent to the fence, as I have already mentioned—2½ ins. is, of course, nothing. The railway authorities must be taken also to have given permission or leave and licence to children to get over the fence and go on to the pile of sleepers and to play there. But the jury negatived expressly that the railway authorities had any knowledge at all of any leave or licence to any children to go on to the main line. That, I think, is the utmost extent to which the evidence and the findings go. But then it is said that that is negligence, because if anyone got on to the pile of sleepers the leave and licence which the railway company gave imposed upon them a duty to fence off that pile of sleepers from everything to the south, so as to prevent children who went to this place from getting into the danger zone, where trains might be passing. I think there are two answers to that. In the first place, this injured child did not go to the only place where the leave and licence to go were given by the railway company. This child did not go to the pile of sleepers at all, and I fail to see, when once that is granted, how any case whatever has been made against the railway company. Even apart from that, can it be said that the next friend of a child, who was permitted to go to the pile of sleepers and play on the same, is entitled to say against the railway company that they ought to have fenced off that pile of sleepers; and that they ought to have been aware that the invitation to children to trespass was irresistible, and to go on to the railway to play in the zone of danger and meet with an accident. I cannot follow that.

It was sought in the very able argument of counsel for the plaintiff to be said that this contention is really strictly in accordance with the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (1). I desire loyally to follow that decision. *Cooke's Case* (1) decided nothing of the kind that is now contended for. In that case, on a field belonging to the railway

company, which could be got into by means of a gap in the fence some 3 ft. wide, there was a turntable, unlocked, and therefore a dangerous machine. From this gap to the turntable there was almost a defined path, showing that the field was a place frequented by children, and to the knowledge of the railway company. There was, as LORD COLLINS in delivering his opinion said, not merely a licence but an invitation to children to go and play with this dangerous machine on the property of the railway company. And all that the House of Lords decided was that in those circumstances, where there was not merely a licence to go and play with this machine, but almost an invitation to do so, that licence and that invitation did impose upon the railway company the duty of taking reasonable precautions to prevent the turntable being used so as to be dangerous to children. I fail to see what bearing that decision has upon the present case. There was no danger in the only place where licence was given to the children to come—namely, the pile of sleepers. It is not as though the child had got on to the pile of sleepers and fallen off, or anything of that kind. We are dealing here with the case of a child who, as I understand it, could not have got through the fence himself without help. He must have been helped over; that is certain. He did not get to the place where leave and licence alone extended to. That being so, I think that we should be most unduly and most irrationally extending *Cooke's Case* (1) if we were to hold that it applied to the present case. In my opinion, the learned judge in the court below was quite right in what he said, and that was this:

> "I think that the decision in the House of Lords depends—at any rate mainly—upon the question of leave and licence. It may be that LORD MACNAGHTEN states a wider principle. It may be that he intends to state a wider principle. But at any rate it is founded upon the railway company's knowledge that children used the particular place where the dangerous machine was lying. I think that where you fail to satisfy the jury that any particular servant knew—that is to say, when you have really exhausted all the people who are likely to know—I ought to say that there is really no evidence of a knowledge on the part of the servants of the railway company. But whether that is so or not, you have a finding against you of leave and licence to use this particular place. You have a finding against you of knowledge with regard to using this particular place—if I confine that to the main line—and you have no finding in your favour about using the part of the line between the fence and the main line."

In my opinion the judgment which the learned judge gave on those findings of the jury was a judgment perfectly correct and sound in law; and this appeal must therefore be dismissed with the usual consequences.

FLETCHER MOULTON, L.J.—I am of the same opinion. I share with the learned judge in the court below the doubt whether any knowledge has been brought home to the railway company. It is not sufficient to say that some servant of the railway company must have known of this trespassing by the children in the locality. It depends upon what servant. The knowledge of an errand boy employed by the railway company is not knowledge of the railway company, and to have a vague finding that some of the railway company's servants must have known of this, and to deduce from that knowledge which must be imputed to the railway company, and thereby a licence imputed from the railway company to the children to play on this pile of sleepers, appears to me to be a series of very dangerous steps. But putting all that aside, the verdict which the jury have found is that children went on to the pile of sleepers by the leave and licence of the railway company, and that they had leave and licence to go nowhere else. Now, in the present case there is not the very slightest evidence that this particular child knew of the existence of the leave and licence, or that it availed itself of it. There is not the slightest evidence that it did avail itself of this leave and licence to go on to the pile of sleepers. If you look at *Cooke's Case* (1), to which we have been so

fully referred, it was because there was leave and licence to play with the turntable, and because the person who availed himself of that leave and licence did play with the turntable, that the injury occurred. In the present case there is not the slightest reason for saying that the child availed itself of the leave and licence, and, if it did not, the leave and licence could not possibly have caused the injury.

For these reasons, and for the reasons given by the Master of the Rolls, I am of opinion that the decision of the learned judge in the court below is perfectly right.

FARWELL, L.J.—I am of the same opinion.

When the invitation or leave and licence depends not on actual but on imputed knowledge, it appears to me that it must be limited by the knowledge which is proved to exist in the landowner over whose land and on whose land the accident has taken place. The invitation in *Cooke's Case* (1) was to play with the turntable which was defective, and by reason of that defect the child was hurt. In the present case such invitation as has been proved was to play on the pile of sleepers. I doubt very much if it could be shown to have extended to a child of such tender years so as to relieve the parents of all responsibility for letting the child go; but I pass that by. The pile of sleepers was not an unnatural place for children to play on, and one would be sorry to compel railway companies or other landowners to be churlish enough to refuse admission to children to a place where perhaps it is safer for them away from the high road in these days of the motor car. However that may be, the only leave and licence in the present case was for the children to play on the pile of sleepers. Beyond the pile of sleepers there is the siding. There is no finding of the jury about that; and, so far as I follow, there is no evidence to prove that any child was ever seen playing on the siding. As regards the main line, the finding was that the accident took place on the main line, and it is really to ask us to extend *Cooke's Case* (1) to this: If the children who were invited to go and play with the turntable had strayed on to the other side of the field and had there fallen into the ditch the railway company would have been liable, although the children had never before been known to go over to the ditch, and although there was no evidence whatever of any invitation or leave and licence except up to the turntable.

In my opinion, that would be an undue extension of the doctrine of *Cooke's Case* (1), and I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Frank Patteson*, for *Edward Harris*, Swansea; *L. B. Page.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

R. *v.* LEVY

[Court of Criminal Appeal (Lord Alverstone, C.J., Hamilton and Bankes, JJ.), November 27, 1911]

[Reported [1912] 1 K.B. 158; 81 L.J.K.B. 264; 106 L.T. 192; 76 J.P. 123; 28 T.L.R. 93; 56 Sol. Jo. 143; 22 Cox, C.C. 702; 7 Cr. App. Rep. 61] B

Criminal Law—Accessory after the fact—"Receive, harbour and maintain" a criminal—Removal of incriminating evidence from workshop of principal after his arrest.

A man was charged with having in his possession a mould for coining counterfeit florins and was later convicted of the felony, and after his arrest C the appellant removed fragments of other coining moulds from his workship. She was charged with being an accessory after the fact on the ground that she did "feloniously receive, harbour and maintain" the man, knowing that he had committed the felony. The jury were directed that, if they were satisfied that she removed the articles knowing that the man was guilty of committing the felony charged against him and did so to assist him to escape conviction, they D should find her guilty. The jury duly convicted.

Held: the test to be applied in determining whether a person was an accessory after the fact was whether he had given any assistance to one known to be an offender in order to prevent his being apprehended, tried, or suffering the punishment to which he had been condemned, and, therefore, the direction to the jury was in accordance with the law and the jury had rightly convicted. E

Notes. Considered: *R.* v. *Jones*, [1948] 2 All E.R. 964.

As to accessories after the fact, see 10 Halsbury's Laws (3rd Edn.) 302–303, and for cases see 14 Digest (Repl.) 109 et seq.

Case referred to:

(1) *R.* v. *Butterfield* (1843), 2 L.T.O.S. 246; 8 J.P. 9; 1 Cox, C.C. 39; 14 Digest (Repl.) 109, *749*. F

Case Stated by the Common Serjeant of the City of London.

The Case was as follows:

"This woman was tried before me with a man, George Green, on an indictment charging them with the felonious possession of a mould for coining G counterfeit florins, and on another count Levy (the appellant) was charged with the felony of being an accessory after the fact to the said felony committed by George Green. Levy was acquitted on the charge of being in possession of the mould. Green was convicted on that count. There was evidence that Levy, after Green's arrest, for the purpose of preventing his being convicted, H removed from a workshop occupied by him a number of fragments of other coining moulds and other things such as would be used in making counterfeit coins and which were adducible, and which were in fact produced in evidence against him. I doubted whether these acts on the part of Levy were sufficient to support the count for harbouring and maintaining Green, the principal felon, but I directed the jury that if they were satisfied that she removed the things I from Green's workshop knowing that he was guilty of committing a felony charged against him, and did so for the purpose of assisting him to escape conviction, they should find her guilty. The jury found her guilty and she was sentenced to three months' imprisonment with hard labour. The question for the court is whether this direction was right: (see *R.* v. *Butterfield* (1)). The count of the indictment on which the appellant was convicted charged her with '. . . well knowing the said George Green to have done and committed the said

felony, she did feloniously receive, harbour, and maintain the said George Green. . . .' "

F. Watt for the appellant.
Beaumont Morice for the Crown.

LORD ALVERSTONE, C.J.—We think this conviction must be affirmed. It cannot be denied that it has been the practice for many years, when indicting a person for being an accessory after the fact, to charge such person in the form adopted in this case by using the words "feloniously receive, harbour, and maintain." It has been argued that there was no evidence given at the trial to support this charge, the principal felon having been arrested before the commission by the appellant of the acts proved against her. It is possible that the word "harbour" in this connection may bear the narrower meaning attributed to it, but it is clear that the word "receive" and possibly the word "maintain" have technical meanings. In Hawkins' Pleas of the Crown ((8th Edn.) vol. 2, c. 29, s. 25) there are these words:

> "As to the third point viz. In what cases a man shall be adjudged an accessory after: I shall endeavour to show, 1. what kind of receipt of a felon will make the receiver such an accessory,"

and (ibid., s. 26):

> "It seems agreed that, generally, any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose."

That passage was cited in *R.* v. *Butterfield* (1). In Stephen's Commentaries, vol. 4, c. 3, it is stated that

> "generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory."

In our opinion the indictment in this case is in the correct form, and whether the word "assist" is in the indictment or not is immaterial, because the Common Serjeant told the jury not to convict unless they were satisfied that the appellant, knowing Green to be guilty, did the acts charged against her for the purpose of assisting Green to escape conviction. That direction was in accordance with the law, and therefore the appellant was properly convicted.

Conviction affirmed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* Gerald Dobson, Esq., *Barrister-at-Law.*]

CHAPLIN *v.* HICKS

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), May 16, 1911]

[Reported [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 27 T.L.R. 458; 55 Sol. Jo. 580]

Contract—Breach—Damages—Remoteness of damage—Test—Whether damage flows naturally from breach—Contemplation by parties as result of breach. In deciding the question whether the damage in respect of which damages are sought to be recovered in an action for breach of contract is too remote the test to be applied is, generally speaking, whether, having regard to the terms of the contract, express or implied, the damage flows so naturally or by express declaration from the terms of the contract and the breach complained of that it can be said to be the result of the breach. That is generally expressed by saying that where the damage is such as must have been in the contemplation of the parties as being a possible result of the breach, it cannot be regarded as too remote.

Contract—Breach—Damages—Assessment—Impossibility of precise and certain assessment—Duty of jury to assess to best of ability—Plaintiff deprived of right to compete for prize—Chance of winning dependent on contingencies. The mere fact that it is impossible to assess damages with precision and certainty does not relieve the jury of their duty to assess damages for breach of a contract to the best of their ability. Where, therefore, a person is deprived of a right to belong to a limited class of competitors for a prize of value, the chance of winning which depends on a number of contingencies, the jury must assess the value of his loss of the opportunity of winning the prize.

Per VAUGHAN WILLIAMS, L.J.: But I will not lay down that the case can in every such case be left to the jury to assess damages. There may be cases in which the loss resulting from a breach of contract is so dependent on the mere unrestricted volition of another person that it would be impossible to arrive at any assessable loss resulting from such breach.

Notes. Considered: *Domine* v. *Grimsdall*, [1937] 2 All E.R. 119. Applied: *Biggin & Co.* v. *Permanite, Ltd.*, [1951] 1 K.B. 422. Considered: *Beach* v. *Reed Corrugated Cases, Ltd.*, [1956] 2 All E.R. 652. Referred to: *Johnston* v. *Braham and Campbell*, [1916] 2 K.B. 529; *Selby* v. *Whitbread*, [1917] 1 K.B. 736; *Turpin* v. *Victoria Palace*, [1918] 2 K.B. 539; *Barnett* v. *Cohen*, [1921] All E.R. Rep. 528; *Ruffy Arnell and Baumann Aviation Co.* v. *R.* (1921), 126 L.T. 573; *Franco-British Ship Store Co.* v. *Compagnie des Chargeurs Francaise* (1926), 42 T.L.R. 735; *London and North Eastern Rail. Co.* v. *B. A. Collieries, Ltd.*, [1945] 1 All E.R. 51; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162.

As to difficulty of ascertainment of damages and remoteness of damage see 11 HALSBURY'S LAWS (3rd Edn.) 226, 227, 268 et seq., and for cases see 17 DIGEST (Repl.) 89, 90, 114 et seq.

Cases referred to:

(1) *Richardson* v. *Mellish* (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore C.P. 579; Ry. & M. 66; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 17 Digest (Repl.) 87, *80*.

(2) *Sapwell* v. *Bass*, [1910] 2 K.B. 486; 79 L.J.K.B. 932; 102 L.T. 811; 26 T.L.R. 452; 17 Digest (Repl.) 120, *318*.

(3) *Maw* v. *Jones* (1890), 25 Q.B.D. 107; 59 L.J.Q.B. 542; 63 L.T. 347; 54 J.P. 727; 38 W.R. 718, D.C.; 17 Digest (Repl.) 119, *302*.

(4) *Ex parte Waters, Re Hoyle* (1873), 8 Ch. App. 562; 28 L.T. 757; 21 W.R. 554, L.J.; 12 Digest (Repl.) 231, *1727*.

(5) *Watson* v. *Ambergate, Nottingham, etc., Rail. Co.* (1851), Cox, M. & H. 495; 17 L.T.O.S. 125; 15 Jur. 448; 36 Digest (Repl.) 198, *1042*.

Also referred to in argument:

Simpson v. *London and North Western Rail. Co.* (1876), 1 Q.B.D. 274; 45 L.J.Q.B. 182; 33 L.T. 805; 24 W.R. 294; 8 Digest (Repl.) 153, *967*.

Walker v. *Goe* (1859), 4 H. & N. 350; 28 L.J.Ex. 184; 32 L.T.O.S. 336; 5 Jur. N.S. 737; 7 W.R. 289; 157 E.R. 875, Ex.Ch.; 17 Digest (Repl.) 124, *344*.

Lagunas Nitrate Co. v. *Lagunas Syndicate*, [1899] 2 Ch. 392; 68 L.J.Ch. 699; 81 L.T. 334; 48 W.R. 74; 15 T.L.R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C.A.; 9 Digest (Repl.) 35, *44*.

Appeal by the defendant from the verdict and judgment at the trial before PICKFORD, J., and a common jury.

The plaintiff's case was that the defendant, Seymour Hicks, an actor, and the lessee of the Aldwych Theatre, London, in the issues of the "Daily Express" newspaper of Nov. 5, 6, and 9, 1908, made a public offer to the following effect: That if any lady in England who wished to become an actress would fill in and sign an application form published in the newspaper and send it, together with her photograph and the sum of 1s., to the offices of the newspaper, he, with the assistance of a committee of experts, would select from the photographs of all ladies accepting the offer and submitting their photographs twenty-four of the most beautiful faces among the photographs sent in; that these twenty-four photographs should be published by the "Daily Express"; that the readers of that newspaper, voting by coupons, should elect from among these twenty-four the twelve whom they considered to be the most beautiful, and that to the four of these twelve who had the greatest number of votes the defendant would give a theatrical engagement for three years each at a salary of £5 a week, to the second four who had the next highest number of votes a theatrical engagement for three years each at a salary of £4 a week, and to the third four a theatrical engagement for three years each at a salary of £3 a week. On Nov. 9, 1908, the plaintiff, Eva Chaplin, filled in an application form, signed it, and sent it to the office of the "Daily Express" together with her photograph and the sum of 1s. On Dec. 9, 1908, the "Daily Express" announced a variation in the terms of the original offer to which the plaintiff did not object. It was stated that as 6,000 photographs had been received, each of which was that of a good-looking girl, and it was impossible for the defendant with the assistance of his committee to reduce the number to reasonable limits, the following plan should be adopted: That to each of the applicants provisionally selected by the defendant and his committee a letter had been written stating that she was one of those eligible to receive votes; that the United Kingdom was to be divided into ten districts; that the photographs of all the selected candidates living in each district were to be given on application to the readers of the paper in the district, who were to select by their votes those whom they considered to be the most beautiful, and that the defendant was then to make an appointment with the five ladies in each division who had obtained the greatest number of votes and himself select twelve of them to fill the places he had offered. In accordance with the above scheme, on Dec. 10, 1908, the "Daily Express" published the photograph of the plaintiff as No. 9 in the district in which she resided in which district she headed the poll. On Jan. 4, 1909, a letter was sent by the defendant's agent directed to the plaintiff at her London address, which she had given to the defendant. The letter was as follows:

> "Dear Madam,—Will you kindly call at the Aldwych Theatre at four o'clock on Wednesday afternoon to see Mr. Seymour Hicks?—Yours faithfully, D. W. J. Douglas."

The plaintiff, who was at that time carrying out a theatrical engagement in Dundee, did not receive this letter till the morning of Jan. 6. On that day she wrote to the defendant as follows:

"Dear Sir,—Your letter was forwarded to me this morning. I am sorry I could not keep your appointment for this afternoon. . . . If I hear from you I could catch the midnight express from Glasgow on Saturday and see you on Sunday."

The plaintiff alleged that she subsequently wrote three times, and called at the Aldwych Theatre three times, with a view to obtaining an appointment to see the defendant, but that she received no answer to her letters from the defendant and failed to obtain any appointment from him. On Mar. 4, 1910, the plaintiff brought the present action against the defendant claiming damages for her loss of the chance of selection for an engagement which, in addition to the salary she would have received, would have been of great value to her professionally. The defendant, by his defence, pleaded that he never entered into the alleged or any contract with the plaintiff; that the statement of claim disclosed no cause of action against him; and that the alleged damage was too remote. At the trial before PICKFORD, J., and a common jury the jury found that the defendant had not taken reasonable means to give the plaintiff an opportunity of presenting herself for selection and assessed the damages at £100. The learned judge, after hearing arguments on the question whether the plaintiff could recover damages, gave judgment for the plaintiff for £100. The defendant appealed.

McCardie (*A. R. Churchill* with him) for the defendant.

G. A. Scott, for the plaintiff, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—This is an application by the defendant asking for judgment or a new trial in a case which was tried by PICKFORD, J., and a common jury. The case is one in which the plaintiff relies on a contract which she alleges she entered into with the defendant under which she says she obtained an opportunity of appearing together with other candidates in a competition in respect of which considerable prizes were offered, and she alleges that the defendant committed a breach of the contract by refusing her an opportunity of appearing in the competition whereby she suffered damage. I need not go into the facts at any length. So far as the contract and the breach of it are concerned, even if they were not admitted on the pleadings, they have, at any rate, been virtually admitted by counsel for the defendant, and the whole case has been discussed on the basis that there was a contract, and that there had been a breach of the contract as alleged by the plaintiff. But then it is said on behalf of the defendant that the breach of the contract was of such a nature that the damage if any, resulting from it was only nominal. In effect the argument on behalf of the defendant was based on these two propositions—namely, first, that the damages claimed were too remote; and, secondly, that they were unassessable. These, then, are the two matters with which I have to deal.

In so far as it is said that the damage is too remote, generally speaking, the test to be applied is to see whether, having regard to the express or implied terms of the contract, the damage in respect of which damages are sought to be recovered flows so naturally or by express declaration from the terms of the contract and the breach complained of that it can be said to be the result of that breach. Generally speaking, that is expressed by saying that where the damage is such as must have been in the contemplation of the parties as being a possible result of the breach, it cannot be regarded as too remote. Here I think that the moment it is admitted that there was a contract which in effect gave the plaintiff a right to present herself for judgment and obtain a chance of winning one of the prizes offered by the defendant, and there being a finding of the jury that the defendant neglected to afford the plaintiff a reasonable opportunity of thus presenting herself, then there was a breach which was caused by the neglect of the defendant to give the plaintiff the opportunity of presenting herself for the final selection, which the defendant ought to have done. When I find that the claim here is for the loss caused to the plaintiff by reason of such a breach—that is to say, through her losing her oppor-

A tunity of taking part in the competition and winning a prize—I think it is impossible to say that such a result and such damages must not have been in the contemplation of the parties to the contract as a possible direct outcome of that breach. I will say nothing more on the question of the remoteness of damages. In my opinion the damage alleged by the plaintiff is not too remote.

But the point which has been more strenuously argued before us is that the B damages are incapable of assessment. It is said that the chance of winning one of these prizes turns on such a number of contingencies that it is impossible to say, after coming to the conclusion that the plaintiff has suffered loss by losing the opportunity which had been afforded her of winning a prize, that there was any assessable value of that loss. It is said that success depends on so many contingencies that it is impossible to say what pecuniary loss accrued to the plaintiff. C I agree that the presence of all these contingencies does make the calculation not only a difficult one, but also one as to which it is impossible to speak with certainty or precision. The proposition put forward is really this, that whenever the contingencies on which a competitor's chance of winning a prize depends are numerous and difficult to estimate, it is impossible for the competitor to recover damages for the loss of his chance of winning a prize. I understand there D were fifty competitors and twelve prizes, so that the average chance of success would be about one in four. It is said, however, that the questions which might arise in the mind of the person who had to decide among the fifty competitors were so numerous that it would be impossible to apply the doctrine of averages. I do not agree. Then it is said that, if it is impossible to fix the damages with precision and certainty, it would be right to describe the damages as unassessable. I agree E there may be cases in which the damages are so unassessable that the doctrine of averages is not possible of application because the figures necessary to be applied are not forthcoming, and indeed several cases are to be found in the reports where it has been so held, but I deny the proposition that, because precision and certainty cannot be arrived at, the jury have no function or duty to determine the damages.

The history of the law as to the assessment of damages is not difficult to trace. F In the early days no rules were laid down by the courts to guide juries in the assessment of damages in respect of breach of contract. Those matters were left to the jury absolutely. But as time went on the judges began to give advice to the jury as to the manner in which they should assess the damages, and as the stream of commerce began to increase and deepen during the period intervening between the reigns of Queen Elizabeth and Queen Victoria rule after rule was laid down G by the judges for the guidance of the jury when assessing damages. Even now there may be many cases in which it would be very difficult to apply these rules. Of course in a case where there has been a breach of contract for the sale of goods the measure of damages is supplied by the fact that there is an existing market available where it is possible to buy similar goods immediately on the breach of the contract. It has, however, always been recognised that in some cases there may H be no such market available, but it has never been suggested that because there was no such market available there could be no damages. In such cases the jury have to assess the damages as best they can. I deny that the mere fact that it is impossible to assess the damages with precision and certainty relieves a wrongdoer from paying any damages in respect of the breach of duty of which he has been guilty. But I will not lay down that it can in every case be left to the jury to I assess damages; there may be cases in which the loss resulting from a breach of contract is so dependent on the mere unrestricted volition of another person that it would be impossible to arrive at any assessable loss resulting from such breach. It is true that in the present case there was no market to furnish a measure of damages; the right of each candidate to compete was personal to herself and could not be transferred. It is obvious that a candidate who found herself one of the fifty eligible for selection could not have gone into the market and sold her right to compete to another. At the same time I think the jury might reasonably have

asked themselves the question, if the right to compete and the chance of winning could have been sold, at what price it could have been sold. In my opinion, anyone could assign a value to the plaintiff's chance. Under those circumstances I think the question was one for the jury. They came to the conclusion that to take away from the plaintiff the opportunity of competing as one of the fifty candidates for the twelve prizes which were to be distributed was to deprive her of something which had a money value. In my opinion, they were right, and this appeal therefore fails.

FLETCHER MOULTON, L.J.—It would have been impossible to have given more assistance to the court than was given by counsel for the defendant in his able argument, but, in spite of that, I have come to the same conclusion as the president of the court. The contract between the plaintiff and defendant was made when the plaintiff in answer to the announcement published by the defendant in the "Daily Express" filled in and signed an application form and sent it together with her photograph to the office of the newspaper. The various photographs sent in were to be submitted to the defendant, who was assisted by a committee of experts, who were to select twenty-four from whom the successful candidates were to be chosen by the votes of the readers of the newspaper. As some 6000 photographs were sent in, it was found necessary to modify the original scheme. Several hundred photographs were provisionally selected by the defendant and his committee. The United Kingdom was divided into ten districts, and the photographs of these provisionally selected candidates were to be given to the readers of the newspaper, who were invited to determine by their votes the respective merits of the candidates residing in each district, and from the first five candidates in each division—that is to say, fifty in all—the defendant was himself to select the twelve candidates who were to fill the twelve appointments of considerable value offered by the defendant. The plaintiff was first in the division in which she resided.

For the purposes of this appeal we must take it that the contract was entered into, and that the defendant did not keep his engagement with the plaintiff by failing to give her an opportunity of appearing before him for selection, with the result that she was excluded from the limited competition and had no chance of securing one of the appointments. Counsel for the defendant did not deny the existence of the contract, or its terms, or the fact that it was a contract which the law would enforce, or the breach of it by the defendant, but he said that the damages sustained by the plaintiff could only be nominal—namely, the amount of the fee (1s.) which the plaintiff had paid upon entering for the competition. He said further that in a case where the expectation of the plaintiff depended upon a contingency the law would give him nothing but nominal damages for a breach of the contract. In my opinion, that proposition is wide of the truth. It may be said that the performance of every contract depends upon a contingency, and that, as it would be impossible to say what the value of the rights under a contract would be until it had fulfilled itself, a party could never recover damages for its breach. Admitting that that proposition was too wide, I could not get counsel to formulate his point. Ultimately, however, he stated his case to the effect that where the volition of a person comes between a party to the contract and the attainment of the advantage which he hopes to obtain under it, the law will give him no damages for breach of the contract; but he was not able to cite any authority for this proposition. In fact, *Richardson* v. *Mellish* (1) is obviously in the teeth of such a proposition. But I do not propose to rely on that; I wish to go deeper and to consider what is the right of the plaintiff to damages on general principles, and, starting from these principles, to show that no such distinction can be drawn between contracts.

At common law contracts were never enforced specifically as in equity. It considered only that the contract was broken and that there must be a solatium to the

A sufferer by the breach. It knew no other principle than that it was the aim of the law to give the injured party such damages as if the contract had not been broken. To do this might in some cases be extremely difficult, because the loss occasioned to the plaintiff might depend on matters which had no real connection with the breach. Thus, for example, if a man furnished a post-chaise to drive a son to see his father before he died and the chaise broke down, the result might B be that the father would cut the son out of his will, but it would not be fair to include in the damages compensation for the loss of the son's expectations. Therefore, the law required this limitation, that the damages must be such as may reasonably be supposed to have been in the contemplation of the parties to the contract, and must not be extraneous to the contract. Counsel for the defendant contended that damages arising from this breach of contract were too remote, C because they were never intended to have any connection with it, but that contention is clearly unsustainable. The very object and scope of the contract was that the plaintiff should have the chance of being selected by the defendant for one of the theatrical engagements he offered, and his refusal to fulfil his part of the contract is the breach complained of. Damages are, therefore, a fair compensation to the plaintiff for being excluded from the limited class of candidates. It seems to D me that nothing more direct or more intimately connected with the contract could be found.

But then counsel for the defendant went on to say that these damages were very difficult, if not altogether incapable, of assessment, because no one could say, even if the plaintiff had had a chance of submitting herself for selection, whether she would have obtained one of these situations. That raises what is really the only E point of importance in the case—namely, whether it is reasonable to say that the fact that the plaintiff was excluded from the limited class amounted to what may be described as an injury done to her? I think it did, and it may be a very substantial injury. According to the theory of the law which tries to give an equivalent for loss actually sustained, the plaintiff starts here with an unchallengeable case. But it is said that, as there was a possibility that the plaintiff might not be chosen, F it is impossible to assess the damages. It is, however, clear that where in the minds of reasonable men there has been a de facto loss, the jury have to do their best to estimate it. It is not necessary that there should be an accepted measure of damages. The recognised rules as to the measure of damages only apply in cases of frequent occurrence where the court is well acquainted with the surrounding circumstances, for instance, in an action for damages for breach of G a contract for sale of goods. In most cases there is no recognised rule, and the jury must assess what they think would be an adequate solatium. I ask myself whether in a case where the results of the contract depend upon the volition of an independent person, the law in the event of a breach shuts its eyes to the wrong and refuses to give damages? During the argument I put the case of a contract of service by which the employer became bound to employ the clerk as one of H five second class clerks at a salary of £200 a year, and afterwards to select from among these five two first class clerks at £500 a year each. I am satisfied that any person accepting that engagement would be entitled to say: "I may be one of the five second class clerks from whom the two first class clerks are to be chosen." He would be entitled to look at that as a valuable part of the consideration for his services, and, if he were deprived of his position, he would be entitled to ask a I jury to estimate the value of that of which he had been deprived.

I have come to the conclusion that where a man has a right to belong to a limited class of competitors for something of value, and that right is taken away from him, it is always open to the jury, and in fact their duty, to assess the damage he has sustained. The present case is a typical one. The plaintiff, from being one of 6,000 competitors, had become one of fifty who were entitled to twelve prizes to be distributed among them; and, seeing she had lost all advantage of being one of the competitors, the jury were entitled to estimate her loss. This is not a case

in which I can lay down any measure of damages. The jury must be entirely guided by their good sense, and I cannot say that they assessed the damages on an extravagant scale. Twelve engagements of considerable pecuniary value were offered as prizes, and no doubt there would be considerable consequential advantages to the plaintiff if she was successful in the competition. I think the jury were entitled to say that it was of considerable pecuniary value to her that she should get into the limited class, and they could award her damages accordingly.

To my mind, that decides the case. I only wish briefly to refer to *Sapwell* v. *Bass* (2). I think that case was rightly decided. It was a case in which the plaintiff had by contract a right to have one of his brood mares served by the defendant's stallion for a fee of 300 guineas, and the defendant broke the contract by selling the stallion. The plaintiff had, on the one hand, the right to send his mare to be served, and, on the other hand, the duty of paying the fee. The plaintiff claimed damages on the footing that foals out of other mares of his previously served by the defendant's stallion had been worth more than 300 guineas; but it was held that the damages claimed depended on so many chances and contingencies that they were too remote and were irrecoverable, and that for breach of the contract the plaintiff was entitled at most to nominal damages. I think the decision in that case can be supported on the ground that there was no evidence to show that the right of service was more valuable than the 300 guineas, and, therefore, no proof that the plaintiff had suffered more than nominal damages; but if the court meant to decide that where there was no question of payment the law could give no damages, I confess that I can see no justification for the decision. The right to have the mare served was a contractual right of considerable value, for the loss of which the plaintiff was entitled to be compensated in money. To tell the jury that in such a case no damages could be given would amount to mis-direction. I think this appeal fails.

FARWELL, L.J.—I agree. It seems to me that the unsoundness of the argument of counsel for the defendant results from his having failed to distinguish between the determination of the questions of remoteness of damage and the assessment of damages—the question of remoteness is for the judge, while the assessment of the amount is for the jury.

I agree that it is unarguable here that the damages are too remote. I do not think any judge could have withdrawn the case from the jury on the ground that the plaintiff was not entitled to any damages at all. Having put herself forward as one of the fifty candidates entitled to offer themselves for selection, and not having been afforded the opportunity of competing with the other candidates, an apparent slur was cast upon her which might stand in the way of her obtaining engagements elsewhere. In this connection I should like to refer to *Maw* v. *Jones* (3), where Lord Coleridge, C.J., said (25 Q.B.D. at p. 109):

> "The plaintiff was entitled to recover for all the damage flowing naturally from the breach, and in considering what that would include the jury might take into account the difficulty that the plaintiff as a discharged apprentice would have in obtaining employment elsewhere."

The jury here might have taken into consideration the difficulty the plaintiff might have, after being debarred from the right of participating in this competition, of obtaining an appointment elsewhere. Clearly the question of remoteness of damages does not arise here.

As to the question of the assessment of the amount, that is clearly for the jury. Counsel for the defendant contended that the amount of the loss sustained by the plaintiff was pure chance, and that it was not sufficiently reasonably ascertainable. I do not think any distinction can be drawn between chance and probability. In the Oxford English Dictionary the word "chance," in the fifth of the meanings there attributed to it, is defined as "a possibility or probability of anything happening, as distinct from a certainty," and the definition is illustrated by

A the following quotation from REID'S INTELLECTUAL POWERS, p. 626: "The doctrine of chances is a branch of mathematics little more than a hundred years old." If judges have used the word "probability" more often than "chance," it may be because the latter is less forensic. The defendant is liable for the breach of the contract and also for the prospective probable loss of the plaintiff. The jury might have thought that her chances of success were so slender that they could not find B more for her than the 1s., and, if they had done so, I do not see how the court could have interfered with their verdict. Here the plaintiff had passed the first two stages of the competition and had become one of the fifty candidates whom the defendant had contracted to see and out of which he was to select the twelve to fill the engagements he had offered. As she had become one of the fifty, her chances of success were more easily ascertainable than when she first started on C the competition. If the plaintiff had never been selected by the votes of the readers of the "Daily Express" as one of the fifty, it would have been very difficult for the jury to arrive at a right assessment of her chance; but that is not the case here.

The mere existence of a contingency depending upon the volition of a third person is not enough to make the damages impossible of assessment. There are D numerous cases to be found on this point, of which *Richardson* v. *Mellish* (1) is a good instance. In that case a ship had been chartered by the East India Co. for four voyages to India, and the defendant agreed with the plaintiff that, if the master of the ship died or resigned before the expiration of the four voyages, the plaintiff should succeed him. The master died in the course of his second voyage, and the plaintiff, not having been appointed, brought an action against the defen- E dant claiming damages for the loss of the remaining voyages. The court held that the jury might give damages for the loss of the two remaining voyages, although the second had not been accomplished at the time of the action, and BEST, C.J., said (2 Bing. at p. 239):

> "If that practice be legal, may I not say, if you had appointed me for the first F voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this: common sense says, you are not to be paid for consequences which might not turn up in your favour; but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases."

G By the expression "almost to a certainty" he means "very probably." The jury were entitled to take into consideration that if the plaintiff had been appointed on the second voyage, he would stand a good chance of being appointed for the remaining two voyages; but in neither case, whether he was appointed on the second voyage or not, had he a certainty of a renewal of the appointment. It was a chance, though in the one case it was better than in the other.

H In *Ex parte Waters, Re Hoyle* (4) MELLISH, L.J., said (8 Ch. App. at pp. 567, 568):

> "It is difficult to imagine any kind of contract (I speak of business contracts) in respect of which, if broken before, or put an end to by, the bankruptcy, a jury could not point out a fair way of estimating the damages under the directon I of the judge."

That was a bankruptcy case, and I agree that the Court of Bankruptcy takes a more extensive view of contingent rights than the courts of common law, because the law of bankruptcy has regard to the whole nature of the estate and the claims that are made against it, and aims at making a complete settlement. But there is no real difference between a case where a party claims compensation for breach of contract in bankruptcy and that in which he claims damages at common law. I cannot see how the mere fact of difficulty of assessment can be used an an

argument against leaving the question of assessment to the jury. It is for the jury to say whether they can or cannot assess the damages, and, if they arrive at a fair assessment, there is nothing more to be said.

With reference to *Watson* v. *Ambergate, Nottingham, etc. Rail. Co.* (5), the effect of that case is stated in SEDGWICK on DAMAGES (7 Edn.), Vol. 1, at p. 128, and the following comment is made upon it in note (a):

"The question of damages was not necessarily involved in this decision. In a similar case in Pennsylvania, the opinion expressed in it was disapproved, the court holding that the value of the opportunity to compete for the premium furnished the measure of the plaintiff's damages. If the company were informed of the object of the transmission, the loss of the privilege of the competition was in view of both parties when they entered into the contract; and, if not, the loss was still the result of the carrier's negligent breach. But it appearing from the evidence of one of the committee by whom the prizes were awarded, that the plaintiff must at any rate have failed to obtain the prize, he was held entitled to nominal damages only."

That expresses my own view too. As to *Sapwell* v. *Bass* (2), I think that the learned judge was performing the functions both of judge and jury, and he came to the conclusion that the plaintiff was entitled to nominal damages only, and that he ought not to give him more than the 1s. So far as the assessment of damages is concerned, I do not see how the court can interfere. The result is that this appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Charles Anderson & Co.; J. D. Langton & Passmore.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

STAIT *v.* FENNER. MACNAB, THIRD PARTY

[CHANCERY DIVISION (Neville, J.), June 25, 26, 27, 1912]

[Reported [1912] 2 Ch. 504; 81 L.J.Ch. 710; 107 L.T. 120; 56 Sol. Jo. 669]

Landlord and Tenant—Lease—Determination—Option to determine—Notice—Notice given by equitable assignee and not owner of leasehold interest—Payment of rent before determination.

Estoppel—Estoppel by conduct—Landlord and tenant—Licence to assign lease granted by landlord—Bad notice to determine lease by assignee—Effect of licences to assign.

A lease for twenty-one years of premises was, with the licence of the lessor, assigned to a person who disappeared, but who subsequently returned the underlease and assignment to the original lessee and gave a written undertaking to re-assign the lease to him. Without the lessor's knowledge, this re-assignment was never executed, but, again with the lessor's licence, the original lessee subsequently purported to assign the lease to a further assignee, who gave six months' notice to determine the lease after the expiration of fourteen years of the term under an option in the lease by which, if the lessee "shall pay all the rent . . . to be paid . . . up to such determination, this present lease and everything herein contained shall cease and be void." The rent was paid on the day after the lease purported to be determined.

Held: the notice to determine the lease was bad because: (i) in the absence of the execution of a proper re-assignment by the former assignee to the original lessee, it was given only by an equitable assignee and not by the

owner of the leasehold interest; (ii) the lessor was not estopped from setting up its invalidity by the licences to assign and receipt of rent from the lessee and his assignee; and (iii) the payment of rent before the determination of the lease under the notice was a condition precedent to the continued validity of the notice, the lessor having no right to recover the rent after the lease had ceased and become void.

Grey v. *Friar* (1) (1854), 4 H.L. Cas. 565, applied.

Dictum of CHANNELL, J., in *Seaward* v. *Drew* (2) (1898), 67 L.J.Q.B. at p. 325, dissented from.

Notes. Considered: *Burch* v. *Farrows Bank*, [1917] 1 Ch. 606; *Metropolitan Properties Ltd.* v. *Jones*, [1939] 2 All E.R. 202.

As to exercise of an option to determine a lease, see HALSBURY'S LAWS (3rd Edn.) 474; and for cases see 31 DIGEST (Repl.) 594.

Cases referred to:

(1) *Grey* v. *Friar* (1854), 4 H.L. Cas. 565; 2 C.L.R. 434; 23 L.T.O.S. 334; 18 Jur. 1036; 10 E.R. 583, H.L.; 31 Digest (Repl.) 598, *7159*.

(2) *Seaward* v. *Drew* (1898), 67 L.J.Q.B. 322; 78 L.T. 19; 14 T.L.R. 200; 31 Digest (Repl.) 565, *6857*.

(3) *Jones* v. *Phipps* (1868), L.R. 3 Q.B. 567; 9 B. & S. 761; 37 L.J.Q.B. 198; 18 L.T. 813; 33 J.P. 229; 16 W.R. 1044; 31 Digest (Repl.) 493, *6191*.

Also referred to in argument:

Porter v. *Shephard* (1796), 6 Term Rep. 665; 101 E.R. 761; 31 Digest (Repl.) 598, *7157*.

Finch v. *Underwood* (1876), 2 Ch.D. 310; 45 L.J.Ch. 522; 34 L.T. 779; 24 W.R. 657, C.A.; 31 Digest (Repl.) 78, *2320*.

Starkey v. *Barton*, [1909] 1 Ch. 284; 78 L.J.Ch. 129; 100 L.T. 42; 30 Digest (Repl.) 500, *1422*.

Action for a declaration that an underlease made between the plaintiff and the defendant was still subsisting.

By an indenture of underlease dated Sept. 2, 1897, and made between the plaintiff, John Stait and James Lancelot Stait (since deceased), therein called the lessors, of the one part and the defendant, therein called the lessee, of the other part, in consideration of the rent and covenants therein contained, the lessors demised unto the lessee 31, New Cavendish Street, for the term of twenty-one years from Sept. 29, 1897, determinable nevertheless in manner therein appearing at a yearly rent of £250 payable quarterly on the usual quarter days "the last payment to be made in advance one calendar month before the determination of the tenancy." The underlease contained covenants to pay the rent, to do certain repairs, and not to assign or underlet without licence in writing, and also a proviso in the following words:

> "That if the lessee shall be desirous of determining the present lease at the expiration of the first seven or fourteen years of the term hereby granted, and of such his desire shall give six calendar months previous notice in writing to the lessors . . . and shall pay all the rent, and perform and observe all the covenants hereinbefore reserved and contained, and on the part of the lessee to be paid, performed and observed up to such determination, then and in any such case, and immediately after the expiration of the said term of seven or fourteen years, as the case may be, this present lease and everything herein contained shall cease and be void."

On May 9, 1899, the defendant assigned the premises to Helen Elizabeth Court, who on May 26, 1902, assigned them to Mrs. Irwin, in each case for the residue of the term. Licences to assign were granted, which described the assignors as "the present tenant." Early in 1905 Mrs. Irwin abandoned the premises and disappeared owing two quarters' rent. The defendant, being called on to pay as original lessee,

talked the matter over with a member of the firm of solicitors advising the lessors, who told him he had better get the underlease back from Mrs. Irwin. Eventually by agreeing to forego his claim against her for rent and dilapidation, he obtained from Mrs. Irwin the underlease, the assignments, and a written undertaking, which had since been lost, that she would execute an assignment of the term to him or his nominee. No such assignment was ever executed and no licence therefore was asked or given. On Sept. 29, 1906, the defendant purported to assign the premises for the residue of the term to Dr. MacNab. On the same day Dr. MacNab signed a tenancy agreement of one of the rooms in favour of the defendant. The licences to assign and to underlet respectively were granted by the plaintiffs, but they did not describe the licensee as "the present tenant." Thenceforward the plaintiffs received the rent from Dr. MacNab and gave him receipts therefor in his own name. On Mar. 8, 1911, Dr. MacNab gave notice to determine the tenancy on Sept. 29 following. It was the validity of this notice that was in question. On Sept. 16, 1911, the plaintiff's solicitors first disputed the validity of the notice, and on Sept. 27, stated, as the reason, that it was because the notice was not given by the person in whom the leasehold term was vested. James Lancelot Stait, one of the lessors, died in 1905, and the plaintiffs were the executors and trustees of his will. The plaintiffs contended that the notice was bad (i) because it was given by the wrong person; (ii) because the rent due on Sept. 29, 1911, was not paid one month before; and (iii) because the repairing covenants were not fulfilled. The defendant pleaded that Dr. MacNab was entitled to give notice either in his own right or as agent for Mrs. Irwin, and that the licences to assign and receipts for rent estopped the plaintiffs from disputing this; he denied the breaches of covenant, but contended in any case that the payment of rent in advance and the performance of the covenants were not conditions precedent. The defendant had served a third party notice on Dr. MacNab for an indemnity against the plaintiffs' claim.

Jenkins, K.C., and *Douglas M. Hogg* for the plaintiffs.
Peterson, K.C., and *H. E. Wright* for the defendant.
Butcher, K.C., and *F. MacMullan* for the third party.

NEVILLE, J. (after stating the facts and referring to the undertakings signed by Mrs. Irwin, continued:)—For the purpose of my judgment I am going to assume that it was an undertaking to assign or surrender which was enforceable, and, if that be so, I have to consider this point. The defendant being the original lessee, having in his hands the two assignments of the lease which vested the term in Mrs. Irwin, and being entitled to treat her as a trustee for him, was he, within the meaning of the lease, also entitled to give notice to determine the lease at the end of the first seven or fourteen years by a six months' notice?

In deciding this point I think I may say I am without the assistance of authority, but I have the assistance of the dictum by CHANNELL, J., in *Seaward* v. *Drew* (2) in which he had to determine whether a notice given by an equitable mortgagee of the term in a lease with a somewhat similar proviso was a good notice. He held that it was not, but he does say (67 L.J.Q.B. at p. 325) that he is inclined to think that, if the person purporting to exercise the right to give notice could have made out that he had got the entire interest in equity, then *Jones* v. *Phipps* (3) would have applied, and the notice might have been good. I need not say that CHANNELL, J., is just as likely to be right on such a question as I am, but it is not an authority that I can act on, and therefore I must exercise my own judgment in the matter, and in my opinion, *Jones* v. *Phipps* (3) does not apply.

In *Jones* v. *Phipps* (3) certain trustees of property including a farm had given one of the cestuis que trust complete authority to manage the farm, and in the course of his management he had given in his own name a notice to determine the tenancy, and the question was whether that was within the terms of his agency so as to bind the trustees. It was held that it was, and that there was no obligation

in the exercise of his authority for him to use the names of the trustees at all. Having regard to the extent of his authority, he was entitled to give notice in his own name, and that bound the trustees. It is quite a new doctrine to me that even in the case of a bare trustee, the cestui que trust is the agent of the trustee. He has rights against the trustee which are readily enforceable. He could have compelled (on the assumption on which I am now proceeding) the trustee of the terms to convey it over to him or as he directed, but, in my opinion, there was no relation of agency existing between the two at all.

As a matter of fact, no assignment from Mrs. Irwin was ever obtained, and beyond question the term is legally vested in Mrs. Irwin; and subsequently the defendant entered into possession of the house and then assigned to Dr. MacNab, and it is said that the receipt of the rent from the defendant and subsequently the receipt of rent from Dr. MacNab, estops the plaintiffs from saying that the term was not vested first in the defendant, or subsequently in Dr. MacNab. I am quite unable to follow that suggestion. In my opinion the lessor had neither notice nor knowledge that the term was not vested in the defendant. Further than that, they had throughout the whole time the right to insist upon payment by the defendant of the rent of the premises, and I have been unable to understand how the receipt of rent from the original lessee can possibly estop the lessor from saying that an assignment was not legally vested in the defendant. Then with regard to the question of Dr. MacNab, it appears to me that the receipt of rent from him would have prevented the lessor from afterwards relying on the fact that the assignment to Dr. MacNab was made without the necessary licence having been obtained. I am of opinion the intention was (as shown by the letters) to accept the defendant as the assignee, and he was advised to get in the lease, and it was quite beyond the idea of either party that any further recognition of the defendant was required. He was the original lessee, and the lessors advised him to get back the lease—the sub-assignee having disappeared—and it appears to me that they were quite justified in supposing that he had got the lease re-vested in him by assignment, and it seems to me to have been no part of their duty at that or any other time (until the time I will deal with presently) to ascertain what the true title of the defendant was, and it seems to me that the argument as to estoppel is only founded on first of all the allocation to the lessors of the duty which was incumbent on the lessees, and then the suggestion that because they did not perform the lessee's duty they are estopped from asserting the lessor's title.

The question, then, that I have in the first instance to determine, whether this notice was effective, I answer in the negative. I think that, the legal estate in the term being outstanding, it was not competent for the lessee or any assignee of the lessee who had not the term vested in him to give a notice. I think under the terms of the lease that must be so, and, as I have already said, I do not think that the cestui que trust can be said to be the agent of the trustee as in *Jones* v. *Phipps* (3), as the cestui que trust was said to be the agent of the trustee there under a special agreement. I think, therefore, that without estoppel the notice was bad, and I have already indicated my view that the facts do not show an estoppel in the present case. I think the mere fact that no express licence was demanded before the assignment to the defendant, nor before the assignment from the defendant to Dr. MacNab, is perfectly intelligible in the circumstances, and certainly not such an admission as would charge the lessors with notice that the defendant was not the legal owner of the term.

The next question that I have to determine is one of considerable importance, and that is whether in this clause the provision that the lessee must pay the rent and perform the covenants of the lease up to such determination—i.e., the determination which is to result from the serving of the six months' notice—whether the conditions there insisted on are conditions precedent to be performed before the expiration of the term, or whether they are conditions that may be performed at any time thereafter. In my opinion, *Grey* v. *Friar* (1) is an absolute

authority for the proposition that these conditions are conditions precedent. It is true that the words used in the present case are not precisely the words used in *Grey* v. *Friar* (1), and it is also true that a provision in *Grey* v. *Friar* (1), which would have made the conditions intelligible if they had been conditions subsequent, does not occur in the present case, because in *Grey* v. *Friar* (1) there was an express proviso (see 4 H.L. Cas. at p. 568), that the termination of the term should not interfere with the rights of action between the parties for what had previously occurred. But it seems to me that, in the absence of a proviso of that character (and there is none such in the present case), the determination of the term at the expiration of the notice, absolutely puts an end to all rights of action in respect of anything contained in the lease on the part of the lessor or the lessee; and the result of that would be that, if one were to hold that these conditions were not conditions precedent, the term might be put an end to, and any right of action on the part of the lessor in respect of breaches of covenant existing at the date of the termination of the term would be altogether gone, and he would be left without any remedy at all. I cannot read the present covenant in that way. It seems to me free from ambiguity. If he gives notice and—the covenant proceeds—

> "shall pay all the rent and perform and observe all the covenants on the part of the lessee up to such determination"

—that means the date of the expiration of the lease, the end of the seven or fourteen years when the lease is to be determined by notice—

> "then and in such case and immediately after the expiration of the said term of seven or fourteen years, as the case may be, this present lease and everything herein contained shall cease and be void."

How can it possibly be said that the meaning of that is that the right of action of the lessor in respect of a breach of covenant should survive, notwithstanding the termination of the lease at the expiration of the seven or fourteen years? It seems to me it would be directly contradictory to the express terms of the clause. It seems to me that the performance up to such determination is perfectly intelligible, and means this: that, if the rent has been paid, and the covenants have been performed up to the date of the determination, i.e., if at the date when the determination has been reached, all rent has been paid, and all acts have been performed, then the term shall determine, and the lease shall be utterly void; but if these conditions have not been fulfilled, then the term shall not cease, and shall not be void. I confess myself quite unable to put any other interpretation upon this clause.

Before I pass from that I should like to refer to another dictum of CHANNELL, J., in *Seaward* v. *Drew* (2) (67 L.J.Q.B. at p. 325) that in the case before him the words there (being "having first paid the rent and performing"—not having performed—"the covenants," which are not the words here) were properly construed by saying that the covenants might be performed at some time or other, but at no particular date. Again, with the greatest deference, I respectfully differ from the dictum of the learned judge. It appears to me, in the first place, that the introduction of refined distinctions in the words of clauses of general use in leases is extremely to be regretted, and leads to an uncertainty in the law which is of very great disadvantage to persons who have to deal with real estate; and consequently, it seems to me, the construction he suggests for a covenant of this kind puts the lessor in this extraordinary position, that, whether all his rights are gone at the expiration of the period for which the notice is given or not, one never can tell—or one cannot necessarily tell—whether for the next twenty years the lease has been determined, or whether it has not; because the obligation on the covenants will continue for twenty years, and the performance of those covenants at any time during that period will determine the lease; and whether the lease is to be determined at that time, or whether there is to be a relation back, and it is to be determined at the end of the seven or fourteen years one really does not know.

A But in either case nobody can say for a very considerable period after the expiration of the seven or fourteen years whether the lease is in existence or not. And it appears to me absolutely essential in construing a covenant of this kind that the question whether the lease does or does not exist after the end respectively of the seven or fourteen years must be determined there and then and cannot possibly be a matter to be left for future consideration, leaving both the lessor and lessee B in absolute uncertainty as to whether they are bound by the lease or not. I think, therefore, the conditions of the clause were conditions precedent.

If that be so, again the matter is a very technical one, but undoubtedly one of the conditions was not performed, because if the lessee had to pay all rent before expiration of the notice—i.e., before the expiration of the seven or fourteen years—he did not do it. He paid the rent one day after the expiration; and the rent had C become payable one month previous to the determination of the term, owing to a provision in the lease—which, having regard to the presence of this clause is absolutely necessary—that the rent shall be payable one month previous to the determination of the term. And that of course, if the construction that I have put on the clause is correct, is absolutely necessary, or else the right to the rent would be gone altogether, because the lease and everything contained therein would have D been absolutely void, and no right of action would have been retained for rent not then paid. Adopting the construction that I put on it, it seems to me that the whole clause becomes perfectly intelligible, because the rent then becomes payable a month before the determination of the term and then the condition of the clause has not been fulfilled and the notice is therefore invalid. [HIS LORDSHIP discussed whether the covenant to repair had been fulfilled, and continued:] I am not satisfied E that the covenant to repair was fulfilled, and, in my opinion, in the present case the burden of showing that it has been fulfilled lies on the defendant and it is not for the lessor to show that the covenant has been broken.

One other point I ought to refer to because it has been strongly argued is that in some way or other there has been a waiver on the part of the lessor of his right to insist on the invalidity of the notice—at all events on any other ground except F the ground of want of title in the person to give such notice. Having paid the greatest attention I could to the arguments, I fail entirely to see how there can have been a waiver. Waiver depends on a course of action, adopted with knowledge of what the true facts are, inconsistent with the right which is ultimately asserted or attempted to be asserted; and it seems to me in this case that there are no such circumstances. The receipt of the rent is the receipt of rent by persons who G are insisting that the term is still continuing, and how that can be a waiver of the right to say it is continuing I do not understand. I think, therefore, in the present case the plaintiffs succeed in showing that the term is still subsisting, and that they are entitled to a declaration that the lease is still subsisting.

Solicitors: *Cooper & Bake; Gedge, Fiske & Gedge; G. E. Hodgkinson.*

[*Reported by* W. J. L. AMBROSE, ESQ., *Barrister-at-Law.*]

HYMAN AND ANOTHER *v.* ROSE

[House of Lords (Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Robson), May 1, 4, 14, 1912]

[Reported [1912] A.C. 623; 81 L.J.K.B. 1062; 106 L.T. 907; 28 T.L.R. 432; 56 Sol. Jo. 535]

Landlord and Tenant—Lease—Forfeiture—Relief—Conditional relief—Remedying of breaches of covenant—Deposit for restoration after alterations not in breach —Conveyancing Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 14 (2).

A building erected for use as a chapel was demised to lessees on a repairing underlease for ninety-nine years from 1845, subject to restrictive covenants which prohibited its use for specified trades and any varying of the front elevation and a covenant for supporting, upholding and maintaining, but did not require the building to be used only as a chapel or prohibit internal alterations suitable for a trade not prohibited. Assignees of the lease sought to use the building for carrying on the business of a cinematograph theatre, which was not a prohibited trade, and carried out certain alterations which were in breach of covenant and would have to be remedied as a condition for relief from forfeiture. Alterations for the purpose also included removal of a wall with a railing not shown to have been in existence at the time of the demise, erection of a movable railing in its place to prevent dedication of the land it had enclosed to the public or its boundary being questioned, and, opening of a new external door. In respect of internal changes relating to the staircase and floor-level the assignees undertook to deposit a sufficient sum to secure the restoration of the building at the end of the lease.

Held: the removal of the wall and railing, the erection of a movable railing, and the opening of a new door were not waste or in breach of covenant, nor were the internal alterations (the change of use also not being in breach of covenant), and relief from forfeiture should, therefore, be granted subject to the remedying of the breaches of covenant and the undertaking to deposit a sum for ultimate restoration of the building.

Per The House: In dealing with an application for relief from forfeiture for breaches of covenant under s. 14 (2) of the Conveyancing Act, 1881, the court should consider all the circumstances and conduct of the parties and exercise the wide discretion vested in it unfettered by rigid rules, and the rules enunciated by the Master of the Rolls, in the present case ([1911] 2 K.B. 234), though useful maxims and reflecting the point of view from which the court should regard an application, might all or any of them be disregarded in a particular case.

Notes. Considered: *Hoffman* v. *Fineberg*, [1948] 1 All E.R. 592. Referred to: *Field* v. *Curnick*, [1926] 2 K.B. 374; *Marsden* v. *Edward Heyes, Ltd.*, [1926] All E.R. Rep. 329; *Bell London and Provincial Properties, Ltd.* v. *Reuben*, [1946] 2 All E.R. 547.

As to alterations of premises constituting a breach of covenant, see 23 Halsbury's Laws (3rd Edn.) 595, and for cases see 31 Digest (Repl.) 177.

Cases referred to in argument:

Doe d. Dalton v. *Jones* (1832), 4 B. & Ad. 126; 1 Nev. & M.K.B.B. 6; 2 L.J.K.B. 11; 110 E.R. 403; 31 Digest (Repl.) 365, *4971*.

Doherty v. *Allman* (1878), 3 App. Cas. 709; 39 L.T. 129; 42 J.P. 788; 26 W.R. 513, H.L.; 31 Digest (Repl.) 391, *5169*.

Batson v. *London School Board* (1904), 69 J.P. 9; 31 Digest (Repl.) 546, *6683*.

Doe d. Wetherell v. *Bird* (1833), 6 C. & P. 195; 31 Digest (Repl.) 365, *4970*.

Gange v. *Lockwood* (1860), 2 F. & F. 115, N.P.; 31 Digest (Repl.) 365, *4967*.

A *Doe d. Vickery* v. *Jackson* (1817), 2 Stark. 293, N.P.; 31 Digest (Repl.) 365, *4966.*

Appeal from an order of the Court of Appeal (COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., BUCKLEY, L.J., dissenting), reported [1911] 2 K.B. 234.

The Court of Appeal had affirmed (i) an order of HORRIDGE, J., made on Feb. 4, 1911, restraining the appellants, their servants and agents, from varying the front B elevation of Adelphi Chapel, Hackney Road, or substantially altering the character thereof until the trial of the action or further order: (ii) an order of RIDLEY, J., made on Mar. 2, 1911, in an action of *Rose* v. *Hyman and Rosenthal*, refusing to grant relief from forfeiture of the premises: (iii) two orders of RIDLEY, J., made on Mar. 2, 1911, to the like effect.

C The building in question was erected for use as a chapel, and was used as a chapel known as Adelphi Chapel until 1909. The frontage in Hackney Road bore the inscription "Adelphi Chapel, 1845." By an indenture of underlease dated May 28, 1845, the premises were demised to lessees for ninety-nine years less ten days from Christmas, 1842, on a repairing lease and subject to certain restrictive covenants. The respondent was entitled to the reversion; the appellants were D assignees of the underlease, and were desirous of carrying on the business of a cinematograph theatre. Structural alterations were in contemplation for this purpose, but the appellants disclaimed any intention of dedicating any of the land round the chapel to the use of the public, and stated that they intended, by the erection of movable iron railings, at such times as the building was not being used as a place of public resort, to exercise full rights of ownership over the land E surrounding the building and included in the lease; and they undertook in the Court of Appeal to deposit money sufficient to reinstate the premises at the end of the term, so that the respondent would be absolutely secured in having the building in its original condition on coming into possession thereof.

Buckmaster, *K.C.*, and *Disturnal* for the appellants.

P. O. Lawrence, *K.C.*, and *G. Herbert Higgins* for the respondent.

F Their Lordships took time for consideration.

May 14. The following opinions were read.

EARL LOREBURN, L.C.—The question in this case is on what terms, if at all, relief should be given against forfeiture for breaches of covenant in a lease of Adelphi Chapel, under s. 14 (2) of the Conveyancing Act, 1881. When that is G decided, the decision will have to be applied to the orders made by the Court of Appeal and by the several judges and masters before whom this intricate piece of litigation has been discussed at different stages.

I desire in the first instance to point out that the discretion given by the section is very wide. The court should consider all the circumstances and the conduct of the parties, and, when the Act is so express to provide a wide discretion, meaning, H no doubt, to prevent one man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach by which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. The rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and in general they reflect the point of view from which judges would regard an application for relief, but it ought to be distinctly I understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions on a free discretion intrusted by statute to the court where the conditions are not based on statutory enactment at all. It is not safe to say that the court must and would always insist on certain things when the Act does not require them, and the facts of some unforeseen case might make

the court wish that it had kept a free hand. In this particular case there have been breaches of covenant as to which there is no doubt that they have to be remedied as a condition of relief, but the real dispute relates to certain alterations which have been effected and are insisted on by the appellants for the purpose of turning this chapel into a place of public entertainment. I have examined the lease and have come to the same conclusion in regard to it as that arrived at by BUCKLEY, L.J., and I do not find anything in it which requires that the building should be used as a chapel. Certain trades are forbidden, but there is nothing to prevent its user for any other trade. Nor is there anything to prohibit internal alterations suitable for such trade. Again there is a covenant not to vary the front elevation and a covenant for supporting, upholding, and maintaining. I do not regard that covenant as prohibiting such alterations as those in question. It is said that there has been waste, and I agree with BUCKLEY, L.J., that this is a question of degree.

The removal of the wall and iron railing was not shown to be a breach of covenant, because it was not shown that it was in existence at the time of the demise. Nor is it waste in this case if a movable railing were put up in place of it so as to prevent the strip of land which it inclosed from being dedicated to the public, and to prevent any question as to the boundary being raised. No harm is done to anyone and the reversion is in no way injured. The opening of a new door in the west wall stands on the same footing. I cannot assent to the argument that a lessee with a covenant such as this to maintain could under no circumstances make a new door, or that doing so necessarily amounts to waste. It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease. In the present case this alteration is permissible without breach of covenant and without waste. In regard to the internal changes relating to the staircase and the level of the floor, it seems that they are quite legitimate for the purpose which I hold to be allowed by the lease; that, indeed, is the governing consideration. The appellants are willing to deposit a sufficient sum to secure the restoration of this building to its former condition at the end of the lease, and, as they are asking for an indulgence in regard to other admitted breaches of covenant, the execution of this offer should be made a condition of relief without inquiring too curiously whether the offer is in excess of what the court would exact, and I agree that these terms should be in the form suggested by BUCKLEY, L.J.

LORD MACNAGHTEN, LORD ATKINSON and **LORD SHAW** concurred.

LORD ROBSON, who was present during the argument, was prevented by ill-health from taking part in the decision.

Appeal allowed.

Solicitors: *John B. & F. Purchase; Crossfield, Cushing & Wheldon.*

[Reported by C. E. MALDEN, ESQ., *Barrister-at-Law.*]

VACHER & SONS, LTD. v. LONDON SOCIETY OF COMPOSITORS AND OTHERS

[House of Lords (Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Moulton), October 24, 25, November 18, 1912]

[Reported [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 29 T.L.R. 73; 57 Sol. Jo. 75]

Trade Union—Action against—Action for tort—Competency—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4 (1).

By s. 4 (1) of the Trade Disputes Act, 1906: "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

There is no context in the Act read as a whole rendering it necessary to cut down the literal meaning of the wide language of s. 4 (1) and import into that sub-section a provision that the tortious act referred to must have been committed in contemplation or furtherance of a trade dispute.

Accordingly, where a trading firm brought an action against a registered trade union to recover damages for conspiracy and libel and an injunction, it not being averred in the statement of claim, expressedly or impliedly, that the acts complained of were done in furtherance or in contemplation of a trade dispute,

Held: on its true construction s. 4 (1) amounted to a statutory prohibition against any court entertaining an action of tort against a trade union, and the defendant trade union must be struck out of the proceedings.

Decision of Court of Appeal, [1912] 3 K.B. 347, affirmed.

Statute—Construction—Construction leading to absurdity—Adoption of alternative construction—Irrelevance of policy of Parliament in passing Act—Repugnancy of one provision in Act to another—Title of Act—Reference to title to ascertain scope of Act.

In the absence of a preamble to an Act there can be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of the Act. It must be shown either that the words taken in their natural sense lead to some absurdity, or that there is some other clause in the body of the Act inconsistent with or repugnant to the enactment in question construed in the ordinary sense of the language in which it is expressed. . . . A judicial tribunal has nothing to do with the policy of any Act which it may be called on to interpret. The only duty of the court is to expound the language of the Act in accordance with the settled rules of construction. It is as unwise as it is unprofitable to cavil at the policy of an Act or to pass a covert censure on the legislature: per Lord Macnaghten.

In construing the words of a statute the court has nothing to do with the question whether or not the legislature has committed an absurdity. But if the words of the Act admit of two interpretations, then they are not clear, and if one interpretation leads to an absurdity and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other conclusion: per Lord Atkinson.

The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. This is not the case with the short title, which is given to the Act solely for the purpose of facility of reference. It is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate to use it to ascertain the scope of the Act. Its

object is identification and not description . . . we have to interpret statutes according to the language used therein, and though occasionally the respective consequences of two rival interpretations may guide us in our choice between them, it can only be where, taking the Act as a whole, and viewing it in connection with the existing state of the law at the time of the passing of the Act, we can satisfy ourselves that the words cannot have been used in the sense to which an argument ab inconveniente points: per LORD MOULTON.

Notes. The provisions of s. 4 (1) of the Trade Disputes Act, 1906, were excluded in the case of offences against the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (see s. 11 (4) and against the Restrictive Trade Practices Act, 1956 (see s. 24 (8)).

Considered: *National Telephone Co.* v. *Postmaster General* (1913), 109 L.T. 562. Applied: *Re Boaler*, [1914–15] All E.R. Rep. 1022. Considered: *London Corpn.* v. *Associated Newspapers*, [1915] A.C. 674. Distinguished: *Sage* v. *Eicholz*, [1918–19] All E.R. Rep. 425. Considered: *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36. Referred to: *Gaskell* v. *Lancashire and Cheshire Miners' Federation* (1912), 28 T.L.R. 518; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Henshall* v. *Porter*, [1923] 2 K.B. 193; *National Union of General and Municipal Workers* v. *Gillian*, [1945] 2 All E.R. 593; *Longdon-Griffiths* v. *Smith*, [1950] 2 All E.R. 662.

As to torts arising out of the operations of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 516 et seq., and as to the interpretation of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 382 et seq. For cases see 43 DIGEST 112 et seq., and 42 DIGEST 609 et seq. For Trade Disputes Act, 1906, see 25 HALSBURY'S STATUTES (2nd Edn.) 1267.

Cases referred to:

(1) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295*.

(2) *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur. N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 42 Digest 626, *277*.

(3) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 42 Digest 650, *569*.

(4) *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 33 Digest 529, *68*.

(5) *Cooke* v. *Charles A. Vogeler Co.*, [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; 17 T.L.R. 153; 8 Mans. 113, H.L.; 42 Digest 687, *1015*.

(6) *R.* v. *City of London Court Judge*, [1892] 1 Q.B. 273, C.A.; 1 Digest (Repl.) 120, *66*.

(7) *Quin* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

Also referred to in argument:

Conway v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest (Repl.) 120, *1237*.

Fielding v. *Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; 47 W.R. 295, C.A.; affirmed sub nom. *Fielden* v. *Morley Corpn.*, [1900] A.C. 133; 69 L.J.Ch. 314; 82 L.T. 29; 64 J.P. 484; 48 W.R. 545; 16 T.L.R. 219, H.L.; 42 Digest 604, *52*.

R. v. *Cockerton*, [1901] 1 K.B. 322; 70 L.J.K.B. 281; 83 L.T. 595; 65 J.P. 115; 49 W.R. 252; 17 T.L.R. 165; affirmed [1901] 1 K.B. 726; 70 L.J.K.B. 441; 84 L.T. 488; 65 J.P. 435; 49 W.R. 433; 17 T.L.R. 402, C.A.; 19 Digest 569, *100*.

Fenton v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 42 Digest 648, *543*.

A *Bussy* v. *Amalgamated Society of Railway Servants and Bell* (1908), 24 T.L.R. 437; 43 Digest 123, *1257*.
Rickards v. *Bartram* (1908), 25 T.L.R. 181; 43 Digest 123, *1258*.
Peru Republic v. *Peruvian Guano Co.* (1887), 36 Ch.D. 489; 56 L.J.Ch. 1081; 57 L.T. 337; 36 W.R. 217; 3 T.L.R. 848; Digest (Pleading) 73, *635*.
Kellaway v. *Bury* (1892), 66 L.T. 599; 8 T.L.R. 433, C.A.; 42 Digest 108, *1026*.
B *A.-G. of Duchy of Lancaster* v. *London and North Western Rail Co.*, [1892] 3 Ch. 274; 62 L.J.Ch. 271; 67 L.T. 810; 2 R. 84, C.A.; Digest (Pleadings) 71, *624*.
Linaker v. *Pilcher* (1901), 70 L.J.K.B. 396; 84 L.T. 421; 49 W.R. 413; 17 T.L.R. 256; 45 Sol. Jo. 276; 43 Digest 127, *1291*.
Temperton v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 43 Digest
C 114, *1185*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (VAUGHAN WILLIAMS and KENNEDY, L.JJ., FARWELL, L.J., dissenting), reported [1912] 3 K.B. 347, reversing an order of CHANNELL, J., at chambers, who had reversed an order of Master WILBERFORCE, made on the application of the respon-
D dents (the defendants) directing that their name should be summarily struck out of the proceedings.

The appellants were a firm of printers, and brought the action against the respondents, a trade union connected with the printing trade, to recover damages for conspiracy and libel, and for an injunction to restrain the further publication of the alleged libel.

E *Danckwerts*, *K.C.*, and *Hugh Fraser* for the appellants.
Harold Morris (*Holman Gregory*, *K.C.* with him), for the respondents.

Their Lordships took time for consideration.

Nov. 18, 1912. The following opinions were read.

F **VISCOUNT HALDANE, L.C.**—This appeal raises the question of the true construction to be put on s. 4 of the Trade Disputes Act, 1906. That Act was passed five years after the decision of this House in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1). It had been there decided that a trade union, registered under the Trades Union Acts, could be sued in its registered name, and also that a trade union, whether registered or not, could, since the Judicature Acts, be sued in a common law action, if the persons selected as defendants were
G persons who, from their position, might fairly be taken to represent the union. It was pointed out by LORD LINDLEY that if a judgment so obtained was for the payment of damages, it could be enforced only against the property of the union, and that to reach such property it might be necessary to make the trustees parties to any proceedings. It is common knowledge that this decision gave rise to keen controversy as to whether the law required amendment. On the one hand, it was
H contended that the principle laid down ought to remain undisturbed, because it simply imposed on trades unions the legal liability for their actions which ought to accompany the immense powers which the Trades Union Acts had set them free to exercise. On the other side, it was maintained that to impose such liability was to subject their funds, which were held for benevolent purposes as well as for those of industrial battles, to undue risk. It was said that by reason
I of the nature of their organisation and their responsibility in law for the action of a multitude of individuals who would be held in law to be their agents, but over whom it was not possible for them to exercise adequate control, they were, by the decision of this House, exposed to perils which must cripple their usefulness. We have heard, in the course of this case, suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of Parliament in the Trade Disputes Act, 1906, of presuming that the legislature was acting with one or other of these points of view in its mind. For my own

part, I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute which are before this House, sitting in its judicial capacity, I propose, therefore, to exclude the consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole before attempting to construe any particular section. Subject to this, I think that the only safe course is to read the language of the statute in what seems to be its sense.

The first question before your Lordships is whether a trade union, if it has committed a tortious act, such as a libel, can be sued for damages at all, even if the act was not committed in contemplation or in furtherance of a trade dispute. Before the Trade Disputes Act was passed it undoubtedly could have been so sued, and the question is whether Parliament has put an end to this liability. The Act is confined to trades unions within the definition of the Trades Union Acts, 1871 and 1876. The title is "An Act to provide for the regulation of Trades Unions and Trade Disputes." This appears to me to indicate that the scope of the statute was not confined to the regulation of trade disputes merely. Section 1 is confined to cases of trade disputes, and amends the law of conspiracy in such cases by precluding legal remedy unless the act done would have been actionable apart from the circumstances of agreement or combination to do it. Section 2 is also confined to cases of trade disputes. It legalises what is popularly called "peaceful picketing." Section 3 takes away the actionable character of any act done by a person in contemplation or furtherance of a trade dispute, if the ground of action is only that what was done induced another person to break a contract of employment, or was an interference with the trade, business, or employment of another person, or with his right to dispose of his capital or his labour as he pleases. It will be observed that all these sections relate to trade disputes, but that none of them relates exclusively to the case of a trade union. Section 4 (1), the section which has to be construed in the present appeal, relates exclusively to the case of a trade union. It enacts:

> "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

I draw attention to the fact that this section differs from the three preceding sections not only in relating exclusively to the case of a trade union, but in that sub-s. (1) omits to mention any restriction which would confine the tortious act to one in contemplation or in furtherance of a trade dispute. Upon this point it has been contended by counsel for the appellants that such a restriction ought to be implied. It is said that s. 5, which provides that the Act may be cited as the Trade Disputes Act, and the scheme of the first three sections which deal only with trade disputes, show that the Act is to be interpreted as so confined, and that it cannot be supposed that the legislature intended to free trade unions from liability to the extent which a literal reading of s. 4 (1) would indicate.

With that contention I am unable to agree. It is true that it is provided that the Act may be cited by the short title of the "Trade Disputes Act." But the governing title introduces the statute as an Act to provide for the regulation of trade unions and trade disputes. The first three sections regulate trade disputes. The fourth section appears to carry out the other intention indicated by the initial title

by laying down new law as to trade unions. I can find no context in the Act read as a whole which indicates an intention to cut down the literal meaning of the wide language of s. 4 (1). For reasons which I have already assigned, I think that it would not only be beyond the functions of a court of justice to presume that the legislature could not, when it passed the Act, have intended to go as far as the plain words used say, but that, if judges could speculate as to its intentions, they would probably speculate wrongly.

I pass, therefore, to the next point which was made for the appellants, and it turned on the effect of sub-s. (2) of s. 4, a sub-section which, it was said, ought to be read as a proviso to sub-s. (1) restricting its operation. Section 4 (2) is in these terms:

> "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, s. 9, except in respect of any tortious Act committed by or on behalf of the union in contemplation or furtherance of a trade dispute."

The Act of 1871 enabled trade unions to register, and provided by s. 9 that the trustees of a registered trade union might sue or be sued as such in cases concerning the property of the trade union. The legislature appears to have desired to draw a distinction between the union and its trustees and to preserve the liability of the trustees under this section, even in the case of tortious acts committed by the union, damages arising out of which might, as pointed out by LORD LINDLEY in his judgment in the *Taff Vale Case* (1), have been made effective against property in the hands of the trustees. But a restriction is put on the liability of the trustees by excepting from it liability in respect of a tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute. Having regard to the distinction drawn in the wording of the statute between the liability of the trade union and the liability of its trustees, I can see no justification for importing the provision restricting liability enacted in the latter sub-section into the words of sub-s. (1), and think that on the second point made the argument which was addressed to the House, to the effect that the words of exception in the second sub-section must be read as qualifying the whole section, cannot succeed.

I now turn to the facts out of which the questions of law which I have considered arose. This action was one for damages for conspiracy and libel, brought by the appellants, whose business was that of printers, against the respondents, who were a trade union to which the Act of 1906 applied. It does not appear whether there were trustees of the union or whether there was property vested in them which could have been made liable, assuming that the cause of action did not arise out of a trade dispute. If there were trustees, they were not made defendants, and, indeed, if the advisers of the plaintiffs were apprehensive that the trial might disclose a trade dispute, there were good reasons for not joining the trustees. A statement of claim was delivered which set out particulars of the conspiracy and libel, the gist of which was that the respondents had conspired to represent and had untruly represented the appellants as a firm which dealt unfairly by their workmen. Without delivering a statement of defence the respondents applied to strike the name of the respondent society from the action on the ground that in the first place a trade union could not be sued at all in such an action, and that, in the second place, even if s. 4 (1) of the Trade Disputes Act, 1906, was to be read as applying only if there was a trade dispute, it did not appear on the face of the proceedings that the acts complained of had not arisen out of such a trade dispute. Master WILBERFORCE made an order allowing the application. CHANNELL, J., on appeal, discharged this order, and directed that the point should not be disposed of summarily, but should stand to the trial. The Court of Appeal by a majority reversed the order of CHANNELL, J., and restored the order of Master WILBERFORCE. VAUGHAN WILLIAMS, L.J., thought that the libel, even according to the bare

description in the statement of claim, was, on the face of it, an act done in contemplation or furtherance of a trade dispute. A

I entertain so much doubt on this point that if it were the only one raised I would be of the opinion of CHANNELL, J., that the application ought to stand over to the trial, in order that the facts might be ascertained which would enable the court to decide whether it had jurisdiction to entertain the action, but VAUGHAN WILLIAMS, L.J., decided in favour of the appeal before him on the other point. He took the B view that sub-s. (2) of s. 4 could not be read as qualifying the prohibition of the courts contained in sub-s. (1). FARWELL, L.J., took a different view and dissented, and KENNEDY, L.J., held that the plain language of sub-s. (1) could not be cut down excepting by indulgence in illegitimate speculation as to what the legislature must have intended. On the other point he found himself unable to agree with VAUGHAN WILLIAMS, L.J. I am in complete agreement with the judgment delivered C by KENNEDY, L.J.* The reasons which I have stated in examining the Act and its various sections have led me to the same conclusions as he has reached, and I, therefore, move that the appeal be dismissed with costs.

LORD MACNAGHTEN.—The point raised by this appeal is a very short one, and, in my opinion, absolutely clear. If I had not had the pleasure of listening D to a most ingenious argument on the part of the appellants, I should not have thought the question arguable here, or anywhere else in the world.

The Trade Disputes Act, 1906, declares that:

> "An action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." E

The language of the enactment is precise and unambiguous. No one can doubt what the words mean. It is "the universal rule," as LORD WENSLEYDALE observed in *Grey* v. *Pearson* (2) (6 H.L. Cas. at p. 106), that in construing statutes as well as in construing all other written instruments,

> "the grammatical and ordinary sense of the words is to be adhered to, unless F that would lead to some absurdity, or some repugnance or inconsistency in the rest of the instrument, in which case the grammatical and ordinary sense of of the words may be modified so as to avoid that absurdity or inconsistency, but no further."

Acts of Parliament are, of course, to be construed "according to the intent of the Parliament which passes them." That is "the only rule" said TINDAL, C.J., G delivering the opinion of the judges who advised this House in the *Sussex Peerage Case* (3). But his Lordship was careful to add this note of warning (11 Cl. & Fin. at p. 143):

> "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and H ordinary sense. The words themselves do alone in such case best declare the intent of the lawgiver."

Nowadays, when it is a rare thing to find a preamble in any public general statute, the field of inquiry is even narrower than it was in former times. In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must I be shown either that the words taken in their natural sense lead to some absurdity, or that there is some other clause in the body of the Act inconsistent with or repugnant to the enactment in question construed in the ordinary sense of the language in which it is expressed. There is nothing absurd in the notion of an association or body enjoying immunity from actions at law. Some people may think the policy of the Act unwise, and even dangerous to the community.

*For the judgment of KENNEDY, L.J., see post p. 254.

A Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert B censure on the legislature.

It was not contended that there is any inconsistency in the Trade Disputes Act, or any conflict between any of its clauses. On the contrary, the argument rather was that it was consistent throughout, so consistent, and so clear that the omission of words, otherwise perhaps material, made no difference. No words, it was said, were to be supplied; there was no room even for implication. Section 4 was merely C consequential on the sections which preceded it. Throughout the statute from first to last the only case which Parliament was contemplating was the case where the tortious act complained of is done in furtherance or in contemplation of a trade dispute. It was said that this was plain from the preceding sections, and that sub-s. (2) of s. 4 made it plainer still. There is some difficulty in grasping an argument so ingenious and so subtle. I agree with the learned counsel for the respondents, D who put his case very well. The appellants must fail unless the words "in contemplation or in furtherance of a trade dispute" are introduced into sub-s. (1) of s. 4 by construction or implication, or by some process of thought reading which I confess that I am unable to follow. Section 4 is not, I think, consequential on the preceding sections in the sense in which the learned counsel for the appellants used the word "consequential." Section 4 seems to me to deal with a different subject E and a different Act of Parliament. The first three sections are concerned with the Conspiracy and Protection of Property Act, 1875. The first two sections refer in terms to that Act. Section 3, though not mentioning the Act in terms, affects it, and amends it by making the act of "a person" in inducing a breach of contract, or in doing certain other things undoubtedly actionable before the Trade Disputes Act, 1906, actionable no longer if done in contemplation or furtherance of a trade F dispute. Section 4 is not directed to the Conspiracy and Protection of Property Act, 1875. In both its sub-sections it is directed to the Trade Union Act, 1871. Everyone knows that sub-s. (1) was introduced in order to neutralise the effect of the decision in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1) by an extension of the Trade Union Act 1871. It is not easy to see the object of sub-s. (2) of s. 4, or to understand its precise meaning. It seems to me, therefore, G that it will be better to leave the construction of that sub-section to be determined when it comes directly in question, if ever that occasion should occur. However it may be construed it cannot, I think, affect the plain meaning of sub-s. (1), or assist the appellants in any way. I am of opinion that the action, as against the trade union, was incompetent, and that the appeal should be dismissed with costs.

H **LORD ATKINSON.**—The sole question for decision in this case is, in my view, the proper construction of sub-s. (1) of s. 4 of the Trade Disputes Act, 1906. It has been quoted already. The law upon the subject of the liability of a trade union to be sued in tort at the time when this statute was passed was, I think, this. Under the decisions in *Duke of Bedford* v. *Ellis* (4) and *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1), it must, I think, be taken (i) that a I trade union, registered or unregistered, could be sued in respect of torts committed by its agents in a representative action, provided that the selected defendants were fairly representative of it; (ii) that a registered society might be sued in its registered name; and (iii) that if the trustees were made defendants in such an action, an order could be made by the court for the payment by them of the damages and costs recovered out of the funds of the society in their hands. LORD LINDLEY lays down this last proposition in so many words in the *Taff Vale Case* (1), so that it was not at all necessary that, if judgment had been recovered against the union in

either of such actions, a second action founded on such judgment should be brought against the trustees to recover the amount of the damages and costs, which the judgment had converted into a speciality debt. Equitable execution against the property of the union held by the trustees could be obtained in the original suit, if they were made parties to it.

In s. 4 (1) the representative form of action is expressly named in so many words, and it is enacted that an action of that kind brought in respect of any tort alleged to have been committed by or on behalf of a trade union shall not be entertained. The sub-section further provides that any action for a similar tort shall not be brought against a trade union. Thus both these modes of proceeding to obtain redress for the tortious act mentioned are in plain and unambiguous language prohibited. Such actions, it says, "shall not be entertained by any court." Counsel for the appellants, insisted that this wide and positive prohibition must be cut down and limited in its scope to cases in which the action is brought in respect of a tort committed by or on behalf of a trade union "in contemplation or furtherance of a trade dispute," and that a trade union should be held to remain as liable as it was before this statute was passed for all torts committed by it, or on its behalf, which were not committed "in contemplation or in furtherance of a trade dispute." He based his argument, as I understood him, upon two grounds: first, upon the consideration of the evil results which would follow from the wider construction, since it would, he said, raise trade unions above the law and enable them to commit torts of all kinds with impunity; and, secondly, upon the ground that s. 4 (1) is merely consequential upon ss. 1, 2, and 3, and that, when taken in connection with these latter, together with sub-s. (2) of the same section, it is necessary to limit sub-s. (1) to the extent for which he contended, in order to bring it into harmony with the provisions of those earlier sections, as well as with those of s. 4 (2).

It is, no doubt, well established that in construing the words of a statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the legislature is presumed not to have intended to bring about, a construction which would not lead to any one of those things should be preferred to one which would lead to one or more of them. But, as LORD HALSBURY, L.C., laid down in *Cooke* v. *Charles A. Vogeler Co.* (5) a court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the legislature has said. If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced, though it should lead to absurd or mischievous results. If the language of this sub-section is not overruled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned whether the policy which it embodies is wise or unwise, or whether its consequences are just or unjust, beneficial or michievous. LORD ESHER, M.R., in *R.* v. *City of London Court Judge* (6) states the principle thus ([1892] 1 Q.B. at p. 290):

> "If the words of an Act are clear, you must follow them, though they lead to a manifest absurdity."

The court has nothing to do with the question whether the legislature has committed an absurdity or not. In my opinion, the rule has always been this. If the words of an Act admit of two interpretations, then they are not clear, and if one interpretation leads to an absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation. So that if in this case the words of this section are plain, and are not controlled by any other portions of the statute, the contention that to interpret

them according to their natural and ordinary meaning would result in placing trade unions above the law is, for the purposes of the judicial decision of this case, entirely irrelevant. We have nothing to do with it. I think that the language is plain, and, therefore, I abstain from expressing any opinion on the character or the results of the enactment.

Next as to the contention that s. 4 (1) is only consequential on the three preceding sections: The first section simply aims at assimilating the civil and criminal law in respect of the particular kind of conspiracy mentioned in the section. Section 3 of the Conspiracy and Protection of Property Act, 1875, provided that an agreement or combination of two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employer and workmen should not be indictable as a criminal conspiracy, if the act when committed by one person alone would not be a crime. It thus struck, in the particular instance mentioned, at the principle of the criminal law of conspiracy to the effect that it is the agreement or combination which is the essence of the crime, and that, therefore, a combination or agreement to do, or procure to be done, something not in its own nature criminal if done by one person, might still be a crime. In order to establish civil liability for a conspiracy, agreement or combination per se is not enough. It must be followed by damage. Damage can only be caused by some act, including in the word "act," of course, the use of threatening words, and the writing and publishing, or speaking and publishing, defamatory words, or such like. Therefore, it was only necessary, in order to protect from civil liability in this kind of case, to provide, as has been provided in s. 1 of the Act of 1906, that

> "an act done in pursuance of an agreement or combination of two or more persons, in contemplation or furtherance of a trade dispute, shall not be actionable if it would not be so when done without such agreement."

The words apply to all persons, whether members of trade unions or not, and to combinations between such persons.

As to s. 2 of the Act of 1906, the Act of 1875, by s. 7, made "watching and besetting" of the kind therein described criminal, but in its last paragraph limited the scope of the section by enacting that the action which would amount under its words to the crime of watching and besetting was not to be so treated if it was done merely to obtain or communicate information. Section 2 of the Act of 1906 deals with civil as well as with criminal responsibility. It makes the acts which it describes lawful acts, and secures immunity not only for the attending to obtain or communicate information, but also for the attending for the purpose of persuading any person to work or to abstain from working, provided always that these things are done, first peaceably, and secondly in contemplation or furtherance of a trade dispute. But this section, like the preceding one, is not confined to trade unions, or to the members of trade unions. It applies to one or more persons acting on his or their own behalf, or on behalf of a trade union or of an individual employer or firm. The members of trade unions who watch or beset in a manner which deprives them of the protection of this section are, of course, liable criminally or civilly, according to the nature of the act done.

Section 3 of the Act of 1906 applies to all individuals. It is intended to encroach upon the law as laid down in *Quinn* v. *Leathem* (7) and the cases which preceded it, but, like the earlier provisions, it applies to all persons, whether members of a trade union or not. It is quite true that in each of these sections the necessary condition, or one of the necessary conditions, to secure immunity is that the act should be done in contemplation or furtherance of a trade dispute. It is from that circumstance that the saving grace apparently flows, and I can fully appreciate the force of the argument from analogy which was pressed upon us, that trade unionists should not escape liability unless they bring themselves within its absolving influence. That argument would have more force if any consistent scheme or plan underlay this statute, but it is not so. Sections 1 and 2 merely introduce qualifying

provisions into two sections of existing statutes, and s. 3 is designed merely to modify by the same qualification the law laid down in several cases. No reason can, I think, be suggested why the legislature should not have expressly qualified the immunity conferred upon trade unions by s. 4 (1) in the manner suggested if they desired or intended so to do. They have used plain, clear, and unambiguous language to confer this immunity, and I do not at all think that it is necessary to qualify that language to bring the provisions of the sub-section into harmony with the provisions of the sections which have preceded it.

There remains for consideration the second sub-section of s. 4. Counsel for the appellants relied strongly upon this sub-section in support of his contention. The qualification common to ss. 1, 2, and 3 is introduced here to qualify to that extent the statutory liability imposed upon the trustees, who may not be members of the union at all, by s. 9 of the Trade Union Act, 1871, and he urged that the use of the words "nothing in this section," with which the sub-section commences, shows that the legislature thought and intended that the words "in contemplation or furtherance of a trade dispute" should be taken as by implication introduced into sub-s. (1). I think, however, that it is clear what the meaning and object of the sub-section really is. A proceeding against the trustees under s. 9 of the Act of 1871 is in fact, if not in form, a proceeding in rem against the property of the trade union. In that sense it is an action against the union itself. Judgments for damages against a trade union for torts committed by its agents, in whatever form the action may be brought, can only be satisfied out of the property vested in the trustees, and it was, I think, apprehended by the legislature that the wide and positive provisions of sub-s. (1) might be taken as practically repealing in part s. 9 of the Act of 1871, and conferring an immunity on the trustees as absolute as that conferred upon the union. This sub-section, while qualifying their liability to some extent by the introduction of the provision common to ss. 1, 2, and 3, was, I think, passed ex abundanti cautelâ to meet this possible danger, and, save as to that qualification, to preserve unimpaired the liability imposed on the trustees by s. 9 of the Act of 1871.

In the view which I take of the provisions of s. 6 (1), it is not necessary to determine whether any evidence of the existence of a trade dispute is disclosed in the statement of claim, or any evidence that the alleged libel was published in contemplation or furtherance of such a dispute. I wish, however, to point out that in a proceeding such as that adopted in this case, which is in truth somewhat of the nature of a demurrer to the statement of claim, the only facts which can be taken as admitted are those which are expressly or impliedly averred in the statement of claim itself. Inferences of fact must be drawn by the jury, and no court can, for the purpose of such a proceeding, take as admitted a fact not averred, but one which is in truth an inference from facts which are averred in that pleading. In this statement of claim it is not averred, expressly or impliedly, that a trade dispute existed or was in contemplation. Neither is it averred that the act complained of was done in furtherance or contemplation of such a dispute. In my opinion, therefore, this case must be disposed of on the assumption that no trade dispute existed, or was in contemplation, and that this libel was not published in contemplation or furtherance of such a dispute. On the whole, I am of opinion that the appeal fails, and should be dismissed with costs.

LORD SHAW.—By s. 4 (1) of the Trade Disputes Act, 1906, it is provided:

> "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

It is conceded that this action, which is against a trade union in respect of a tort, is within the class of actions there set forth, if the words of the sub-section mean what they say. I think that the sub-section is neither self-contradictory nor

repugnant to the other provisions of the Act, and that, as regards the words themselves, they are unambiguous, comprehensive, and imperative. Were they ambiguous, other sections or sub-sections might have been invoked to clear up their meaning, but, being unambiguous, such a reference might distort that meaning, and so produce error; and of course this is a fortiori the case if a reference is suggested, not to something within, but to considerations extraneous to the Act itself. If, for instance, it be argued that the mind of Parliament, looking before and after, having in view the past history of a question, and the future consequences of its language, must have meant something different from what it has said, then it must be answered that all this essay in psychological dexterity may be interesting, may help to whittle language down, or even to vaporise it, but is a most dangerous exercise for any interpreter like a court of law, whose duty is to accept loyally and to expound plainly the simple words employed. I, therefore, agree entirely with LORD MACNAGHTEN in his view of this case.

The comprehensiveness is plain; the action against a trade union which no court is to entertain is "in respect of any tortious act," &c. To limit this to tortious acts of a particular character, or in respect of particular things, such as trade disputes, is to imply an addition to the language, and to import a limit to the comprehensiveness of the section, and so pro tanto to defeat the statute. Nor is the imperative doubtful—no court is to entertain such an action. Apart altogether from the pleadings it is pars judicis to stop the case whenever its true nature is revealed. To entertain the action would be to disobey the legislature, and would constitute a usurpation on the part of the judiciary. I content myself with these propositions, and do not enter into the details. I refrain for this reason, that these details, together with what are, in my humble opinion, the proper conclusions to be derived therefrom, have been marshalled by KENNEDY, L.J., in a judgment to which I do not feel that I could usefully add anything.*

LORD MOULTON.—I concur. The only question raised by this appeal is, in my opinion, the proper construction of s. 4 (1) of the Trade Disputes Act, 1906. If it be construed in the manner contended for by the respondents, it amounts to a statutory prohibition to all courts against entertaining an action of tort against a trade union. This renders it obligatory upon the court to stay such an action so soon as it is made aware of its existence. To allow it to come to trial would, in my opinion, be "entertaining" it. The statute so interpreted gives protection to trade unions against actions of tort, not by furnishing them with a defence, but by giving them complete immunity against legal proceedings. The words of the sub-section appear to me to be free from any ambiguity when taken apart from their context in the Act. At the date when the Act was passed it had been settled that trade unions could be sued in a representative action, or, if they were registered trade unions, under their registered name, and the plain meaning of the enactment is that, however the trade union be sued, the court shall not entertain the action if it is in respect of a tortious act alleged to have been committed by or on behalf of the trade union. But the appellants say that when the whole Act is considered it will appear that this is not the right construction, and that, on the contrary, the general language of the section must be limited by implication from other parts of the Act. It is, of course, a well-recognised principle in the interpretation of the statutes that a statute must be looked at as a whole, and I shall, therefore, as the matter is of great importance, proceed to consider in detail the arguments urged on behalf of the appellants for thus restricting the meaning of the enactment.

The Act is entitled "An Act to provide for the regulation of Trades Unions and Trade Disputes." It consists, substantially, of four enacting sections. The first section amends the law as to combination, the second permits peaceful picketing, the third amends the law by which it was actionable to persuade servants or workmen to break contracts of employment. There is a similarity in the objects

*For the judgment of KENNEDY, L.J., see post p. 254.

of the three sections inasmuch as they all operate to increase the immunity of the individual in respect of acts such as usually occur in connection with trade disputes; but the sections have nothing else in common. They are not parts of any integral scheme of legislation, but only amendments of specific points in the law as it then stood, partly by reason of the common law, and partly by reason of specific Acts of Parliament. I am satisfied that these sections do not, either individually or collectively, throw any light on the interpretation of s. 4, which relates to a wholly different subject. Counsel for the appellants would have us limit the generality of the words "any tortious acts" by reading in or implying the limitation "in contemplation or furtherance of a trade dispute." He based his contention on three grounds: (i) The title of the Act; (ii) the presence of the words in sub-s. (2) of s. 4; and (iii) the argument ab inconvenienti. He further urged us to treat the clause as consequential upon the first three sections of the Act, but with that contention I have already dealt. The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole, and ascertaining its scope. This is not the case with the short title, which, in this case, is "The Trade Disputes Act, 1906." That is a title given to the Act solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate, in my opinion, to use it for the purpose of ascertaining the scope of the Act. Its object is identification and not description. The full title of the Act is, as I have said, "An Act to provide for the regulation of Trade Unions and Trade Disputes." The appellants ask us to read this as if it were "for the regulation of trade unions as to trade disputes," and to treat the Act as though it related solely to trade disputes, so that s. 4 (1) must be read with that limitation. I can see nothing to justify such an extraordinary mode of construing the Act. The title as it stands is not only intelligible, but describes admirably the purposes of the Act. Sections 1, 2, and 3 relate to trade disputes without any special reference to trade unions, and s. 4 relates to trade unions, whichever of the two rival interpretations of the section be adopted. It is evident, therefore, that the title of the Act is amply accounted for, whatever be the view which the House takes of the matter in dispute, and, therefore, it cannot assist us in deciding between the two proposed constructions. The point next urged on behalf of the appellants was that s. 4 should be read as a whole, and the limitation "in contemplation or furtherance of a trade dispute" should be treated as implied in sub-s. (1), because it is present in sub-s. (2). This contention appears to me to be directly contrary to the most elementary principles of the construction of statutes. To my mind, as a matter of construction, the fact that sub-s. (1) speaks of tortious acts generally, and sub-s. (2) speaks of a certain class of tortious acts, creates a contrast between the two sub-sections which emphasises the generality of the one and the limited character of the other. If there were any difficulty of grammatical construction or interpretation of the language of sub-s. (1), it might be necessary to consider whether, taking the section as a whole, there was not some interdependence of one sub-section on the other. But inasmuch as the language of sub-s. (1) is clear and unambiguous, this is not open to us. There are, no doubt, difficulties arising from the drafting of the section, and I shall consider them presently, but they arise exclusively in connection with sub-s. (2), and afford no aid to the contention of the appellants.

Finally, the argument ab inconvenienti is pressed upon us. It is urged that it is impossible to suppose that the legislature could have intended to give so wide an immunity to trade unions as that which follows from taking the words of sub-s. (1) in their natural sense. The argument ab inconvenienti is one which requires to be used with great caution. There is a danger that it may degenerate into a mere judicial criticism of the propriety of the acts of the legislature. We have to interpret statutes according to the language used therein, and though occasionally the respective consequences of two rival interpretations may guide us in our choice

between them, it can only be where, taking the Act as a whole, and viewing it in connection with the existing state of the law at the time of the passing of the Act, we can satisfy ourselves that the words cannot have been used in the sense to which the argument points. There is nothing of the kind here. At the time of the passing of the Act the recognised state of the law was that a trade union could be sued in the same way as any other association by the procedure of a representative action, or, in case it was a registered trade union, under its registered name. That this was the state of the law had, no doubt, come as a surprise to large sections of the community. Even in the courts themselves there had been a difference of opinion on the point, as is shown by the history of the *Taff Vale* (1) litigation. Under these circumstances the Trade Disputes Act, 1906, was passed, and we find in it a plain provision that no action shall be entertained against a trade union by either of the two methods of procedure by which, at that time, such an action could be brought, in case the action is in respect of a tortious act. Under such circumstances a court is not justified in allowing itself to be influenced by the argument ab inconvenienti. The legislature has expressed its decision plainly that such should be the law.

I am further of opinion that too much has been made of the supposed gravity of the consequences of the enactment. It will be seen that it does not affect the personal liability of any individual. Trade unions, like other associations, must act through agents, and it is a fundamental principle of the English law that no tortfeasor can excuse himself from the consequences of his acts by setting up that he was acting only as the agent of another. All that the section takes away is the power of proceeding against the association, or making its corporate funds liable. The association, therefore, is in a position in some respects analogous to, though by no means identical with, the position of a statutory corporation with regard to contractual acts which are ultra vires. No matter how completely the act may be in form an act of the corporation, it cannot be made liable under the contract because it must act through agents, and it could give no authority to anyone to do on its behalf an act which was ultra vires. Nor is such a provision of a wholly novel type in connection with trade unions. In s. 4 of the Trade Union Act, 1871, we find a list of legal proceedings which, although the association had by that Act been made legal, the courts were not, on that account, permitted to entertain. It is true that the Trade Disputes Act, 1906, makes an addition to the list which is of enormous importance, and does so in very peremptory language, but it cannot be said that, interpreted according to its plain language, it is of a type wholly without precedent in past trade legislation.

The real difficulty in the interpretation of s. 4 is found in sub-s. (2), which reads as follows:

> "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, s. 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

The difficulty is caused by the fact that there is nothing in sub-s. (1) of s. 4, which relates to suing the trustees of a trade union. It only refers to suing the officials of a trade union when they are sued in a representative action, and that is not what is referred to in sub-s. (2). One would be inclined to avoid the difficulty by saying that the sub-section was put in ex abundanti cautelâ only, were it not for the exception which it contains, which would seem to indicate that sub-s. (1) would have granted immunity to the trustees in respect of actions of tort coming under s. 9 of the Act of 1871, and that it was the intention of the legislature to limit that immunity to cases where the tort was committed by, or on behalf of, the union, in contemplation or in furtherance of a trade dispute. Whether this is or is not the true interpretation of the section as a whole is not before us in the present appeal, but I have thought it right to indicate the real difficulty which exists in its inter-

pretation. It, I think, points either to imperfect drafting, or to some intermediate provision having been struck out without the proper consequential amendments being made in the language of sub-s. (2). But the difficulty, however great, has no bearing on the point which is before the House. The language of the section, so far as it relates to the present case, is clear and unambiguous, and, in my opinion, we must follow, it. I am, therefore, of opinion that the decision of the Court of Appeal was right, on the lines adopted by KENNEDY, L.J., in his judgment (infra) and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Scatliffs; Shaen, Roscoe, Massey & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

COURT OF APPEAL

March 25, April 3, 1912.

April 3, 1912. **KENNEDY, L.J.**, read the following judgment.—The plaintiffs, who are printers, sued the defendant society, which is a trade union, and two other defendants, who are respectively the secretary and the organising secretary of the defendant society, claiming damages for torts, which the plaintiffs allege to have been committed by all of the three defendants. These torts, as stated in the plaintiffs' pleading, consist of (i) libel, (ii) conspiracy to injure the plaintiffs as printers by the publication of the alleged libels. The libels in every case but one consist of the contents of a document entitled "The Compositor's Fair List and Guide to the London Printing Office," sent by the defendants with covering letters to actual or possible customers of the plaintiffs. In para. 13 there is a further libel charged in respect of a letter therein set out which was addressed by the defendant Holmes, as agent (so the plaintiffs allege) of his co-defendants, as well as on his own behalf, to the United Committee for the Taxation of Land Values. The plaintiffs in substance and effect allege in their statement of claim that the meaning and the purpose of all these communications was to injure the plaintiffs by representing that the plaintiffs had been guilty of unfair dealing in their business as printers; that they treated their employees harshly and unfairly, and never employed trade union compositors, and were not, therefore, persons fit to be intrusted with the execution of orders for printing. For the purpose of deciding the matter of the present appeal it must be assumed that the plaintiffs can substantiate their charges of tort as pleaded by them in the statement of claim.

The application with which we have to deal is an application to strike out the name of the defendant society from the writ of summons and all subsequent proceedings in this action under Ord. 25, rr. 2, 4, on the ground that the case, as presented by the plaintiffs in their pleading, discloses no reasonable cause of action against the defendant society. CHANNELL, J., in chambers dismissed this application, giving leave to appeal; and this court has to say whether that decision was right or not. The question is undoubtedly one of importance, for it involves the interpretation of s. 4 (1) of the Trade Disputes Act, 1906. If I felt a doubt as to the meaning and effect of this enactment in relation to the present case, I should assuredly, whatever might be the inclination of my own mind as to the true interpretation, affirm my brother CHANNELL'S, decision, and leave the point to be argued at the hearing of the action. I have, however, come to the conclusion that the meaning and effect of the enactment in relation to the plaintiffs' action is not open to any doubt; that the statement of claim, every statement in which I assume, for the purpose of deciding the question before us, to be true, does not disclose any reasonable cause of action against the defendant society; and, therefore that this application to strike out its name as a defendant ought to be allowed. Nothing, as it appears to me, could be clearer or more explicit than the language of the enactment itself:

A "An action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court."

The statement of claim alleges torts—libel and conspiracy—it sues this defendant, the trade union, in respect of those alleged torts. It follows, as I venture to think, that we cannot allow such an action to be entertained by the High Court of Justice B against this defendant without contravening the express provisions of the Act of Parliament.

What are the arguments against this view? I trust that I do not do any injustice to the case as it was presented to this court with his usual force and skill by counsel for the defendants, if I state the arguments put forward by the plaintiffs in the following propositions: (i) It is inconceivable, or at all events most improbable, on C grounds of public policy, that the legislature should have accorded so large and special an immunity to a trade union, and the court therefore ought to presume in favour of any limitation which can reasonably be suggested in order to limit the effect of the enactment. (ii) We may infer such a limitation from the presence in ss. 1 and 3 of the words, "An Act done in contemplation or furtherance of a trade dispute," and the presence of similar words in s. 4 (2), and from the provision in D s. 5 that "this Act may be cited as the Trade Disputes Act, 1906"; and, therefore, we may properly read into s. 4 (1), after the words "and tortious act alleged to have been committed by or on behalf of the trade union" the words "in contemplation or furtherance of a trade dispute." (iii) Section 4 (2), is inconsistent with the attribution of its natural meaning to the language of s. 4 (1).

I must confess myself unable to attach weight to these arguments. In regard E to the alleged improbability of the legislature having meant what it appears from the natural and ordinary sense of the words in s. 4 (1), to have enacted, I say that I decline to speculate in regard to any statutory enactment which it becomes my duty to interpret as to what was the policy to which the legislature thought it was giving the force of law. Nothing in my humble judgment could be more dangerous, if the words of a statute according to their natural grammatical sense F are plain, than to allow oneself to drift into a wilderness of conjectures as to the à priori probability or improbability of the legislature having intended to say what it has in fact said. I agree entirely with the proposition that, in construing and applying s. 4 (1), inasmuch as it accords, as on any view it does, a novel immunity from legal proceedings to one particular kind of association, the enactment ought to be strictly construed. I agree also that if a section in an Act of Parliament is G either on its face ambiguous, or, if read in that which is prima facie the natural meaning of the words, is plainly inconsistent with the context and the very purpose of the Act of which it is part, it is legitimate, in construing the section, to treat the purpose of the Act as appearing in it as the governing element in the choice of interpretations, even although, in the latter of the two cases which I have put, a less natural meaning has in consequence to be imposed upon the language of the H section. But none of these considerations appear to me to avail the plaintiffs here. Construe s. 4 (1), as strictly as one can its simplicity and freedom from ambiguity are, in my humble judgment, transparently clear; there is nothing in the purpose of the Act, and the Act must speak for itself, with which the natural interpretation of s. 4 (1), is inconsistent. In this connection it is convenient to consider the I limitations which the plaintiffs seek to introduce into s. 4 (1), and the arguments which they endeavour, as I have already stated, to draw from the language in ss. 1, 3, and 5, and from the title of the Act itself in s. 5. The plaintiffs propose to read into s. 4 (1), after the words "committed by or on behalf of the trade union," the words "in contemplation or furtherance of a trade dispute," or at any rate to add words to that effect. Why? Because, they argue such words are to be found where, under ss. 1, 3, and 4, sub-s. (2), the legislature is granting a decree of immunity from legal liability for wrongdoing to individuals, and it is reasonable

to infer that it was only subject to the same limitation that the legislature intended to grant immunity from wrongdoing to the trade union. I can only say that I see nothing to compel me to make such an assumption as to the intention of the legislature. Knowing, as everyone does, the controversy as to the protection of trade union funds, I decline to infer from the limitation of the immunity of individuals in other sections that the legislature could not have intended to give an unlimited measure of immunity to the trade union. And, to my mind, the very fact that in each of those other parts of this short Act which are referred to by the plaintiffs we find the express insertion of the limitation makes it most improbable, to say the least, that the omission of such a limitation in s. 4 (1), was a casual slip and not intentional. I am not impressed by the argument founded by the plaintiffs on the title of the Act and on the provision in s. 5 (1), that the Act may be cited as the Trade Disputes Act, 1906. If the Act is by its title an Act to provide for trade disputes, it is also by its title an Act to provide for the regulation of trade unions; if under s. 5 it may be cited as the Trade Disputes Act, 1906, the Trade Union Acts of 1871 and 1876 and this Act, according to the same section, may be cited together as the Trade Union Acts, 1871 to 1906.

This brings me to the consideration of the last of the arguments which were put forward on behalf of the plaintiffs. It is contended that s. 4 (2), shows, or tends to show, that some such limitation as the plaintiffs suggest must be read into s. 4 (1). I venture to think that the purposes for which this s. 4 (2), was inserted are not difficult to understand, and that nothing in its provisions requires or justifies a rejection of the natural interpretation of sub-s. (1). The first half of sub-s. (2) runs thus:

> "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, s. 9."

That section (so far as it is material to the present question) empowered the trustees of a trade union to bring or defend or cause to be brought or defended any action, suit, prosecution, or complaint, in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union; and provided that they (that is, the trustees) should and might sue or be sued, plead or be impleaded, in any court of law or equity in their proper names without other description than the title of their office. But for the provision of the first half of sub-s. (2) of this Act, which preserves the liability of the trustees to be sued in the events provided for by s. 9 of the Trade Union Act, 1871, it might have been successfully contended that the operation of the previous sub-section was to deprive a person who has been injured in a matter touching or concerning the property of the trade union —as for example, by a nuisance—from any remedy. This the legislature apparently did not desire, and the first half of s. 4 (2), effectually preserves the right of action for such torts. But if the sub-s. (2) had stopped at its first half an action could have been brought against the trustees under s. 9 of the Act of 1871 if the subject of claim was one touching or concerning the property of the union, even if the claim was based on tort which had been done in contemplation or furtherance of a trade dispute, and so an exception would have been introduced to the scheme of the Act which is contained in ss. 1 and 3 of the Act of 1906. To prevent this the legislature enacted this second half of sub-s. (2):

> "except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

So s. 9 of the Act of 1871 stands subject to the exception that the act complained of and forming the basis of claim cannot be made the subject of claim against the trustees of the union if that act is one done in contemplation or furtherance of a trade dispute.

In the result, the liability of the trustees under s. 9 of the Trades Union Act, 1871, for wrongs touching or concerning the property of the trade union is preserved,

except where the alleged wrong is committed in contemplation or furtherance of a trade dispute. I am unable to see, therefore, in what way sub-s. (2) assists the plaintiffs in their claim to insert such a limitation as they suggest in sub-s. (1). In my opinion, the language of that sub-section must be read in its natural sense, without the introduction of any qualifying words, and this appeal should be allowed. I have only to add, having had the opportunity of reading and considering the judgment of VAUGHAN WILLIAMS, L.J., that, if the insertion of any qualifying or modifying words into s. 4 (1), is justifiable, the insertion of "as such" after "trade union," as the lord justice suggests, seems to me to be the one least open to any objection, and even if such an insertion were made, the defendants' application succeeds, for the reason which VAUGHAN WILLIAMS, L.J., himself stated in his judgment—namely, that the facts as alleged by the plaintiffs themselves in the statement of claim show that the alleged torts are such as were committed by a trade union as such. I think, therefore, the appeal should be allowed.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re HOBSON. BARWICK *v.* HOLT

[CHANCERY DIVISION (Parker, J.), February 26, 27, 1912]

[Reported [1912] 1 Ch. 626; 106 L.T. 507; 56 Sol. Jo. 400]

Will—Survivorship—Gift of income to fourteen named persons for their respective lives—Direction that share of any one of them who died leaving children to be divided equally among the children—Gift over of estate on death of survivor of thirteen of the fourteen named persons—Two of named persons dying in testator's lifetime without issue—Intestacy of their shares of income.

By his will a testator gave the income from his real and personal estate to trustees on trust to pay and divide the income equally between fourteen named persons "during their respective lives, and in case any of them shall die leaving children them surviving . . . the share of the income payable to the parent so dying shall be divided equally amongst his . . . children." From and immediately after the death of the survivor of thirteen of the fourteen named persons the trustees were directed to realise and distribute the estate equally among the children of the thirteen persons and one other person. Two of the thirteen named persons died in the testator's lifetime without issue.

Held: there was an intestacy as to their two shares of income since on a true construction of the will the gift of income to the fourteen named persons did not create a joint tenancy so as to give rise to the benefit of survivorship, and a gift over of the two shares of income to the survivors could not be implied.

Notes. Applied: *Re Pringle, Baker* v. *Matheson*, [1946] 1 All E.R. 88. Considered: *Re Davies, Public Trustee* v. *Davies*, [1950] 1 All E.R. 120. Referred: *Re Hey's Settlement Trusts, Hey* v. *Nickell-Lean*, [1945] 1 All E.R. 618.

As to the presumption against intestacy, see 34 HALSBURY'S LAWS (2nd Edn.) 204–207; as to survivorship, see ibid. 279–283 and as to gifts by implication, see ibid. 427 et seq., and for cases see 44 Digest 563 et seq., 1183 et seq., and 1250 et seq.

Cases referred to in argument:

Jones v. *Randall* (1819), 1 Jac. & W. 100; 37 E.R. 313; 44 Digest 982, *8378*.

Bryan v. *Twigg* (1867), 3 Ch.App. 183; 37 L.J.Ch. 249; 16 W.R. 298, L.J.; 44 Digest 988, *8454*.

Pearce v. *Edmeades* (1838), 3 Y. & C. Ex. 246; 8 L.J.Ex. Eq. 61; 3 Jur. 245; 160 E.R. 693; 44 Digest 1213, *10487*.

Round v. *Pickett* (1878), 47 L.J.Ch. 631; 26 W.R. 493; 44 Digest 1215, *10500*.

Armstrong v. *Eldridge* (1791), 3 Bro. C.C. 215; 29 E.R. 497; L.C.; 44 Digest 1212, *10481*.

Alt v. *Gregory* (1856), 8 De G.M. & G. 221; 2 Jur. N.S. 577; 4 W.R. 436; 44 E.R. 375, L.JJ.; 44 Digest 1214, *10494*.

Re Telfair, Garrioch v. *Barclay* (1902), 86 L.T. 496; 44 Digest 1215, *10503*.

Adjourned Summons taken out by trustees of a will to determine whether there was an intestacy of the shares of income given by the will to Joshua Holt and Joseph Hobson who died without issue in the testator's lifetime or whether the shares accrued to survivors.

By his will, dated May 16, 1889, Joseph Hobson directed his trustees to receive all the rents and profits arising from his real estate and all the surplus that there might be from the investments of his personal estate after payment of certain charitable legacies and to pay one half of the same quarterly, commencing six months after his death, to his sister Elizabeth Lea and the other half to his sister Bathsheba Holt during their respective lives, and after the death of either or both of them upon trust to pay and divide the share to which either of them were entitled equally between and amongst the following named persons: Sybil Holt, the daughter of the late Charles Holt; the defendant Joseph Holt; Emily, Annie, Lucy, Elizabeth, and Joshua Holt, the children of the testator's sister Bathsheba Holt; Alice and Ann Thornton, the children of his late sister Hannah Thornton; Herbert, Joseph, and Elizabeth Hobson, the children of his nephew Benjamin Hobson; and Jane and Annie Robinson, the children of his late wife's cousin the will continued:

> "During their respective lives; and in case any of them shall die leaving children them surviving I direct that that share of the income payable to the parent so dying shall be divided equally amongst his, her, or their children, and from and immediately after the death of the survivor of them the said Joseph, Emily, Annie, Lucy, Elizabeth, and Joshua Holt, Alice and Ann Thornton, Herbert, Joseph, and Elizabeth Hobson, and Jane and Annie Robinson, then upon trust to sell and realise the whole of my said trust estates and divide the proceeds equally amongst such of the children of [thirteen of the persons named above and one other person] as may be living at the date of the death of the last survivor of them, or in case any of them be dead leaving children them surviving, then amongst their children, such children taking their respective parents' share equally between them if more than one."

The testator died on June 27, 1892, and his will was proved on Sept. 7, 1892. Joshua Holt and Joseph Hobson died without issue during his lifetime. His sister Elizabeth Lea died in 1910.

Dighton Pollock for the trustees.
W. M. Cann for the heir-at-law.
Shebbeare, for the next of kin.
Maugham for one of the surviving tenants for life.
Ward Coldridge for another of the surviving tenants for life.

PARKER, J.—This will is by no means easy to construe. As a matter of fact, I think that in construing it the cases do not really give very much assistance. The clauses of the will which are material on the point which I have to decide are these: [His Lordship stated the provisions of the will down to the gift over on the death of Elizabeth Lea and Bathsheba Holt, and continued:] I may pause there to say that it has been suggested that the fact that the testator in that clause used the expression "the same rents and profits" shows that he was dealing only with the real estate as opposed to the personal estate. In my opinion, however,

having regard to all the prior words, and the fact that he has used "and profits" in connection with the personal estate as well as the real estate, the right inference is that he is dealing with the whole, whether it consisted originally of realty or whether it consisted originally of personalty. I may say that that is only an incidental point, and I do not think it was actually raised by the summons; but I am prepared to take that view and to make that declaration. The income of the estate therefore is to be divided between fourteen persons named. Then the will proceeds, "during their respective lives." Then the testator continues,

> "and in case any of them shall die leaving children them surviving, I direct that the share of the income payable to the parent so dying shall be divided equally amongst his, her, or their children."

That clause would, no doubt, according to the ordinary principles, be read as a substitutional or original gift according to whether any of the named persons died after the death of the testator or in his lifetime. If any of them died in his lifetime then it is a substitutional gift in favour of the children who survive and, of course, who survive the testator. If, on the other hand, any of the fourteen persons are alive at the testator's death, then it is an original gift in remainder after his or her life interest. So far I think the will is reasonably clear. Then it goes on, "and from and immediately after the death of the survivor of them," and then he names thirteen out of the fourteen people, from and after the death of those thirteen

> "upon trust to sell and realise the whole of my said trust estate and divide the the proceeds equally amongst each of the children of the thirteen persons and one other, that one other being the father of the fourteenth person originally named."

That, of course, is a distribution per capita and not per stirpes. So far, again, I think the will is reasonably clear and the difficulty arises with regard to certain implications which I am asked to draw, and which are said to be justified by the fact that otherwise in the events which have happened there might be a partial intestacy, and also by the cases which have been decided in these courts and which bear some analogy, at any rate, to the case actually before me, although they certainly are not in any sense on all fours with it. -It appears that two of the named persons died in the lifetime of the testator without children, and I am asked to imply a gift of their shares of income down to the time of the ultimate division of the capital of the estate in order to avoid an intestacy.

I think on the cases it is quite clear that where there is a gift equally between A., B., and C. for their respective lives and on the death of the survivor of them the whole property is given over, the court has implied an intention on the part of the testator that the survivor or survivors of A., B., and C. shall after the death of one or more of them be entitled to all the income right up to the period of distribution. This conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the judges have said that the gift in question—one in equal shares during their respective lives—only prima facie creates a tenancy in common; and that if the court can further an intention on the face of the will that the tenancy is not to be a tenancy in common, but a joint tenancy, it will take those words as not destroying what would otherwise be a joint tenancy. That, of course, would have in the ordinary sense the desired effect, for if A., B., and C. are joint tenants, on the death of A., for instance, B. and C. would continue to be joint tenants of the whole, and on the death of B., C. would become tenant of the whole. That is one way of getting out of the difficulty and avoiding an intestacy. But in some of the cases it is put on different grounds, and in this way it has been said that where there is a gift to A., B., and C. equally during their respective lives and on the death of the survivor a gift over, there is an intention manifested that A., B., and C., or those of them who are living at the time being, shall enjoy property right up to the period of distribution, and that the best way

of effecting it is to imply a gift over on the death of any of them of his or her share, as well original as accruing, to the survivors or survivor. Some of the cases seem to have been decided on a kind of mixture of these two theories. In the present case I am asked to do something which appears to me to be different from what has been done in any case which has been decided; and to do so in construing a will which is certainly different from any of the wills on which the other decisions to which I have referred were given. I cannot, as it appears to me, give effect to any presumed intention or to any intention of the testator which I could fairly presume by construing this as a joint tenancy. The effect of that would be this: Supposing that I held that the fourteen named persons were entitled as joint tenants and not as tenants in common, then, on the death of one of them leaving issue, by the very words of the will the joint tenancy would be severed so far as his or her share was concerned, and the joint tenancy which existed would exist only between the other original takers, and so on, as any one or more died leaving issue. The result would be that on the deaths of those of the fourteen who died without issue, the persons to take would be those of them still alive, and the stocks of those who had died would be excluded.

Let me now look at the question from the other point of view and see if I effect what is devised by an implied gift to the survivors. It appears to me that to carry out that intention of the testator which I can fairly presume I should have to construe the gift as a gift, not in the ordinary sense on the death of any of the named persons to the others, but to say that contingently on the death of any of them without issue his or her share was to go, not to the survivors in the ordinary sense of the word, but to a modification of survivors in this sense, that I should have to construe "survivor" as meaning survivorship by stocks. In that case on the death of one of the fourteen leaving issue, that issue would be entitled to a share as representing their parent, and their parent might be considered to have survived by reason of the stocks. No doubt an intention could be framed in that way; but the gift which I am asked to imply is in my opinion different from any gift which I can find to have been implied in any of the cases cited and is a gift of considerable complication. Further, so far as I am aware, the cases in which gifts of this kind have been implied have exclusively been cases where the gift over is on the death of the survivor of the first takers.

In the present case it is not on the death of the survivor of the first takers, but on the death of the survivor of the thirteen out of the fourteen first takers. In the second place, I can find no case in which the implication has arisen where there was a provision for the persons entitled under the gift over, or some of them, during the lives of some of the first takers where others of them have died. For instance, the general gift over in all the cases is a gift to A., B., and C. during their respective lives, and after the death of the survivor of them for their children per capita. That is the usual form. In no case that I can find has there been a provision giving the children who ultimately take under the gift over an interest in substitution for their parent before the period of distribution.

In my opinion, therefore, not only is the case different in many material respects from other cases in which implications such as I have mentioned have arisen, but the implication which I am asked to draw is an implication in itself quite different from all the implications which have been held legitimate in the cases to which I have referred. In those circumstances what I really have to consider is whether I ought on any general principle to introduce a limitation or series of limitations into a will not containing them, and from which they cannot be gathered by any ordinary method of construction, merely because, if I do not do so, there will be a partial intestacy in the events that have happened. In my opinion the testator in this case clearly contemplated that these people might die leaving children or without leaving children. He has made a disposition to meet the case of their dying and leaving children, and has left the rest to be dealt with according to the ordinary method of construction; and it does not

appear to me that I have any right to read so complicated a clause into a testator's will merely to avoid an intestacy. I quite agree that in all probability, if anyone had asked the testator what he intended in this possible event which has actually happened, he would probably have said: "Well, in that case I think the income had better go to the survivors" or "the children of the survivors." But he has not said so, and it is not right to consider the question from the point of view of whether the testator did or did not contemplate an intestacy. What I have to determine is whether on a reasonable construction of the will in the event that has happened he has avoided an intestacy by giving a property which otherwise would be undisposed of to some legatee. In my opinion, he has not, and though probably it would be doing a rational thing, and one of which the testator, if he had been alive, would have thoroughly approved, it would, in my opinion, be a bad precedent, and one which I am not justified in making.

Solicitors: *Thorowgood, Tabor & Hardcastle*, for *Bond, Barwick & Peake*, Leeds; *Jacques & Son*, for *Scott & Turnbull*, Leeds; *Crowders, Vizard & Oldham.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re OWEN. SLATER *v.* OWEN

[CHANCERY DIVISION (Neville, J.), February 8, 1912]

[Reported [1912] 1 Ch. 519; 81 L.J.Ch. 337; 106 L.T. 671; 56 Sol. Jo. 381]

Trust—Trust for sale—Unauthorised securities—Retention under power to postpone sale —Method of calculating interest to which tenant for life entitled—Some securities yielding less than four per cent. or no income, and others yielding more than four per cent.—Interest to be calculated on aggregate of securities—Insufficiency of unauthorised securities to produce interest at four per cent.—Receipt by tenant for life in previous year of more than total income produced by aggregate value—Adjustment.

Will—Leasehold—Loss from re-letting of premises—Charge on income of residuary estate.

In applying the rule that a tenant for life under a trust for sale and conversion is entitled from the testator's death to four per cent. per annum on the estimated value at the date of the death of unauthorised securities held by the testator and retained by his trustees under a power to postpone sale and conversion, the unauthorised securities should be aggregated in calculating the interest of four per cent. even though some of those securities have yielded less than four per cent. or no income at all and others have yielded more than four per cent.

A testator devised and bequeathed his residuary estate to trustees on trust for sale and conversion with discretionary power to postpone the sale and conversion, and directed that the proceeds of sale should be invested in authorised trustee investments and that three-fifths of the income of the trust fund should be paid to his widow for life with remainder over to his sons. A large part of the estate consisted of unauthorised securities some of which yielded more and some less than four per cent. per annum while some paid no dividend. The will contained no direction as to the payment of income from unauthorised securities retained by the trustees pending sale and conversion.

Held: in calculating the interest of four per cent. per annum on unauthorised securities to which the widow as tenant for life was entitled, the unauthorised securities should be aggregated and the interest calculated on the whole of the aggregate value and not on each individual security; and if the income from the aggregate value were insufficient to produce four per cent. per annum, and in a previous year the tenant for life had received more than the total income produced by the aggregate value, there should be an adjustment in subsequent payments to the tenant for life.

At the date of his death the testator held a leasehold flat which then had an unexpired term of three and a quarter years, the rent being £300 per annum. The executors were unable to sell or surrender the lease and had to sub-let the flat at £50 less than the rent payable by the testator, viz., at £250 per annum.

Held: the loss of £50 per annum was a charge on the income of the residuary estate and must be borne by the tenant for life as an outgoing of the estate.

Principle stated by KINDERSLEY, V.-C., in *Allen* v. *Embleton* (1) (1858), 4 Drew. at p. 229, applied.

Notes. Followed: *Re Beech, Saint* v. *Beech*, [1920] 1 Ch. 40. Distinguished: *Re Shee, Taylor* v. *Stoger*, [1934] All E.R. Rep. 623. Considered: *Re Parry, Brown* v. *Parry*, [1946] 2 All E.R. 412.

As to adjustment between tenant for life and remainderman in case of income-producing property retained under a trust for sale, see 16 HALSBURY'S LAWS (3rd Edn.) 383, para. 747; as to allowances to beneficiaries for life and in remainder, see 33 HALSBURY'S LAWS (2nd Edn.) 119–121, and as to outgoings in respect of leasehold property see ibid., 125. For cases see 40 DIGEST (Repl.) 759 et seq.

Case referred to:

(1) *Allen* v. *Embleton* (1858), 4 Drew. 226; 27 L.J.Ch. 297; 4 Jur. N.S. 79; 6 W.R. 272; 62 E.R. 87; 40 Digest (Repl.) 747, *2338*.

Also referred to in argument:

Yates v. *Yates* (1860), 28 Beav. 637; 29 L.J.Ch. 872; 3 L.T. 9; 6 Jur. N.S. 1023; 54 E.R. 511; 40 Digest (Repl.) 730, *2187*.

Earl of Lonsdale v. *Countess Berchtoldt* (1857), 3 K. & J. 185; 3 Jur. N.S. 328; 69 E.R. 1074; 44 Digest 403, *2350*.

Brown v. *Gellatly* (1867), 2 Ch. App. 751; 17 L.T. 131; 15 W.R. 1188, L.J.; 43 Digest 619, *596*.

Wentworth v. *Wentworth*, [1900] A.C. 163; 69 L.J.P.C. 13; 81 L.T. 682; 16 T.L.R. 81, P.C.; 40 Digest (Repl.) 708, *2041*.

Re Earl of Chesterfield's Trusts (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 32 W.R. 361; 40 Digest (Repl.) 751, *2372*.

Summons.

By his will dated Mar. 25, 1908, the testator devised and bequeathed the residue of his real and personal estate to trustees on trust for sale and conversion, with power to postpone the sale and conversion, and directed the trustees, after payment of funeral and testamentary expenses, debts and legacies, to invest the residue of the moneys arising from the sale and conversion in any authorised trustee investments and to pay three-fifths of the income of the trust moneys and of the the investments for the time being representing the same to his wife during her life and thereafter to hold the trust estate and the income thereof on trust for his two sons. The testator died on June 20, 1910. At the date of his death his estate was valued at about £80,600 which included securities of the estimated value of £76,691, comprising stocks, funds, shares and mortgages; about £70,851 of this amount represented securities which were not authorised trustee investments and about £5,840 represented authorised securities. By an order made on Mar. 8, 1911, it was declared that according to the true construction of the will the widow was entitled to three-fifths of interest calculated at four per cent. per annum on the estimated capital value, as at the date of the testator's death, of all the

securities held by the testator which were not authorised trustee investments, the surplus income to be invested and treated as added to capital, and the income of these investments to be treated as income of the testator's estate to three-fifths of which his widow was entitled for life, and that the executors of the will might postpone the conversion of the unauthorised securities for so long as might be necessary for the beneficial realisation of the testator's estate. During the first year following the testator's death the executors realised certain of the unauthorised securities and, as a result, the estimated capital value as at the testator's death of unauthorised securities held by the testator and remaining unrealised at the end of the first year after his death amounted to some £46,000. Of the retained unauthorised securities, some were non-dividend paying shares, some paid less than four per cent. per annum and others paid four per cent. or upwards on their estimated capital value as at the testator's death.

At his death the testator also held a leasehold flat which had a term of three and a quarter years unexpired and for which the rent was £300 per annum. The executors were unable to surrender or assign the term and accordingly they sub-let the flat for the remainder of the term at a rent of £250 per annum, viz., at a loss of £50.

Further questions having arisen as to how the income of the estate should be dealt with, the present summons asked whether the interest of four per cent. per annum mentioned in the order of Mar. 8, 1911, should be calculated on the estimated capital value as at the testator's death of each one of the unauthorised securities or whether the interest of four per cent. should be calculated at the end of the first year, for the whole of that year, on the estimated capital value as at the date of death of the aggregate of all the unauthorised securities including those which had been realised by the executors, those which paid less than four per cent. on their capital value and those which were non-dividend paying. The summons also asked whether the loss of £50 per annum on the leasehold flat should be charged against the capital of the estate or against the income of the tenant for life, the widow.

T. L. Wilkinson for the trustees.
R. M. Pattisson for the tenant for life.
Ward Coldridge for the remaindermen.

NEVILLE, J., having stated the facts, continued.—I think it is clear that at the time the former declaration contained in the order of Mar. 8, 1911, was made the attention of the court had not been called to the questions which are now raised resulting from the fact that some of the unauthorised investments did not produce as much as four per cent., while some, I understand, produced no interest at all, and that the aggregate income of the estate might be insufficient to provide an allowance of four per cent. of the estimated value of the unauthorised securities. It appears to me that the order deals with the aggregate value of all the unauthorised securities, and allows four per cent. upon that. I also think that that order was right under the circumstances of the case, and that that is the order I should have made now if the matter had been before me.

This case depends on the conventional rule which has been adopted by the courts of Chancery in cases where the testator has disposed of his property to trustees upon trust for sale, and has given the trustees a discretion to postpone the conversion of all or any part of the estate, and has given his property to a tenant for life, with remainders over, but has not provided that until the sale the tenant for life shall have the benefit of the actual income produced by the unauthorised securities which under the discretion to postpone the trustees may have retained. The court in such a case has adopted a rule of taking the value of the unauthorised securities at the death of the testator and allowing to the tenant for life four per cent. interest upon the estimated amount, and directing that in regard to the surplus income arising out of the unauthorised investments there should be

accumulation and capitalisation of that income. First of all, I think it is clear from the cases, and certainly clear in my own opinion, that the whole basis of the rule adopted by the courts is that it was not intended thereby to alter the relative positions of the tenant for life and the remainderman, and that the discretion given to the trustees is a discretion to be exercised for the benefit of the estate, and not by any means necessarily with a nice consideration of how the tenant for life will be affected by the retention of the securities or how the remainderman will be affected by the retention of the securities, but whether the estate itself—the property entrusted to their charge—is likely to realise better if converted at once or is likely to realise better if some or all of it is retained until a future time. The rule, as I say, is conventional, and the question then arises as to how it is to be applied in the case where some of the unauthorised investments retained by the trustees produce an income in excess of the four per cent. allowed by the court and other unauthorised investments produced either no income at all or an income less than four per cent. In my opinion the value of the unauthorised investments, as I said before, ought to be aggregated and interest allowed on the whole of that aggregate value at the rate mentioned.

Then comes the question. What is to happen in case the income actually produced by the estate does not produce sufficient to provide the four per cent.? With regard to that, I think the case is free from difficulty. What I have to do here is not so much to decide whether the rights of the tenant for life must invariably be limited to the total amount of the income actually produced by the estate, but what was the meaning of the order which is before me now. But I cannot construe it as an order intended to deal with more than the income of the estate, because I see the direction is that the surplus income is to be invested and treated as added to capital, and I think that it was not present to anyone's mind that the income might be insufficient to pay four per cent., and the order obtained was an order which dealt with the income and not with the capital. I think, therefore, that the matter must be adjusted, and that, if the tenant for life has received more than the aggregate income of the total estate during the first year that must be made right in subsequent payments. I understand that it is anticipated, at all events, that the income will be sufficient to recoup the estate in regard to other payments made to the tenant for life in the early stages of the administration. I think that deals with the first point raised.

Then comes another point. The testator at his death was, I think, in occupation, or, at all events, tenant of a certain house or tenement at a rent of £300 a year, which was a rack rent. That rack-rented leasehold or tenancy undoubtedly passed as part of his estate to the trustees upon trust to be dealt with in accordance with the directions he had given. It was a damnosa hæreditas; it was not worth anything and it could not be sold, but the trustees have succeeded in letting it for £250, the rent paid by the testator amounting to £300 and consequently there has been a loss of £50 for the residue of the tenancy vested in the testator at his death. The question is whether that loss is a charge on income—that is to say, if the income of the estate is to be calculated after deducting the loss of income on this particular property, or whether it is to be treated as a debt of the testator which must be discharged out of capital. It seems to me that the case which has been cited to me of *Allen* v. *Embleton* (1) deals exactly with that point, and decides that in such a case the income must be calculated after deducting the loss on the conversion of the items of property which form the residue of the estate. In that case the testator was the lessee of the property, the lease of which he assigned during his lifetime to another, so that at the date of his death he was under the burden of the covenants which he had entered into upon taking the lease, but the property was not in his possession nor had he any title to it. He had assigned his lease away to someone else, but he seems to have retained his liabilities under the original covenants with the lessor. Under circumstances which I do not think are material, the lease ultimately became revested in the executors owing to the bank-

ruptcy of the assignee. The Vice-Chancellor, dealing with that case, held that having regard to the circumstances, the obligations under the lease were debts of the testator which had to be discharged out of the capital. He says this (4 Drew. at p. 229):

"Now, if the leasehold in question had remained the property of the testator; if it had not been assigned to Marter, then this leasehold would have formed part of the testator's residuary personal estate, and the tenant for life would have been tenant for life of this and the other leaseholds; and then the tenant for life would have had no right to say, I will take leasehold A. because it is beneficial, and I will repudiate leasehold B., because it is not beneficial, and, if I were deciding anything trenching on that principle, I should be wrong."

That seems to me to deal directly with the point that, inasmuch as this was property owned by the testator at the date of his death, notwithstanding that the burden of it was greater than the benefit, it was part of that which passed to residuary legatees, and the residuary legatees must either repudiate the whole or take the whole subject to any burden which may attach to it. I think, therefore, that, in considering what the income of the estate was, the £50 must be allowed as part of the outgoings of the estate.

If the income at any time is not sufficient to produce the four per cent. it is to be adjusted, but if the future income during the life of the tenant for life is sufficient to make up the deficiency, of course the whole four per cent. for the past years will be allowed.

Solicitors: *Stock & Slater; A. H. Baker.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

METROPOLITAN WATER BOARD *v.* AVERY

[HOUSE OF LORDS (Earl of Halsbury, Lord Kinnear, Lord Dunedin and Lord Atkinson), November 14, December 12, 1913]

[Reported [1914] A.C. 118; 83 L.J.K.B. 178; 109 L.T. 762; 78 J.P. 121; 30 T.L.R. 189; 58 Sol. Jo. 171; 12 L.G.R. 95]

Water Supply—Domestic purposes—Supply to public house—Catering business carried on—Water used for cooking, and washing plates, cutlery, and restaurant floor—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi*), *ss.* 8, 25.

Where a private Act provided for the supply by a water board of water "for domestic purposes" at a specified rate, and water was supplied for use on premises where a trade or business was carried on

Held: every use of water, however domestic in its nature, which appeared as a step, however insignificant, in a trade operation was not use of water for a trade and so non-domestic; the crucial consideration in determining whether or not water was supplied for domestic purposes was the character of the purpose for which the water was supplied and not the character of the premises to which it was supplied; and, therefore the test whether a supply was "for domestic purposes" was whether the purpose for which the water was used in connection with the trade or business was in its nature domestic or non-domestic.

The respondent was the occupier and licensee of a public-house which was supplied by the appellant water board with water for domestic purposes at a rate of five per cent. on the rateable value of the premises. In addition to the ordinary business of a public-house the respondent carried on a catering business, and some twenty or thirty luncheons were served daily, that business involving the use of water for cooking, washing plates, cutlery, &c., and scrubbing floors. The appellants claimed to be entitled to charge extra for the water so used, on the ground that it was used for a "trade, manufacture, or business" within the meaning of s. 25 of the Metropolitan Water Board (Charges) Act, 1907.

Held: the user of the water being in its nature domestic, the water was used for "domestic purposes" within the meaning of s. 25 and the appellants were not entitled to make the charge claimed.

Notes. Distinguished: *Oddenino* v. *Metropolitan Water Board*, [1914] 2 Ch. 734; *Barrett* v. *Ilkeston Corpn.*, [1917] 1 K.B. 827. Applied: *Manchester Corpn.* v. *Buttle*, [1929] All E.R. Rep. 426. Considered: *Kingston-upon-Hull Corpn.* v. *Yuille*, [1939] 2 All E.R. 48.

As to the supply of water for domestic use, see 33 Halsbury's Laws (2nd Edn.) 450–454, and for cases see 43 Digest 1078 et seq.

Cases referred to:

(1) *Metropolitan Water Board* v. *Colley's Patents, Ltd.*, [1911] 2 K.B. 38; 80 L.J.K.B. 929; 104 L.T. 478; 75 J.P. 217; 27 T.L.R. 286; 55 Sol. Jo. 311; 9 L.G.R. 483; affirmed sub nom. *Colley's Patents, Ltd.* v. *Metropolitan Water Board*, [1912] A.C. 24; 81 L.J.K.B. 126; 105 L.T. 674; 76 J.P. 33; 28 T.L.R. 48; 56 Sol. Jo. 51; 9 L.G.R. 1159, H.L.; 43 Digest 1081, *162*.

(2) *Pidgeon* v. *Great Yarmouth Waterworks Co.*, [1902] 1 K.B. 310; 71 L.J.K.B. 61; 85 L.T. 632; 66 J.P. 309; 18 T.L.R. 97, D.C.; 43 Digest 1081, *155*.

(3) *Metropolitan Water Board* v. *London, Brighton, and South Coast Rail. Co.*, [1910] 2 K.B. 890; 79 L.J.K.B. 1179; 103 L.T. 304; 74 J.P. 409; 26 T.L.R. 676; 8 L.G.R. 930, C.A.; 43 Digest 1082, *164*.

(4) *Smith* v. *Müller*, [1894] 1 Q.B. 192; 70 L.T. 170; 58 J.P. 167; 10 T.L.R. 30; 38 Sol. Jo. 26; 10 R. 622, D.C.; 24 Digest (Repl.) 1043, *147*.

(5) *South-West Suburban Water Co.* v. *St. Marylebone Guardians*, [1904] 2 K.B. 174; 73 L.J.K.B. 347; 68 J.P. 257; 52 W.R. 378; 20 T.L.R. 299; 48 Sol. Jo. 397; 2 L.G.R. 567; 43 Digest 1078, *139*.

(6) *South Suburban Gas Co.* v. *Metropolitan Water Board*, [1909] 2 Ch. 666; 79 L.J.Ch. 27; 101 L.T. 560; 73 J.P. 503; 26 T.L.R. 12; 8 L.G.R. 43; 43 Digest 1080 *149*.

Also referred to in argument:

Barnard Castle Urban Council v. *Wilson*, [1902] 2 Ch. 746; 71 L.J.Ch. 825; 87 L.T. 279; 51 W.R. 102; 18 T.L.R. 748; 46 Sol. Jo. 665, C.A.; 43 Digest 1080, *147*.

Frederick v. *Bognor Water Co.*, [1909] 1 Ch. 149; 78 L.J.Ch. 40; 99 L.T. 728; 72 J.P. 501; 25 T.L.R. 31; 53 Sol. Jo. 31; 7 L.G.R. 45; 43 Digest 1080, *145*.

Liskeard Union v. *Liskeard Waterworks Co.* (1881), 7 Q.B.D. 505; 45 J.P. 780; 30 W.R. 292; 43 Digest 1079, *141*.

Appeal by the plaintiffs, the Metropolitan Water Board, from a decision of the Court of Appeal affirming a decision of the Divisional Court (Channell and Bray, JJ.).

The appellant Board claimed from the respondent, defendant in the action, 5s. for two quarters' water which they alleged was payable in addition to the ordinary rate, on the ground that some of the water supplied was used for other than domestic purposes. On the facts stated in the headnote the county court judge decided in favour of the appellants; the Divisional Court held that the water was used for

"domestic purposes," and that the appellants were not entitled to make the charge claimed; and the Court of Appeal affirmed that decision. The appellants now appealed to the House of Lords.

By the Metropolitan Water Board (Charges) Act, 1907:

"Section 8. Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid, or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes, furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost, a sufficient supply of water for domestic purposes, at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required, and such rate shall, subject to the provisions of this Act, be charged uniformly under like circumstances to all customers entitled to such supply.

Section 25. In and for the purposes of this Act, the expression 'domestic purposes' shall be deemed to include water-closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes—namely: Steam, gas, motor, and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses and cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose, tube, pipe, sprinkler, or other like apparatus, fountains, or any ornamental purposes; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps, baths, or washhouses; any trade, manufacture, or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

Sir Robert Finlay, K.C., Clavell Salter, K.C., and *Goodland* for the appellants. *Ryde, K.C.*, and *Konstam*, for the respondent, were not called on to argue.

Their Lordships took time for consideration.

Dec. 12. The following opinions were read.

THE EARL OF HALSBURY.—This case turns upon the construction to be given to s. 25 of the Metropolitan Water Board (Charges) Act, 1907. By that section it is enacted that the expression "domestic purposes" shall be deemed to include water-closets and baths within certain capacities, and then proceeds to exclude from that expression a large number of categories, among which are to be found "any trade, manufacture, or business." If each of these words is to be taken as establishing a distinct category, that clause is unskilfully drawn, and indeed its main purpose is apparently not so much to define what are domestic purposes as to enact what shall not be deemed to be domestic purposes, and the result of giving the meaning to the phraseology of the defining section which is sought to be given to it in this case would be to enact what it is, I think, absolutely certain that the legislature never intended. I think that *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1) is decisive of this if one looks at the meaning of the judgment of LORD LOREBURN, L.C., and the judgment of CHANNELL, J., in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) very clearly points out the mode in which the increased consumption of the water is intended by the legislature to

be paid for when used for domestic purposes. I cannot help adding that I think no ordinary person would have misunderstood the meaning of the enacting section but for the defining section, which, as I have said, is not a defining section at all.

LORD DUNEDIN.—The question in this case is whether the water which is used by the occupier of a public-house in preparing luncheons for customers, and in washing plates and dishes, is water used for domestic purposes. The two judges of the Divisional Court and three judges of the Court of Appeal have unanimously held that it was. With that judgment I agree. The point depends upon the construction to be put on the words "domestic purposes" as used in the Metropolitan Water Board (Charges) Act, 1907, and the argument has ranged round the expressions used in s. 25 of that statute.

It is first of all to be noticed that s. 25 is not in the true sense of the word a definition section. It is not only that, as the Lord Chancellor said in *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1), it is couched in slovenly and inaccurate language, but it does not even profess exhaustively to define. It begins by taking "domestic purposes" as a known expression; it then goes on to say it shall be "deemed to include" two specific uses, and then it proceeds to give an enumeration of certain uses it is not to include—not an exhaustive definition, but a series of warning notes, so to speak, against an undue inflation of the term "domestic purposes." The particular warning note that is here appealed to by the appellant is the expression supply for "any trade, manufacture, or business."

What is the criterion which enables us to fix whether the water is supplied for a trade, manufacture, or business? It does not settle it to point out that a trade, etc., is carried on in the premises where the water is supplied. That is absolutely clear from the terms of s. 9, which contemplates a supply of water for domestic purposes being furnished to a building where not only a trade is carried on, but where the occupation is solely for the purposes of the trade, i.e., not residential at all, and *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1) in this House is a direct authority. Nor will it do to say that the persons who use it on the premises only go there for the purposes of a trade being carried on. *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) (the boarding-house case) is an authority against that. It seems to me that there are just two alternative views left. Either the criterion is to see whether the purpose in connection with the trade is domestic or non-domestic in itself, the criterion adopted by the courts below, and very clearly expressed in the judgments of BRAY, J., and BUCKLEY, L.J., or to say, as the appellants contend, that every use of water, however domestic in its nature, that appears as a step, however insignificant, in a trade operation, is use of water for a trade, and, therefore, non-domestic. The great objection to this latter view is that it goes so far, and leads to such astounding results, as to make it flagrantly in conflict with what I venture to call the common-sense view of the Act. The appellants themselves seem to have felt this, inasmuch as they admit that they are not used to exact from public-houses anything more than a domestic rate. Yet unless all liquors are consumed neat, and the glasses and mugs never washed, it is clear that the water used in public-houses is, according to their method of definition, a trade use. Nor does the matter stop there. Not only does all water in hotels and boarding-houses for the cooking of provisions (a severe narrowing down of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2)) follow the same fate, but no retail shopkeeper could use a damp sponge to clean dusty goods without becoming liable to a trade rate for the water so used. On the other hand, the test of the quality of the use in itself—so tersely put by BUCKLEY, L.J. ([1914] 1 K.B. at p. 239)—

> "the test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic"

is not only easy of application but is automatic in checking abuse. For purposes truly domestic cannot be amplified, and when the consumption on such heads is

large it is invariably attended by an increase in the rating value of the premises, which brings with it an increased water rate.

The only seeming puzzle is introduced by the illustrations, to which counsel for the appellants clung hard in his argument—an establishment of public baths or public water-closets carried on for a profit. The use of a bath or of a water-closet is, says he, in its nature a domestic purpose, and, therefore, the test of domestic purposes by nature breaks down. I think such extreme cases—for such establishments, at least of the second class, are not common—may be left to be dealt with till they arise within the Metropolitan area. But when they do I think the solution may be suggested by a phrase in the judgment of BRAY, J. He says ([1913] 2 K.B. at pp. 265, 266):

> "If the water is used for a purpose which is common to all ordinary domestic establishments, it is none the less used for domestic purposes because it is ancillary to a trade, manufacture, or business."

In the case supposed the use of the water would not be ancillary to the business, it would be the business itself, and I should personally be prepared to hold—again, I venture to think, taking a common-sense view of the situation—that the trade use of the water was so pre-eminent that it could not be said that in those establishments there was truly a use for a domestic purpose at all. I think the appeal should be dismissed. I concede that the case is not covered by the actual judgment in the case of *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1) in this House. But I believe the views I have expressed are in entire concordance with the spirit of that judgment.

LORD ATKINSON.—The appeal in this case is brought from an order of the Court of Appeal affirming an order of a Divisional Court composed of BRAY, and CHANNELL, JJ., whereby a judgment and order of the judge of the county court of Middlesex was reversed. This last-mentioned order was made on a suit instituted by the Metropolitan Water Board against the respondent in the county court to recover the sum of 5s. in respect of water supplied to the latter's premises for the purposes, as it was alleged, of a trade or business within the meaning of s. 25 of the Metropolitan Water Board (Charges) Act, 1907.

The facts are not disputed. So far as material they are as follows. The respondent is the occupier and licensee of premises known as the Crutched Friars Hotel, No. 1, John Street, Minories. In these premises she carries on, in addition to the business of a publican, what has been styled a catering business, that is, she serves luncheons for reward to the number of twenty or thirty per day to persons, members, of the public, who come to her establishment to get their luncheon, and are ready to pay for it. The premises are fitted in the same manner as ordinary public-houses, with supply pipes connected with the appellants' mains. The so-called catering business involves a use of water for cooking, washing dishes, plates, &c., and scrubbing floors, in excess of what would be used in an ordinary public-house, certainly of the size and nature of the Crutched Friars Hotel, and the sum sued for was sued for under s. 18 and s. 24 of the before mentioned Act in respect of this additional supply. The county court judge came to the conclusion that this catering business involved the use of a considerable quantity of water in excess of what would be used if the respondent had not carried on that business, that she could not carry it on without using this extra quantity of water, and held that the water was being used for the purposes of a trade or business, as distinguished from domestic purposes, within the meaning of this section. This question is obviously of vast importance.

The matter for decision is the construction of this 25th section, and ultimately, I think, the meaning of the words "any trade, manufacture, or business" used in it. The Master of the Rolls, in speaking of this section in *Metropolitan Water Board* v. *London, Brighton, and South Coast Rail. Co.* (3), said that "a more confusing section could scarcely be imagined." And LORD LOREBURN, L.C., in *Colley's*

Patents, Ltd. v. *Metropolitan Water Board* (1) described it as "couched in slovenly and inaccurate language." Criticisms even more severe than these would, in my view, be well deserved. Your Lordships were referred to many authorities decided before 1907 on statutes dealing with waterworks and water supply to houses, somewhat similar in their provision to those of this Act of 1907. It must, I suppose be assumed that the draftsman who drafted this section had some intelligent appreciation of the points ruled on and of the principles laid down in these cases, and one would not unnaturally expect that when this last Act came to be drafted its framer would have made their meaning plain and clear, instead of leaving it obscure, as he has done.

It has been many times pointed out that this s. 25 does not contain any complete definition of "domestic purposes," and that several of the purposes excluded by it are not true exceptions at all, that is, are not purposes which but for the exclusion would be covered by the words "domestic purposes" used in a rational sense. For instance, cleansing and watering streets or roads, railways purposes, public pumps, &c. And it is impossible to discover what principle, if any, guided the framer of the Act in selecting the purposes excluded.

According to the ordinary meaning of language, I take it that water supplied for domestic purposes would mean water supplied to satisfy or help to satisfy the needs, or perform or help in performing the services which, according to the ordinary habits of civilised life are commonly satisfied and performed in people's homes, as distinguished from those needs and services which are satisfied and performed outside those homes, and are not connected with nor incident to the occupation of them. It is plain from the provisions of ss. 7 and 8 of this statute that it is the character of the purpose for which the water is supplied, and not the character of the premises to which it is supplied, that is the crucial consideration in determining whether the water is supplied for domestic purposes or not. Again it is plain from these sections that it is not at all necessary that the persons for whose use the water is supplied should reside in the premises supplied. In each of the following cases, decided on this statute of 1907 as well as on other statutes whose provisions were somewhat similar, it was held that residence on the premises supplied was no test whether water was supplied for domestic purposes or not: *Smith* v. *Müller* (4); *South-West Suburban Water Co.* v. *St. Marylebone Guardians* (5); and *South Suburban Gas Co.* v. *Metropolitan Water Board* (6). *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1) is to the same effect, as the staff who used the sanitary appliances for which the water was supplied did not reside on the premises. No person slept in them, and no portion of them was charged with the payment of inhabited house duty.

If this be the law, as I think it clearly is, I confess I am unable to discover any sound principle upon which *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) can be distinguished from the present. There the occupier of the premises supplied carried on therein the business of a lodging-house keeper. His guests were lodged as well as boarded. The water was used for the purposes of cleansing, cooking, drinking, and sanitary purposes. These are obviously domestic purposes. The preparation and supply of food, the cleansing of the appointments necessary to serve it, the cleansing of the rooms in which the food is served, the supply of water to be drunk with the food, the supply of water for flushing lavatories, are all domestic requirements. The guests paid for their board and lodging, and they resorted to the house solely for the purpose of being boarded and lodged. The water was supplied directly in and for that business, and was used in the conduct of it. It was held that the water was supplied for domestic purposes, but if there be no virtue in residence as a test, it would appear to me that, on principle, precisely the same result should be arrived at if the guest had merely boarded on the premises and not lodged. And I think that the business of providing, for reward, food for the persons who resort to the occupier's premises is as much a business and no more than is the business of providing not only food for them

but lodging them in addition. The fact that the occupier could probably feed more people on his premises than he could feed and in addition lodge cannot, in my view, affect the question. It may well be that CHANNELL, J., was quite right in saying, as he did in that case ([1902] 1 K.B. at pp. 315, 316), that the use of water for the domestic purposes of the inmates of the house, is the thing which is covered by the water rate based on the annual value of the house, that

> "It is a rough way of measuring the amount of water likely to be used for domestic purposes by the number of inmates which the house is capable of containing and accommodating."

But the annual value of the house would as obviously be increased by its being turned from an unprofitable dwelling-house to a profitable eating-house, as by turning it from an unprofitable dwelling-house into a profitable board and lodging-house. And, in a rough way, the Water Board would be as surely remunerated in the one case as in the other. He also said (ibid. at p. 316):

> "I think that, although the supply for domestic purposes is paid for on the annual value, it does not make any difference whether the inmates of the house are guests who are entertained by the occupier at his own expense, or whether they pay for their board and lodging, or whether they are pupils whose parents pay for their board and lodging, or whether they are paupers for whom the parish pay. All those cases have been dealt with and decided; and it seems to me that our decision is, to a certain extent, governed by authority."

In *South-West Suburban Water Co.* v. *St. Marylebone Guardians* (5), the defendants were the owners and occupiers of premises in which they had erected and maintained schools for the education of children from the workhouse of the parish. The defendants required the plaintiffs to supply (on the usual terms) water to this school for domestic purposes, which the latter declined to do. The main question for decision was the right of the defendants to have this supply. BUCKLEY, J., expressed himself thus ([1904] 2 K.B. at p. 180):

> "But, granting that the schools are a dwelling-house, the next contention of the plaintiffs is that these premises have not and cannot have domestic purposes because that which is carried on upon the premises is a business, and that all the supply is for the purposes of that business. . . . I agree that these premises are used to carry on a business. If I were to define the business carried on I should say that it is the business of providing for, maintaining and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. . . . But, although that which is carried on upon the premises is a business, it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is what is the character of the purpose, not what is the character of the place of user."

I think the decisions in that case and in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) were perfectly right; but if the business carried on in this school was in fact the providing for and maintenance of pauper children, it is, I think, clear that the water supplied was at the same moment supplied both for domestic purposes and business purposes. This indeed must be so, inasmuch as the very essence of the business carried on was to supply those needs and render those services. And when one has to construe this clumsily drawn and puzzling statute, one may well ask oneself if the water supplied is at the same moment used, and intended to be used, for both purposes, and it is impossible to separate the one purpose from the other, which consideration is to prevail? Is the domestic purpose to be treated as the real and dominant purpose, and the business purpose to be ignored, or vice versa? I confess that the answer to this question, which commends itself to my mind, is this: that the business of maintaining these pauper children, or a business which consists in providing, cooking and supplying food to persons who resort to the

occupier's premises for the very purpose of having their food supplied, is not a "trade, manufacture, or business" within the meaning of the excluding clause of s. 25.

Counsel for the appellant admitted, on the principle laid down in *Colley's Patents, Ltd.* v. *Metropolitan Water Board* (1) that water used to supply food to, or provide some of the conveniences of civilised life for the staff engaged in a factory, would rightly be held to have been supplied for domestic purposes. He further, as I understood, admitted that if food was supplied to persons who resorted to the occupier's premises for some lawful purpose of business or pleasure, the water used to cook that food would be properly held to have been supplied for domestic purposes. I think this contention is absolutely sound. He went on, however, to contend, as it was absolutely necessary for the appellants' case that he should contend, that the result would be different if the only business carried on in the occupier's premises was the supply of food, and if the only purpose for which the persons resorted to those premises was to be supplied with food. In the one case he said the water would be used in the business only incidentally, as an ancillary for the convenience of customers or of the staff; in the other it would be used directly for the very purposes of the business itself. I cannot think that the framers of this statute ever intended to base the distinction between domestic purposes and trade purposes on such a narrow foundation as this.

Business in its widest sense means "a state or quality of being busy," "a state of being busily engaged in anything." "Industry, diligence, an occupation, profession, or trade, &c.," OXFORD ENGLISH DICTIONARY, vol. 1, p. 1205.

Section 9 of this Act provides for a rebate in certain cases where any house or building, or any part thereof, is occupied solely for

> "any trade or business, or of any profession or calling, by which the occupiers seek a livelihood or profit."

It is obvious that a calling by which a person "seeks a livelihood or profit" may be a business in a very true sense, or a trade, and unless the word "calling" is used in this section to denote something akin to a profession, it would in this instance denote a business. If its meaning be not so restricted, then, unless there be a redundancy in the section, this word "business" must itself be used in a restricted sense. In s. 16, the purposes for which a supply of water may be demanded by meter are stated to be all purposes other than domestic. That is the broad distinction. Section 20 provides that the Board shall not be bound to afford a supply otherwise than by measure for any house or building whereof any part is used for any trade or manufacturing purposes for which water is used, or for any common lodging-house, barracks, workhouse, or any public institution or building. The word "business" is not used in this section. The obligations and privileges of the Board are, therefore, these. They are bound under s. 7 to supply water for domestic purposes when required without meter; they are equally bound, under s. 16, to supply when required, water by meter for all purposes other than domestic; and under s. 20 they have the privilege of refusing to supply otherwise than by measure any house or building, any part of which is used for any "trade or manufacturing purpose." It would be but natural that a provision should be introduced into s. 25 to guard the privilege thus conferred by s. 20, and prevent the Board under any pretence, or by any device, from being deprived of the benefit of it. As the Board are bound to supply without meter water for domestic purposes, and are not bound to supply water otherwise than by meter for purposes of trade or manufacture, the two provisions would be brought into harmony by excluding the purposes of trade or manufacture from the meaning of domestic purposes, and would none the less be so if the word "business" was added in s. 25 with the object of covering businesses of the nature of trade or manufacture. In my view, the principle of noscitur a sociis applies to this provision of s. 25. I think the business indicated is a business of the nature and character of some manufacture,—or trade in the

nature of manufacture—in which, to use the words of CHANNELL, J., the water is as it were, the raw material of the trade, not like the business carried on in this eating-house. Counsel for the appellants pressed in his argument the case of public laundries. He urged that they render services for their customers which are usually rendered in one's home. I do not think the cases are analagous, and it is unnecessary to decide the point. I am clearly of opinion that the purposes for which the water was in this case supplied were in their nature and character domestic, and the business carried on by the respondent was not a business within the meaning of s. 25. I therefore think that the judgment appealed from was right, and the appeal should be dismissed with costs.

THE EARL OF HALSBURY.—**LORD KINNEAR** concurs in this decision.

Solicitors: *Walter Moon; Maitlands, Peckham & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BAYLIS AND OTHERS *v.* BISHOP OF LONDON

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), October 31, November 1, 9, 1912]

[Reported [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 29 T.L.R. 59; 57 Sol. Jo. 96]

Mistake—Mistake of fact—Payment of money to agent—Recovery from principal in action for money had and received.

Ecclesiastical Law—Sequestration—Bankruptcy of incumbent—Profits of benefice paid to bishop—Sums paid to sequestrator under mistake of fact—Right of payer to recover from bishop.

Money paid under a mistake of fact can be recovered from the recipient save where the money was paid to a person known to be an agent for a principal and known to be receiving it as such, if he has, before notice of the mistake, paid over the money to his principal. In such a case the agent cannot be sued, but an action will lie against the principal.

The bishop of a diocese who, on the application of the trustee in bankruptcy of a beneficed clergyman under s. 52 of the Bankruptcy Act, 1883 [now s. 50 of Bankruptcy Act, 1914], sequesters the profits of the benefice and appoints a sequestrator to collect those profits and pay them to him (the bishop), whose duty it is, first, to secure the due performance of spiritual duties in the parish, secondly, to satisfy any liability for dilapidations, and then to pay the balance to the trustee in bankruptcy, is not an " agent " within the above principle, for there is no one who could be called a principal for whom the bishop is an agent.

In dealing, however, with the money got in under the sequestration, the bishop must be treated as a trustee, and, therefore, he is accountable as a principal in an action for money had and received for any money which has been paid to the sequestrator under a mistake of fact.

Notes. Referred to: *Sinclair* v. *Brougham*, [1914–15] All E.R. Rep. 622; *Holt* v. *Markham*, [1922] All E.R. Rep. 134; *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36; *Morgan* v. *Ashcroft*, [1937] 3 All E.R. 92; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579; *Re Diplock's Estate, Diplock* v. *Wintle*, [1947] 1 All E.R. 522; *Minister of Health* v. *Simpson*, [1951] A.C. 251.

As to recovery of money paid to an agent under a mistake, see 1 HALSBURY'S LAWS (3rd Edn.) 233, 234, and as to sequestration of benefices see ibid., vol. 13, pp. 314–322. For cases see 1 DIGEST (Repl.) 768 et seq., and 19 DIGEST 417 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to :

(1) *Sadler* v. *Evans*, *Lady Windsor's Case* (1766), 4 Burr. 1985; 1 Digest (Repl.) 768, *3018*.

(2) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 35 Digest 154, *511*.

(3) *Peto* v. *Blades* (1814), 5 Taunt. 657; 128 E.R. 849; 39 Digest 430, *597*.

(4) *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263; 23 T.L.R. 696; 51 Sol. Jo. 672, H.L.; 1 Digest(Repl.) 781, *3101*.

(5) *Fitzpatrick* v. *M'Glone*, [1897] 2 I.R. 542.

(6) *Bunter* v. *Cresswell* (1850), 14 Q.B. 825; 4 New Maq. Cas. 154; 19 L.J.Q.B. 357; 16 L.T.O.S. 41; 14 J.P. 637; 14 Jur. 692; 117 E.R. 317; 19 Digest 350, *1628*.

(7) *Williams* v. *Ivimey* (1870), 23 L.T. 100; 19 Digest 420, *2551*.

(8) *Bradford Corpn.* v. *Ferrand*, [1902] 2 Ch. 655; 71 L.J.Ch. 859; 87 L.T. 388; 67 J.P. 21; 51 W.R. 122; 18 T.L.R. 830, D.C.; 44 Digest 35, *262*.

(9) *Holland* v. *Russell* (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L.J.Q.B. 297; 8 L.T. 468; 11 W.R. 757; 122 E.R. 365, Ex.Ch.; 1 Digest (Repl.) 773, *3047*.

(10) *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest 159, *545*.

(11) *Buller* v. *Harrison* (1777), 2 Cowp. 565; 98 E.R. 1243; 1 Digest (Repl.) 770, *3030*.

(12) *Cox v. Prentice* (1815), 3 M. & S. 344, 348; 105 E.R. 641; 1 Digest (Repl.) 770, *3031*.

(13) *Newall* v. *Tomlinson* (1871), L.R. 6 C.P. 405; 25 L.T. 382; 1 Digest (Repl.) 774, *3049*.

(14) *Taylor* v. *Metropolitan Rail. Co.*, [1906] 2 K.B. 55; 75 L.J.K.B. 735; 95 L.T. 149; 22 T.L.R. 479, D.C.; 1 Digest (Repl.) 774, *3050*.

(15) *Weston* v. *Downes* (1778), 1 Doug. K.B. 23; 99 E.R. 19; 12 Digest (Repl.) 261, *2027*.

(16) *Longchamp* v. *Kenny* (1779), 1 Doug. K.B. 137; 99 E.R. 91; 12 Digest (Repl.) 614, *4740*.

(17) *Straton* v. *Rastall* (1788), 2 Term. Rep. 366; 100 E.R. 197; 12 Digest (Repl.) 559, *4229*.

(18) *Smith* v. *Jones* (1842), 1 Dowl. N.S. 526; 11 L.J.C.P. 99; 6 Jur. 283; 12 Digest (Repl.) 605, *4680*.

(19) *Lamb* v. *Cranfield* (1874), 43 L.J.Ch. 408; 35 Digest 156, *529*.

(20) *Rogers* v. *Inham* (1876), 3 Ch.D. 351; 35 L.T. 677; 25 W.R. 338, C.A.; 35 Digest 93, *25*.

(21) *Standish* v. *Ross* (1849), 3 Exch. 527; 19 L.J.Ex. 185; 12 L.T.O.S. 495; 13 J.P. 269; 35 Digest 158, *541*.

(22) *Kelly* v. *Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest 151, *487*.

(23) *Morley* v. *Attenborough* (1849), 3 Exch. 500; 18 L.J.Ex. 148; 12 L.T.O.S. 532; 13 J.P. 427; 13 Jur. 282; 154 E.R. 942; 37 Digest 16, *126*.

(24) *Inland* v. *Bushell* (1836), 5 Dowl. 147; 2 Har. & W. 118; 29 Digest 466, *146*.

(25) *Whitmore* v. *Greene* (1844), 2 Dow. & L. 174; 13 M. & W. 104; 13 L.J.Ex. 311; 3 L.T.O.S. 241; 8 Jur. 697; 153 E.R. 43; 5 Digest (Repl.) 894, *7434*.

(26) *Notley* v. *Buck* (1828), 8 B. & C. 160; 2 Man. & Ry. K.B. 68; 6 L.J.O.S.K.B. 271; 108 E.R. 1003; 5 Digest (Repl.) 894, *7439*.

Also referred to in argument :

Pond v. *Underwood* (1705), 2 Ld. Raym. 1210; 92 E.R. 299; 1 Digest (Repl.) 768, *3017*.

Greenway v. *Hind* (1792), 4 Term Rep. 553; 100 E.R. 1171; 1 Digest (Repl.) 773, *3042*.

Durrant v. *Ecclesiastical Comrs.* (1880), 6 Q.B.D. 234; 50 L.J.Q.B. 30; 44 L.T. 348; 45 J.P. 270; 29 W.R. 443, D.C.; 19 Digest 489, *3468*.

Re Condon, Ex parte James (1874), 9 Ch. App. 609; 43 L.J. Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 5 Digest (Repl.) 887, *7383*.

R. v. *Bishop of London* (1822), 1 Dow. & Ry. K.B. 486; 19 Digest 418, *2536*.

Harding v. *Hall* (1842), 10 M. & W. 42; 11 L.J.Ex. 354; 6 J.P. 633; 6 Jur. 649; 19 Digest 419, *2543*.

Jones v. *Barrett* (1724), Bunb. 192; 1 Rayn. 204; 2 Wood, 235; 145 E.R. 644; 19 Digest 425, *2613*.

Action by the trustees of the will of Charles Bentley Bingley to recover from the Bishop of London the sum of £197 6s. 11d., being a portion of moneys demanded of and paid by the trustees since 1905 under a mistake of fact to the sequestrator of the benefice of Greenford for tithe rentcharge in respect of lands in the parish of Greenford neither occupied nor owned by them.

In 1879 Charles Bentley Bingley was the owner in fee simple of certain land in the parish of Greenford. By an indenture of lease dated Aug. 15, 1879, and made between one Ravenor, of the one part, and C. B. Bingley, of the other part, certain lands adjoining the said freehold lands and amounting to 164 acres were demised to C. C. Bingley for the term of sixteen years, from Sept. 29, 1879, at the yearly rent of £370, free and clear of and from all manner of rates, taxes, assessments, payments, and impositions whatsoever (land tax and property tax only excepted), and subject to a covenant to bear, pay, and discharge during the said term all and all manner of rates, taxes, tithe, tithe rentcharge, or due, rectorial or vicarial and all outgoings levied, assessed, or imposed upon or to become due and payable for or in respect of the demised premises. The lands included in the lease and the lands of which C. B. Bingley was the freeholder were respectively subject to a tithe rentcharge of about £36 and £23 per annum. The sums of £36 and £23 were payable to the same rector; for many years one demand of the total aggregate of the tithe rentcharge was in the habit of being made from, and the same was paid by C. B. Bingley during his life in one sum. On Mar. 20, 1887, C. B. Bingley died, and his executors or trustees continued paying the £59 tithe rentcharge in one sum. In March, 1895, the rector of the parish of Greenford was adjudged bankrupt, and in May, 1897, the trustee in the bankruptcy applied under s. 52 of the Bankruptcy Act, 1883 [now s. 50 of Bankruptcy Act, 1914] for a sequestration of the profits of the benefice. On June 17, 1897, the Bishop of London sequestered the tithes and other profits, rights, and emoluments to the rectory or benefice and duly appointed a sequestrator thereof. Notwithstanding that the lease determined on Sept. 29, 1895, the collectors for the rector or the sequestrator continued to demand the tithe rentcharge, and the trustees of C. B. Bingley continued to pay the same till October, 1910, when the mistake was discovered. It was admitted that neither the bishop nor the sequestrator nor the collectors had any knowledge that the lease had determined, nor even that there was any such lease. On Feb. 10, 1911, the plaintiffs, the trustees of the will of C. B. Bingley, brought this action against the bishop, claiming the repayment of the tithes during the preceding six years paid to the bishop by mistake. The case was heard by NEVILLE, J., who gave judgment for the plaintiffs. The bishop appealed.

Lord Robert Cecil, K.C., and *Frank Phillips* for the bishop.
Jenkins, K.C., and *Manby*, for the plaintiffs.

Cur. adv. vult.

Nov. 9, 1912. **COZENS-HARDY, M.R.**—In this action the plaintiffs seek to recover from the Bishop of London certain sums paid to him in respect of tithe rentcharge, such payments being made under a mistake of fact—namely, that the

rentcharge was payable in respect of lands in which the plaintiffs were interested, whereas in truth those lands had been sold. The mistake of fact and the receipt by the bishop are not now disputed.

It has long been held that money paid under a mistake of fact can be recovered from the recipient; but an exception has been engrafted upon the rule that, where the money was paid to a person known to be an agent for a principal and known to be receiving it as such, the agent cannot be sued if he has, before notice of the mistake, paid it over to his principal. In *Sadler* v. *Evans*, *Lady Windsor's Case* (1), where the action was brought against Lady Windsor's agent, LORD MANSFIELD said (4 Burr. at p. 1986) that the action ought to have been brought against Lady Windsor herself, and not against her agent, and that the court

> "thought the principles upon which actions for money had and received to the plaintiff's use are founded did not apply to the circumstances of the present case. It is a liberal action founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action. This money was paid to the known agent of Lady Windsor. He is liable to her for it; whether he has actually paid it over to her or not, he received it for her. . . . He said he kept clear of all payment to third persons, but where 'tis to a known agent, in which case the action ought to be brought against the principal, unless in special cases (as under notice or mala fide)."

This passage is the foundation on which the bishop's argument is erected. In *Moses* v. *Macferlan* (2) LORD MANSFIELD says that an action for money had and received lies only "for money which ex æquo et bono the defendant ought to refund." But the wide language thus used by that great judge has not been followed. For example, money paid under a mistake of law cannot be recovered, although its retention would seem to be equally against good conscience.

It is argued on behalf of the bishop that the bishop, whose precise position I shall more fully consider, ought not, within the principle thus laid down by LORD MANSFIELD, to be held liable in the action because he has no individual interest in the money paid, and has applied it in accordance with his duty. I am unable to accede to this view. No case can be found in the books in which a defendant has been exempted except that of an agent who has paid over to his principal. I think it is impossible for us at the present time to say that this exception ought to be extended in the manner which is desired. Not only is there no decision in favour of this view, but there is not even a dictum, except that of GIBBS, C.J., in *Peto* v. *Blades* (3), but that case is so badly reported that I am quite unable to satisfy myself that the alleged dictum has any bearing upon the present case. But, however that may be, it is sufficient to say that there are many dicta in favour of the opposite view. I need only to refer to the observations of LORD ATKINSON in *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (4), and to the judgment of the Irish court delivered by PALLES, C.B., in *Fitzpatrick* v. *M'Glone* (5). Unless, therefore, the bishop can establish that he received this money as an agent and has paid it over to his principal, I do not think his defence can prevail.

The rector of the parish in respect of which the tithe rentcharge was payable, was adjudicated a bankrupt in 1895, and under s. 52 of the Bankruptcy Act, 1883 [now s. 50 of the Bankruptcy Act, 1914], the trustee applied for a sequestration of the profits of the benefice. On June 17, 1897, the bishop sequestered in accordance with the provisions of that section, and granted to Mr. Lee his power and authority in that behalf until he (the bishop) should think fit to relax the same. The duties of the bishop are defined by the Sequestration Act, 1871, which must be read with ss. 15 to 20 of the Ecclesiastical Dilapidations Act, 1871 [repealed with savings Ecclesiastical Dilapidations Measure, 1923 (7 HALSBURY'S STATUTES 2nd Edn.) 836), and see amending measure of 1929 (7 HALSBURY'S STATUTES 870)]. The effect is, shortly, that the money got in by the bishop under the sequestration

must first be applied for securing the due performance of the spiritual duties of the parish, for which purpose not more than two-thirds of the income may, at the discretion of the bishop, be applied; next in satisfying any liability for dilapidations; and lastly in payment to the trustee in bankruptcy. In these circumstances it seems to me quite plain that there was no one who could be called a principal for whom the bishop is merely an agent. The sequestration was not issued in any court as a means of enforcing judgment of that court. The bishop cannot be called upon to account on the footing that he is merely in the position of a sheriff executing the judgment of a court of law. In my opinion, the only mode in which a claim could be maintained against the bishop would have been in old days by a bill in Chancery, and would now be by an action in the Chancery Division asking for an account of money received by him in a fiduciary character. In other words, the bishop must, for the purposes of the present argument, be treated as a trustee. It follows that, in my opinion, both on the general ground and in view of the peculiar position of the bishop, having regard to s. 52 of the Bankruptcy Act, 1883 [s. 50 of the 1914 Act], the plaintiffs are entitled to recover the money paid to the bishop under a mistake of fact, and that it is not a defence to say that the money so paid had been duly applied by the bishop. I may add that if the bishop is not liable I fail to see against whom the plaintiffs could obtain any relief. In my opinion, the judgment of NEVILLE, J., was correct, and this appeal must be dismissed with costs.

FARWELL, L.J.—I am of opinion that the decision of NEVILLE, J., is right. The bishop under statutory power has become sequestrator, but he remains none the less the bishop intrusted with the duty of providing for the spiritual needs of the parish and of paying over the surplus to the trustee in bankruptcy. A sequestrator is accountable only to the person who appointed him; if he were appointed by the court he would be accountable to the court. The position is clearly explained by PATTESON, J., in *Bunter* v. *Cresswell* (6). He said (14 Q.B. at p. 830):

> "The church being for the time in substance deprived of its minister, it is cast upon the bishop to provide for the temporary vacancy; and to enable him to do so he is to receive the profits, not as when he receives them in the execution of a writ from a temporal court, as a sort of sheriff, with a liability to account to the court for his receipts, but in virtue of his office of chief pastor, responsible to no one so long as the church is properly supplied."

That was a case under the Church Discipline Act, 1840; the present case is under the Bankruptcy Act, 1883, and the last sentence is, therefore, not applicable. But it is clear that the bishop cannot obtain any protection as if he were sequestrator, because he is liable to account to no one but himself. The law is stated in PHILLIMORE'S ECCLESIASTICAL LAW (2nd Edn.), vol. 2, pp. 1079, 1080. A sequestrator appointed by the court is accountable to that court only, and no bill would lie against him in equity: see *Williams* v. *Ivimey* (7). A sequestrator appointed by a bishop was accountable only to the spiritual court, and if the incumbent desiring an account was aggrieved with that court he could file a bill in equity against the bishop, and possibly also against the sequestrator, but not against the latter alone, for an account in equity; but against the bishop as the person to whom the sequestrator was accountable, no action at law for money had and received would lie. He was accountable in equity as a person who has received money in a fiduciary capacity, it is true, but as a principal, as between himself and the person who has paid the money. It is, therefore, unnecessary to consider the character in which a sequestrator or sheriff receives money or land, or the dictum of GIBBS, C.J., in the ill-reported case of *Peto* v. *Blades* (3).

The bishop's case must, therefore, rest on the argument founded on LORD MANSFIELD'S reasons for the action for money had and received. He says in *Moses* v. *Macferlan* (2) (2 Burr. at p. 1012):

"This kind of equitable action to recover back money, which ought not, in justice, to be kept, is very beneficial, and therefore much encouraged. It lies only for money which ex æquo et bono, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play, because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."

LORD MANSFIELD thus excepts money payable merely in honour and honesty, and necessarily so, for it is clear that money paid under mistake of law cannot be recovered, the reason given being that no one can plead ignorance of the law, but this will apply equally to the recipient, who while the plaintiff is convicted of stupidity or carelessness, will himself be convicted of dishonesty, for he has accepted and insists on keeping money that he knew was not his. When, therefore, LORD MANSFIELD in *Sadler* v. *Evans* (1) says (4 Burr. at p. 1986):

"It is a liberal action founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action,"

some limitation must be placed on the generality of his words. It is further clear that the equity to which he was referring is not "an equity" in the sense in which it is used in the Court of Chancery, for there was no equity to support a bill to restrain an action of assumpsit on the ground that the money sued for had been paid in mistake, and paid away by the recipient, even although the recipient was a trustee, and had paid the money over to his cestui que trust. The defence, if there was one, was a legal defence; and LORD MANSFIELD was referring to the jus naturali of Roman law, which (as I have attempted to show in *Bradford Corpn.* v. *Ferrand* (8) [1902] 2 Ch. at p. 662) has had a considerable influence in moulding our common law.

It is, in my opinion, impossible for us now to create any new doctrine of common law, and the cases show that the defence that the defendant has parted with the money before action is confined to cases where he was an agent, and has paid it over to his principal. No case has been cited to us except cases of principal and agent, and in *Fitzpatrick* v. *M'Glone* (5). PALLES, C.B., treats the rule as "part of the settled law of principal and agent." LORD ATKINSON'S speech in *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.* (4) states the law thus (97 L.T. at p. 265):

"Whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal, as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

I am, therefore, of opinion that this appeal fails.

HAMILTON, L.J.—I agree. The bishop's first position is that the liability to return money paid under a mistake of fact is itself an exceptional liability, which only arises when it would be not unfair to enforce it, and that an agent's defence of the "usual protection of an agent" (*Holland* v. *Russell* (9), 4 B. & S. at p. 17)

A is only an illustration of a wider rule. The test is whether the defendant had or could have any personal interest in the money or was entirely disinterested. No express decision can be cited as authority for this. It is rested on *Sadler* v. *Evans*, *Lady Windsor's Case* (1). To be sure this was itself a case of money paid under a mistake of fact to an agent who had, before claim made, paid it over to his principal, but the court in giving judgment said that this action

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> "is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action,"

and LORD MANSFIELD said he

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> "kept clear of all payments to third persons, but where 'tis to a known agent, in which case the action ought to be brought against the principal, unless in special cases."

I think that in citing dicta so largely expressed it is well to remember a saying of SIR JAMES MANSFIELD in *Brisbane* v. *Dacres* (10) (5 Taunt. at p. 162):

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> "It certainly is very hard upon a judge, if a rule which he generally lays down, is to be taken up and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on, but great caution ought to be used by the court in extending such maxims to cases which the judge, who uttered them never had in contemplation."

In a long line of cases, where such claims have been made against agents and have E been met by the answer that the agent had already paid the money to his principal, such as *Buller* v. *Harrison* (11), *Cox* v. *Prentice* (12), *Holland* v. *Russell* (9), *Newall* v. *Tomlinson* (13), *Taylor* v. *Metropolitan Rail. Co.* (14), *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (4) there are no expressions suggesting that the agent's case is only an instance of a wider immunity, while there are many which convey that this immunity is confined to the case of a mere agent. This consideration, coupled F with the entire absence of any decision to the contrary, seems conclusive. The truth is that the language of LORD MANSFIELD's judgment upon the action for money had and received must be applied to other cases with great caution. He described himself as being "a great friend" to the action for money had and received, and he was, therefore, "not for stretching, lest I should endanger it": *Weston* v. *Downes* (15). From his language in *Moses* v. *Macferlan* (2) and *Longchamp* v. G *Kenny* (16) he would seem to have favoured it quite as much, because of the extreme informality of the pleadings, or because it was "governed by the true equity and conscience of the case." It is true that he says of it that the defendant may go into every equitable defence and claim every equitable allowance. So, too, BULLER, J. (of whose knowledge of equity LORD THURLOW spoke respectfully), says in *Straton* v. *Rastall* (17) (2 Term Rep. at p. 370) that the action was extended H by the Court of King's Bench, "on the principle of its being considered like a bill in equity," and that

> "to recover money in this form of action, the party must show that he has equity and conscience on his side, and that he could recover in a court of equity."

As late as 1842 the Court of Common Pleas spoke of the principle "which has been I held since the time of LORD MANSFIELD, that where money is due ex æquo et bono it may be recovered in an action for money had and received: *Smith* v. *Jones* (18). But the bishop can derive little aid from such generalities. Since then a bill for money had and received for money paid under a mistake of fact has been successfully demurred to for want of equity: *Lamb* v. *Cranfield* (19), and in *Rogers* v. *Ingham* (20), JAMES, L.J., says (13 Ch.D. at p. 355):

> "The law on the subject was exactly the same in the old Court of Chancery as in the old courts of common law. There were no more equitys affecting the

conscience of the person receiving the money in the one court than in the other, for the action for money had and received proceeded upon equitable considerations." A

In effect, therefore, both the equitable and legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallised in the reported common law cases. The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back. B To ask what course would be ex æquo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish* v. *Ross* (21) and *Kelly* v. *Solari* (22). Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man."

The bishop's second position is that he, truly considered, is an agent, and, C therefore, having disbursed these tithes, is immune as such from any claim to repay them. No case is cited to show this, but he is described, with scant respect, as being "a sort of ecclesiastical sheriff," and it is claimed that a sheriff, at any rate, is not so liable. For this a dictum of GIBBS, C.J., is relied on in *Peto* v. *Blades* (3). The case is so ill reported that there is some doubt whether the defendant was the sheriff himself or only his auctioneer, but in *Morley* v. *Attenborough* (23) the case D was cited by counsel (Bovill among them) as being an action against the sheriff, and the interlocutory observation of PARKE, B. (reported only in 18 L.J.Ex. at p. 50), seems to show that he took it so to be. I cannot find the case relied on as an authority in sheriff law; it is cited in the books as an authority on the sale of goods: see notes to the report of it in 15 REVISED REPORTS, p. 611, and BENJAMIN ON SALE (5th Edn.), p. 602. Nor can I find such exemption from liability anywhere E claimed for a sheriff in books of authority. On the other hand, in *Inland* v. *Bushell* (24) COLERIDGE, J., assumes that, in spite of having paid the money over, the sheriff will, as a matter of course, be ordered to repay the judgment debtor's assignees in an action for money had and received to their use. A sheriff is not in any true sense the judgment creditor's agent. The latter is not liable in trover for the F former's wrongful seizure unless he has personally interfered. *Witmore* v. *Greene* (25); *Notley* v. *Buck* (26). Goods seized by the sheriff are in the custody of the law, not in the possession of the judgment creditor. Whatever analogy there may be between the sheriff and the bishop, the latter is even less an agent than the former. No answer is forthcoming to the question: "Who is the bishop's principal?" His large powers of devoting the emoluments of the sequestered benefice to parochial G needs makes him more independent in his own sphere than the sheriff is in his. No one can tell whether the plaintiff's money went to the incumbent's trustee in bankruptcy, or to the clerk taking the spiritual charge of the parish, or to the repair of dilapidations. As NEVILLE, J., tersely put it, when the money reached the bishop it had "reached its destination." I should add that the point as to estoppel by conduct was rightly abandoned by appellant's counsel. I think the appeal fails on both grounds and must be dismissed with costs. H

Solicitors: *Lee, Bolton & Lee; R. R. G. Norman.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

SIMMONS *v.* LIBERAL OPINION, LTD. Re DUNN

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), February 14, 15, 22, 1911]

[Reported [1911] 1 K.B. 966; 80 L.J.K.B. 617; 104 L.T. 264; 27 T.L.R. 278; 55 Sol. Jo. 315]

Solicitor—Personal liability for costs—Implied warranty of authority—Appearance in legal proceedings—Client not in existence.

The plaintiff brought an action for libel against a company. D., a solicitor, entered an appearance on the company's behalf, but before the trial the plaintiff's solicitors wrote to D. saying they could not find any record of the defendant company at Somerset House. D. replied by congratulating the plaintiff's solicitors on their researches and suggesting they continued them. At the trial the plaintiff was awarded damages against the defendant company, but it was then discovered that no such company existed. The plaintiff applied that D. should be ordered personally to pay the plaintiff's costs of the action.

Held: D. had warranted that he had authority to enter an appearance on behalf of the defendant company and as the defendant company did not exist and the proceedings taken by the plaintiff were abortive, D. should pay the costs of the action.

Notes. Applied: *Russian and English Bank* v. *Baring Bros & Co.*, [1935] Ch. 120. Considered: *Brendon* v. *Spiro*, [1937] 2 All E.R. 496. Referred to: *Watts* v. *Official Receiver*, [1936] 1 All E.R. 249; *Myers* v. *Rothfield*, [1938] 3 All E.R. 498.

As to liability of an agent for breach of warranty of authority, see 1 HALSBURY'S LAWS (3rd Edn.) 231, 232; and for cases see 1 DIGEST (Repl.) 758 et seq.

As to the effect of a solicitor acting without authority, see 31 HALSBURY'S LAWS (2nd Edn.) 104 et seq.; and for cases see 42 DIGEST 338 et seq.

Case referred to:

(1) *Yonge* v. *Toynbee*, [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57; 26 T.L.R. 211, C.A.; 42 Digest 335, *3785*.

Also referred to in argument:

Hoskins v. *Phillips* (1847), 16 L.J.Q.B. 339; 42 Digest 343, *3871*.

Salton v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L.J.Ch. 20; 81 L.T. 437; 48 W.R. 92; 16 T.L.R. 25; 7 Mans. 74; 42 Digest 350, *3969*.

Doubleday v. *Muskett* (1830), 7 Bing. 110; 4 Moo. & P. 750; 131 E.R. 43; sub nom. *Doubleday* v. *Muskett*, *Doubleday* v. *Lousada*, 9 L.J.O.S.C.P. 35; 9 Digest (Repl.) 533, *3512*.

Appeal by the plaintiff from the refusal of DARLING, J., to make an order on the plaintiff's application that the solicitor of the defendant company, by the name of Dunn, should show cause why he should not be made personally liable to pay the plaintiff's costs in an action brought by the plaintiff against the defendant company for libel in which the plaintiff had been awarded £5,000 as damages. DARLING, J., was of the opinion that he had no jurisdiction to make the order because the solicitor had authority to act for certain persons who carried on business under the style of Liberal Opinion, Ltd., and, therefore, it could not be said that he had no client.

The plaintiff's grounds of appeal were that (i) there had been a breach of warranty by the solicitor that he had authority to act for his supposed client when as a fact he had none, and (ii) the solicitor had been guilty of misconduct in not instructing his counsel on the second day of the trial, when he was aware of the fact, that Liberal Opinion had not been registered under the Industrial and Provident Societies Act, 1893.

H. A. McCardie for the plaintiff.

C. A. Russell, K.C., and *Stuart Bevan* (with them *Lord Tiverton*) for the defendant company's solicitor.

COZENS-HARDY, M.R.—This is an application in the action of *Simmons* v. *Liberal Opinion, Ltd.*, and in the matter of Mr. Dunn, a solicitor, asking that the solicitor should be ordered to pay, the plaintiff's costs of the action less the sum of £150, which has been received from co-defendants against whom the action has been discontinued upon terms. The action claimed damages for libel contained in a newspaper known as "The St. George's and Wapping Progressive Champion," purporting to be published by Liberal Opinion, Ltd. The writ was issued on Feb. 28, 1910. Appearance was entered for Liberal Opinion, Ltd., on Mar. 3, by Mr. Dunn. The statement of claim was delivered on Mar. 23. The statement of defence was delivered on April 20 by Mr. Dunn as solicitor for the defendants; and by that defence the defendants admitted that they published the words set out in the statement of claim. On Aug. 11 an affidavit of documents was made by Mr. Duncan Campbell Lee, who swore that he was the managing director of the defendant company, Liberal Opinion, Ltd., and was duly authorised to make the affidavit, and on the same day an answer to interrogatories for the examination of the defendant company was made by Mr. Lee. Each of these documents was prepared by Mr. Dunn. On Nov. 26 Mr. Dunn filed an affidavit describing himself as solicitor for the defendants. Meantime, on Nov. 14 the plaintiff's solicitors, Messrs. Lewis and Lewis, wrote to Mr. Dunn a perfectly proper letter, saying that they had searched Somerset House, and could not find that there was any such company as "Liberal Opinion, Ltd." That was replied to by a letter of the 15th, which I can only describe as impertinent and improper. It invited Messrs. Lewis and Lewis to continue their research. The action came on for trial on Jan. 18 and 19. It was then ascertained that there is no such limited company either under the Companies Acts or under the Industrial and Provident Societies Act, 1893. The jury gave a verdict for the plaintiff for £5,000 damages. In my opinion the proceedings in the action have been futile, and the costs incurred by the plaintiff have been absolutely thrown away by reason of the appearance entered by Mr. Dunn for a non-existing corporation. A solicitor must be held to warrant the authority which he claims as representing his client. *Yonge* v. *Toynbee* (1) is a recent illustration of this well-established principle. I do not think this is seriously contested, but it is sought to escape by arguing that Mr. Dunn had some persons for whom he was authorised to act, though, strange to say, he even now declines to say who were his clients. If A., B., and C. publish a newspaper under the style of the X. Co., Ltd., the rules of court contain provisions that they may be sued under that style. But they must appear in their own names. The whole proceedings in the present action are inconsistent with the theory now set up. In my opinion the judgment is not available against Mr. Dunn's unknown clients, and I fail to see that the plaintiff by signing judgment in the only way in which it could be signed—viz., against Liberal Opinion, Ltd.—have in any way altered the position. I think we have jurisdiction to order Mr. Dunn to pay the plaintiff's costs of the action (less £150); and that we ought to exercise this jurisdiction. The appeal must be allowed, with costs here and below.

FLETCHER MOULTON, L.J.—I am of the same opinion. It is impossible to doubt that this action was brought against Liberal Opinion, Ltd., as a company. The appearance was entered as a company, and the proceedings were carried on by the solicitor on behalf of it as a company. For example, in the answers to interrogatories, Mr. Duncan Campbell Lee referred to the managing director of the defendant company, Liberal Opinion, Ltd., and Mr. Randall described himself as secretary to the defendant company. But that does not matter. When one looks at the facts of the case it is quite clear that everybody thought that it was a company. The solicitor for the defendants believed he was acting for a company, and the consequence is that we have here an action brought against a company.

That company was non-existent, and therefore Mr. Dunn had no authority from anyone to enter an appearance on behalf of a company. The proceedings were entirely abortive, and there was judgment against a non-existent company. It has always been held that a solicitor warrants that he has authority from the clients to enter an appearance. If that appearance is not entered, no action can be carried on. Judgment follows at once, and therefore the plaintiff is not exposed to the costs of an abortive action, because no action is tried. The principle is one which not only has been recognised, but it is almost necessary to the procedure in our courts. A plaintiff cannot challenge the acts of the defendant's solicitor in the action. He is bound to take those as acts authorised by the defendant himself. And if it was not held he warranted that he had authority from his client to do all the things necessary for the action the gravest injustice might often be done. So I have no hesitation in coming to the conclusion that we ought to make Mr. Dunn liable to pay the costs of the plaintiff in the action in the present case. A suggestion has been made and pressed on behalf of Mr. Dunn that this action is not abortive, but that Mr. Duncan Campbell Lee, Mr. Dolman, and some other persons who signed the application for registration, must be treated as persons who carried on business under the firm and style of Liberal Opinion, Ltd., and that therefore the judgment is a judgment against them, and they duly authorised Mr. Dunn to appear. In my opinion there is a fallacy in every step of that argument. Those people never agreed to carry on business as "Liberal Opinion, Ltd." All they agreed to do was to form an industrial company under that title, and that that company should carry on that business; and none of them had any idea of doing, or any intention of doing, that which it is alleged that they did. There are two things that must be distinguished very clearly. They are quite different. One is persons carrying on business under a particular name and style, and persons doing acts which, if the plaintiff chooses, may bring upon them responsibilities just the same as if they had been carrying on that business. I do not say that it would have been impossible for the plaintiff in the present case in a properly framed action to make these people, or some of them, just as liable as the company would have been liable if it had existed. But that is not what the plaintiff has done. He has brought an action against this non-existent company, being led to continue it by the acts of Mr. Dunn. You cannot say to the plaintiff: "You must hold these people to be under the responsibilities which you, perhaps, have the right to hold them under in order to free Mr. Dunn." In my opinion the plaintiff did carry on the action against the company, and the company did not exist, and he has done no act which insists on these people by their improper actions having the same responsibilities as the company would have, and therefore he was perfectly right in applying to the court for an order that Mr. Dunn should pay the costs of the action, and I think we must make him do so.

BUCKLEY, L.J.—I am of the same opinion. Of the various steps which the solicitor took which have been detailed by the Master of the Rolls in his judgment, by far the most salient and important to my mind is Mr. Dunn's letter of Nov. 15. Any solicitor may make a mistake. Mr. Dunn may have entered an appearance for "Liberal Opinion, Ltd." with a bona fide belief that such a corporation existed. And I assume for the purpose of my judgment that he was under that belief. In that state of things the plaintiff's solicitors on Nov. 14 wrote Mr. Dunn a letter, and the substance of that letter is this: "We have made searches and inquiries, and we cannot find that there is any such corporation," and they used this language, which is perfectly courteous language: "We can only think that you were under a misapprehension when you appeared for your client as Liberal Opinion, Ltd.," and they ask this question: "We have to ask you by return of post to inform us what the exact constitution of Liberal Opinion may be; whether it is a partnership, or whether it is a private individual who carries on business under that name." To that inquiry Mr. Dunn replied by the letter of Nov. 15.

I am not going to make any comment upon what appears to me to be the very discourteous tone of that letter. I do not decide this question on any ground of discourtesy. But to my mind the meaning of that letter is this: "You ask me who my clients are—whether they are a firm, or what it is. I will not tell you. I accept the responsibility of saying that there is such a thing as Liberal Opinion, Ltd. I congratulate you on the research which you have made. Please go on searching further." He took upon himself the responsibility of saying deliberately by that letter to my mind, having regard to the question which was put to him, "I am perfectly right in entering an appearance for 'Liberal Opinion, Ltd.' There is such a corporation." Of course, in that he was wrong. The result of that was that the action went on; all the costs were incurred, and were incurred quite wrongly. I think under these circumstances that the solicitor certainly ought to be ordered to pay all the costs of the proceedings.

Appeal allowed.

Solicitors: *Lewis & Lewis; Dunn, Baker & Co.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

CLAYTON *v.* LE ROY

[Court of Appeal (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), May 3, 4, 24, 1911]

[Reported [1911] 2 K.B. 1031; 81 L.J.K.B. 49; 105 L.T. 430; 27 T.L.R. 479; 75 J.P. 521]

Detinue—Recovery of goods—Need of demand for return of detained goods and refusal before issue of writ.

The plaintiff's watch was stolen. Some years later it was bought at a public auction held in the city of London by B., a bona fide purchaser, who sent it to the defendant, a jeweller, to see if it was genuine. The defendant recognised the watch as belonging to the plaintiff and wrote to B. telling him this; he also wrote to the plaintiff informing him of the discovery and asking him if he would like to re-purchase the watch as B. would be willing to give it up for the price which it cost him. No reply was sent to this letter. A writ was issued to the plaintiff's solicitors and their clerk took it with him to the defendant's premises where he asked to see the watch, which was shown to him, and then demanded that it should be given up to him. He produced no written authority for this request and the defendant refused to hand it over, whereupon the clerk served the writ on the defendant claiming the return of the watch or its value on the ground that the defendant had wrongfully detained it.

Held (by Fletcher Moulton and Farwell, L.JJ., Vaughan Williams, L.J., dissenting): for the action to succeed it had to be established as a fact that there had been a demand by the plaintiff for his watch and a refusal by the defendant to hand it over before the issue of the writ and neither of these facts had been established.

Per Fletcher Moulton, L.J.: The cases show clearly, as one would expect, that it is not an unlawful refusal for a man to decline to give up property at once and without taking time to inquire as to the title of the claimant.

Per Farwell, L.J.: Whether an action is one of detinue or trover, the fact that the detention is wrongful forms the gist of the action; there must be an element of wrong; the mere fact of possession of the article is not in itself sufficient to support the action.

Notes. Referred to: *Eastern Construction Co.* v. *National Trust Co. and Schmidt*, [1914] A.C. 197; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor*

& Co., [1921] 1 K.B. 456; *London Jewellers, Ltd.* v. *Attenborough*, [1934] All E.R. Rep. 270; *Beaman* v. *A.R.T.S., Ltd.*, [1948] 2 All E.R. 89.

As to demand and refusal in trover and detinue, see 33 HALSBURY'S LAWS (2nd Edn.) 56–59; and for cases see 43 DIGEST 486 et seq.

Cases referred to:

(1) *Burroughes* v. *Bayne* (1860), 5 H. & N. 296; 29 L.J.Ex. 185; 2 L.T. 16; 157 E.R. 1196; 43 Digest 471, *106*.

(2) *Morris* v. *Pugh and Harwood* (1761), 3 Burr. 1242.

Appeal from a decision of SCRUTTON, J., in an action brought by the plaintiff, Major Clayton, against the defendant, who carried on business as a jeweller under the name of Le Roy et Fils, for the return of a pedometer Bréguet watch alleged to be wrongfully detained by the defendant, or for its value. The defendant alleged (i) that no cause of action had arisen at the date of the writ, and (ii) that the watch had been purchased by a predecessor in title of the defendant in market overt whereby the plaintiff's title became barred.

The facts as stated by SCRUTTON, J., were that about the year 1902, Mrs. Clayton, the wife of the plaintiff, bought a gold Bréguet pedometer watch, No. 195, from the defendant for £100, and presented it to her husband. In the spring of 1908, while in the Riviera, the watch was stolen from Major Clayton. Shortly afterwards the watch was pawned with a firm of pawnbrokers, and in November, 1909, it was sold with a large number of other unredeemed pawnbrokers' pledges by public auction by Messrs. Johnson, Dymon & Son, at their City auction rooms, No. 38, Gracechurch Street, in the City of London. It was there bought by a bona fide purchaser for £26, and by steps came into the hands of one Bennett, who gave £44 for it. On May 10, 1910, Bennett sent it up to the defendant for examination. The defendant had been told by Mrs. Clayton of the theft soon after its occurrence, and, on receiving the watch from Benentt and looking at his books, the defendant found it was the stolen watch. On May 11 the defendant wrote to Bennett informing him that the watch had been stolen, and asking him how much he would take for the watch. In reply Bennett said he would be pleased to restore the watch to the original owner provided he paid him the price he (Bennett) gave for it. On May 16 the defendant wrote to Mrs. Clayton informing her of his discovery, and that Bennett had expressed his willingness to give it up on being paid the price he had paid for it. Major and Mrs. Clayton thereupon instructed their solicitor to act. Having issued a writ, he went to the defendant's premises, and, after inspecting the watch, demanded its return to Major Clayton. The defendant refused, and was thereupon served with the writ.

SCRUTTON, J., held that upon the facts of the case the City auction rooms were not a "shop," and that the sale of the watch thereat was not a sale in market overt according to the custom, and did not divest the plaintiff of his property in the watch; and, further, that the demand and refusal to return the watch, although they were after the issue of the writ, were evidence of a prior conversion which enabled the plaintiff to maintain the action. He accordingly gave judgment against the defendant for the return of the watch, or for £100, its value. The defendant appealed.

C. L. Attenborough (*Atkin, K.C.*, with him) for the defendant.

E. W. Hansell for the plaintiff.

FLETCHER MOULTON, L.J.—This is an action of detinue brought by the plaintiff against the defendant on the ground of the alleged illegal detention of a certain watch, made by the well-known maker Bréguet, belonging to the plaintiff.

At the trial in the court below two points were raised on behalf of the defendant—namely: (i) that in any case no cause of action had arisen at the date of the writ—of course, if there was no cause of action then the plaintiff's case must fail, subject, of course, to his right to bring another action founded on events which have

happened since that date—and (ii) that the plaintiff was not the owner of the watch, because, although he had at one time been its owner, it had been lost or stolen and was subsequently acquired by Bennett's predecessor in title, who had purchased it in market overt whereby the plaintiff's title became barred and the defendant could only hold the watch for the bailor who had deposited it with him. This point is important, because if the plaintiff's title has been barred by a sale in market overt, he cannot recover the watch in an action of detinue. The second point raises a very difficult question as to the extent of the custom by which a shop in the City of London is deemed in law to be market overt. London seems to be the only city that was strong enough to assert the privilege that a shop within its boundaries is equivalent to a market overt, although more than one city has attempted to assert it. It is therefore a unique custom and one which does not seem to me to be very much in keeping with modern ideas, and it certainly is not a custom which is likely to receive any further judicial extension. At the same time I am bound to say that it seems to be well established by legal decisions, and must therefore be respected. The exact limits of it are very difficult of ascertainment. In the present case I have considerable doubt whether the sale of this watch was in market overt. The learned judge in the course of the careful judgment which he delivered held it was not. I have, however, formed no strong opinion on that point, and, as I am able to decide the case on the other ground, I do not propose either to affirm or dissent from his judgment on the question of market overt, as I prefer to decide this case on the other point which has been taken on behalf of the appellant—namely, as to whether there was a cause of action in detinue at the date of the issue of the writ.

It may seem very technical as to when a cause of action actually arises, but I think this point is one of substance. The reason is that in an action of detinue, as in other actions of tort, the Statute of Limitations begins to run from the time when the cause of action arose. The consequence is that, if nothing has happened to give rise to an action of detinue, there is no period fixed within which the title of the real owner of chattels may be extinguished. He may have been deprived of his property for a hundred years, but it still remains his property, and an action will lie to recover it, unless the demand and refusal are admittedly sufficient to give rise to a cause of action, in which case the statute will run. If a demand has been made by the owner from the person in possession of the property and it has met with a refusal by the latter to give it up, then in six years the remedy of the owner is barred. It is therefore very important that the owners of chattels should know what is sufficient in law to constitute a cause of action in detinue. I think it would be mulcting the real owner of his rights if the law did not insist that there should be some deliberate act of withholding the chattel in order to afford a good cause of action. If something short of that were held to be sufficient, the Statute of Limitations might run against the true owner without his knowledge.

The facts here are very peculiar, and illustrate clearly the legal essentials of an action of detinue. The watch was originally bought by the defendant and sold by him to his client, Mrs. Clayton, the plaintiff's wife, in 1902; it was an old watch, and thoroughly well known. In 1908 it was lost by or stolen from the plaintiff, to whom it had been given by his wife, and communications which are not material for the purposes of this judgment passed between the plaintiff and defendant. In 1910 Bennett, another customer of the defendant, sent to him a watch which he had bought in order that the defendant might give an opinion as to its genuineness. The defendant recognised the watch as being the one which he had sold to the plaintiff's wife and which he afterwards heard had been lost or stolen. The defendant thereupon most properly communicated with Bennett to the effect that he recognised the watch, and on May 11 he wrote Mr. Bennett the following letter:

"57, New Bond Street, London, May 11, 1910.—Dear Sir,—I beg to acknowledge receipt of your pedometer watch, and it is, of course, quite genuine.

Directly I saw it I recognised it as the watch stolen from my customer some years ago, about which I told you. I have also referred to the old books and find the number of it was 195. There is therefore no possible doubt about it being the same watch. It places me in a difficult position as I do not see how I can do otherwise than acquaint my customer with the facts. It was stolen a good many years ago, I think about eight or nine, so I should think there can be no legal claim against you. Will you kindly let me know what you think about it before I write to the customer, and also tell me how much you would take for the watch, if I can buy it from you?—I remain, Sir, your obedient Servant, M. Le Roy."

There is nothing more in that letter than the defendant was bound to write to the customer who had intrusted him with the watch; there is no evidence of any intention on the part of the defendant of detaining it from the real owner. Much comment has been made upon the expression "a good many years ago." In my opinion it is only the language of a practical man; personally I should have been sorry to have been in the defendant's position, and should have thought it very probable that the plaintiff had no legal claim to the watch, for the law of foreign countries applicable to such a state of facts is often different from that of this country. I do not think that the language of the letter indicates any concluded intention on the part of the defendant to interfere with the legal rights of the plaintiff.

After receiving Bennett's answer, the defendant offered to give up the watch to the plaintiff on receiving the amount Bennett had paid for it. In all these facts I cannot see any concluded intention on the part of the defendant to detain the watch if it belonged to the plaintiff; the defendant's language is just the practical language of a person who assumes that things will be settled between the rival claimants. The defendant's letter of May 16 to Mrs. Clayton is very important, and is in the following terms:

"57, New Bond Street, London, May 16, 1910.—Madam,—We beg respectfully to inform you that an old customer of ours has just sent us an old Bréguet watch for our inspection, and upon referring to our books we find it is the pedometer Bréguet watch we sold to you many years ago, and which if our recollection is accurate, you told us was subsequently stolen from Major Clayton somewhere abroad. We believe the watch cost our customer about £50 only, and we wrote to tell him it is the watch we believe was stolen from you. It is now so long ago that it would no doubt be impossible to trace the thief, but we are writing to you thinking you might like to re-purchase the watch. Our customer has written to tell us that he would be willing to give it up for the price it cost him, if the person from whom it was stolen wished to re-purchase the watch. Will you kindly let us know what your wishes are in reference to it?—We remain, Madam, your obedient Servants, M. Le Roy.—Mrs. Clayton."

By far the greater part of this consists of information as to the watch sold to her by the defendant, and the only part which goes further than the giving of information is the concluding sentence. That is a letter to which an answer ought to have been sent. The plaintiff might have replied insisting on the restoration of the watch or agreeing to a compromise, or saying that the defendant need take no steps at all. But no reply was sent to the defendant's letter, and I am of opinion that in declining to answer it the plaintiff was most unreasonable. That letter cannot be construed as indicating the assertion by the defendant of any hostile title or as any evidence whatever of an intention on his part to detain it wrongfully. Beyond the conveyance of information which the defendant was in courtesy bound to give to the plaintiff, that letter was a mere request to be informed of the plaintiff's wishes in the matter.

The next event in the history of the case is the issue of the writ, and the plaintiff must contend that at the moment of its issue he was in a position to bring an action of detinue—in other words, that there had been a wrongful denial by the defendant of the plaintiff's title to the watch. At first the case was treated as though the question was as to the effect of a demand by the plaintiff of his watch and a refusal by the defendant to hand it over, but this point was practically abandoned for there had been neither demand nor refusal.

Then it was argued that it was a case of conversion and that the defendant's letter of May 16 was evidence of it; but it is not sufficient to have evidence pro and con. on such a point; you must find as a fact that there was a demand and refusal before the issue of the writ. If there is evidence of a demand and refusal, the tribunal may, of course, come to the conclusion that there was one in fact; but to say that that letter is to be construed as evidence of any unlawful act not only does violence to its construction, but also ignores the circumstances under which it was written, and is wholly unwarranted by anything that happened up to the date of the writ. I therefore come to the conclusion that up to that date there was no conversion here, and no wrongful refusal to give up possession of the watch on the part of the defendant. If that is so, this action fails. But it is said that subsequent events go to show that there must have been a previous conversion. To my mind that view is wrong. If there were any evidence of conversion before issue of the writ, it is possible that there may have been acts and admissions later on which might very properly be taken into consideration when determining whether there had been a conversion before writ; but if you come to the conclusion that nothing which happened before the issue of the writ can give rise to an action of detinue, then nothing that happened afterwards can mend the flaw. What happened afterwards is to my mind irrelevant. This is shown by a simple test. Suppose the plaintiff had taken no step, could it have been said that because he had received a letter which was equivalent in law to a detention or conversion of the watch therefore his title would be barred at the end of six years? He would naturally answer that there had been no conversion and that the statute had not begun to run, and certainly if an action were brought at the end of six years and this letter were set up as indicating the time from which the statute would begin to run, the court would certainly take no heed of such an argument. What in fact happened here was that early in the morning the writ in this action was issued to the managing clerk of the plaintiff's solicitors, who went with it in his pocket to the defendant's premises. He asked to see the watch, which was accordingly shown to him; he demanded that it should there and then be given up to him; he produced no evidence of any authority to make such demand, and, the defendant having refused to hand over the watch, he at once served him with the writ. It is said that the defendant's subsequent conduct in declining to return the watch and in defending the action may be regarded as referring back and as showing the motives that actuated the conduct of the defendant before the date of the writ. I decline to allow that to influence any construction which I may place upon the letter of May 16 which was the last event before the issue of the writ. The cause of the defendant's subsequent conduct was his natural irritation at being treated in an unreasonable manner; the fact that his refusal to hand over the watch on the demand of a stranger who produced no written authority was answered by the immediate service of a writ already issued would account for any amount of irritation. The cases show clearly, as one would expect, that it is not an unlawful refusal for a man to decline to give up property at once and without taking time to inquire as to the title of the claimant. The proper course for the plaintiff to take would have been to state his wishes to the defendant, who would then have communicated them to Bennett with an intimation that before parting with the watch he was to inquire as to which of them was entitled to it. The plaintiff contends that at that date there could have been no doubt as to the person to whom the watch belonged, but I think it was a proper case for inquiry as to who the

watch belonged to, and the proper moment for the defendant's final decision had not arisen at the date of the writ. As there was no indication on the defendant's part of any wrongful intention to withhold the watch from the person to whom it belonged, I am clearly of opinion that at the date of the writ the plaintiff had no cause of action for the wrongful detention of the watch, and that this appeal must therefore be allowed.

FARWELL, L.J.—I have come to the same conclusion. I express no opinion upon the question of market overt, both because it is unnecessary for me to do so, and also because, as SCRUTTON, J., says, the question is one of fact with which I decline to interfere. The other question is one of considerable interest, and, upon the authorities which have been cited to us, I think it is indisputable. Whether an action is one of detinue or trover, the fact that the detention is wrongful forms the gist of the action; there must be an element of wrong; the mere fact of possession of the article is not in itself enough to support the action. BRAMWELL, B., in *Burroughes* v. *Bayne* (1) puts it thus (5 H. & N. at p. 309):

> "The result is you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use."

Then, again, in *Morris* v. *Pugh and Harwood* (2) LORD MANSFIELD said (3 Burr. at p. 1243): "Refusal upon demand is not an actual conversion, but evidence of it."

The real question is whether the true inference from the conduct of the defendant subsequent to May 16 is sufficient to show a withholding by the defendant such as to amount to a conversion of the watch to his own use. As to the letter itself, I think it is quite impossible to adopt the construction which was put upon it by SCRUTTON, J. I cannot so read the letter, which seems to me to be an eminently proper and reasonable one. The watch was sold by the defendant to the plaintiff's wife, who, after it had been subsequently stolen, called and told the defendant of the theft. Some time afterwards the defendant received the same watch from another customer, and he wrote to the plaintiff stating his belief that it had been stolen, and asking his wishes upon the matter. How can such a letter possibly be construed as a claim to retain the watch in derogation of the title of the plaintiff? But it is said that the defendant refused to hand over the watch, and subsequently defended the present action to recover it. I cannot conceive anyone in the position of the defendant so foolish as to hand over a watch to a man whom he had never seen before and who presented no credentials in writing. The writ in this action was admittedly issued before any demand for the watch had been made—as a matter of fact before the solicitor's clerk had reached the defendant's shop. In my opinion it was the duty of the defendant to refuse to hand over the watch, and I cannot imagine anything less unreasonable than his conduct in refusing to do so. How I am to infer a refusal to hand over the plaintiff's property I fail to see. What answer could the defendant have had if he had handed over the watch to the solicitor's clerk and it had been stolen from the latter on his way home? This contention of the plaintiff seems under the circumstances to be absolutely unreasonable. Then reliance is placed upon the subsequent letters, and upon the fact that the defendant is defending the action. Those letters, in my opinion, amount to nothing; they show that the action was defended by the defendant under his natural exasperation at the issue of the writ before he had answered the letter. It is clear that the defendant's subsequent conduct does not show a wrongful detention of the watch on his part antecedent to the issue of the writ. The case is, in my opinion, a perfectly plain one, and this appeal should be allowed.

VAUGHAN WILLIAMS, L.J.—I regret to say that I am obliged to come to a different conclusion. No material assistance is to be gained by a perusal of the pleadings, which are quite simple. At the outset I may remark that the learned judge below heard the witnesses give their evidence and observed their demeanour,

and we must endeavour to place ourselves in his position. It is said that the defendant's refusal to hand over the watch on May 23 might be justified, because it would not be reasonable to expect him to hand it over to a stranger who might have no authority from the true owner to demand it. But there is no suggestion that the defendant did not know the person who demanded the watch from him, and there would have been no such suggestion, because in his letter of the following day the defendant recognised him as being the clerk of the plaintiff's solicitor, and there are other matters which do not appear in the correspondence. A suggestion has been made that the defendant, being the bailee of Bennett, was entitled to have time to inquire into the matter, and I agree that he might very well have the right to inquire into the antecedent history of the watch; but no such suggestion was made by him. In fact, the defendant kept the watch in order to give the plaintiff an opportunity of treating Bennett handsomely. In my opinion the defendant had no right to base his refusal on any such ground—in other words, he had no right to withhold the watch from its true owner in order to give him such an opportunity. It is plain to me that the defendant knew whose watch it was. I am not suggesting that he did anything wrong; on the contrary, I think he behaved extremely well. But we have to see whether he so withheld the watch as to render himself liable to an action. The word "conversion" is very often used in cases of this kind, but it is not very easy to understand what it means. There is, however, no difficulty in understanding what is the sort of withholding which renders a man liable in such an action. There are many cases upon the point, but I need only refer to the judgments in *Burroughes* v. *Bayne* (1). MARTIN, B., says this of the term "conversion" (5 H. & N. at p. 302):

> "It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them."

BRAMWELL, B., who only differed from the other members of the court on the facts, said this (ibid. at p. 311):

> "Therefore, in consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff."

That is the question we have to ask ourselves in the present case. In order to amount to an assertion of dominion, it is not necessary to say either "It is mine" or "It is not yours," but it is necessary to assert by word or act such a right as is inconsistent with the dominion of the plaintiff. A man may not assert any other person's title, but he may nevertheless do an act which is inconsistent with the dominion of the true owner. Very often such an act may be justified, as, for instance, if the thing is retained for the purpose of making a reasonable inquiry as to the title. With regard to the title to this watch, there was, in my opinion, no room for doubt upon the facts there before the parties. The watch was the very one which had been stolen. There was not only no room for inquiry, but the defendant never pretended that he wished to inquire. If this case had been tried before a judge with a jury instead of before a judge alone, there would have been ample evidence to justify a finding that the defendant had interfered with the dominion of the plaintiff. I have read the judgment of SCRUTTON, J., in the court below, and I agree with the conclusions at which he arrives. In my opinion the present appeal should be dismissed. Upon the question of market overt, I entirely agree with the view expressed by FLETCHER MOULTON, L.J., that we ought not to interfere with the decision of SCRUTTON, J. Indeed I may go further, for I should feel very little difficulty in coming to the conclusion that the present case has not been brought within the custom at all.

Appeal allowed.

Solicitors: *Hasties; Stanley J. Attenborough.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re SUNDERLAND

[Court of Appeal (Cozens-Hardy, M.R., Buckley, and Kennedy, L.JJ.), May 5, 12, 1911]

[Reported [1911] 2 K.B. 658; 80 L.J.K.B. 825; 105 L.T. 233; 27 T.L.R. 454; 55 Sol. Jo. 568; 18 Mans. 123]

B

Bankruptcy—Receiving order—Refusal—"Sufficient cause"—Extortion—Judgment obtained by petitioning creditor for amount of debt—Knowledge of petitioner that debtor in financial difficulties—Petitioner's refusal to execute deed of assignment—Petitioner's issue of bankruptcy petition against debtor—Bankruptcy Act, 1883 (46 & 47 *Vict., c.* 52), *s.* 7.

C

A debtor, who knew that he was insolvent, took delivery of certain goods on credit from the petitioning creditors. At a preliminary meeting of the debtor's creditors, the petitioning creditors demanded the return of these goods or their value, and they refused to vote in favour of a resolution that the debtor should execute an assignment for the benefit of his creditors and that a committee of inspection should be appointed, although, the resolution having been passed by

D

the other creditors, their representative did suggest the name of a person to be a member of the committee. The petitioning creditors refused to execute the deed of assignment and after a demand for the return of the goods or their value was refused by the accountant in charge of the debtor's affairs, they issued a writ and obtained final judgment in respect of the amount owing to them. Subsequently, they served the debtor with a bankruptcy notice which

E

was not complied with and they issued a bankruptcy petition, the act of bankruptcy alleged being non-compliance with the bankruptcy notice, and finally a receiving order was made. The debtor appealed to the Divisional Court where it was held that the petitioning creditors had endeavoured to obtain an advantage over the other creditors, and the receiving order was rescinded on the ground that "sufficient cause" had been shown why no order

F

ought to be made within the Bankruptcy Act, 1883, s. 7 (3). The petitioning creditors appealed. On appeal to the Court of Appeal,

Held: there was no "sufficient cause" why a receiving order should not be made because a creditor was entitled to use legal process to enforce payment of his just debt, and none the less so if he knew that his debtor was in pecuniary difficulties and unable to pay all his creditors; in the present case there was no

G

trace of fraud or extortion on the part of the petitioning creditors as there was no secret arrangement and everything was open and above board; the conduct of the petitioning creditors in connection with the assignment did not prevent them from presenting a petition because (per Cozens-Hardy, M.R., and Kennedy, L.J.) they were relying on a subsequent and independent act of bankruptcy, and because (per Buckley, L.J.) there was no conduct on their

H

part which amounted to an assent of the deed.

Notes. Section 7 (3) of the Bankruptcy Act, 1883, has been replaced by s. 5 (3) of the Bankruptcy Act, 1914.

Considered: *Re Debtor* (*No. 23 of 1939*), *Debtor* v. *Petitioning Creditor and Official Receiver*, [1939] 2 All E.R. 338. Referred: *Re A Debtor* (*No. 883 of 1927*), [1927] All E.R. Rep. 267.

I

As to grounds for the refusal of a receiving order, see 2 Halsbury's Laws (3rd Edn.) 315, 318; and for cases see 4 Digest (Repl.) 171 et seq. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Re Mills, Ex parte Mills*, [1906] 1 K.B. 389; 94 L.T. 41; 54 W.R. 322, C.A.; 4 Digest (Repl.) 139, *1253*.

(2) *Re Shaw, Ex parte Gill* (1901), 83 L.T. 754; 49 W.R. 264; 45 Sol. Jo. 218, C.A.; 4 Digest (Repl.) 176, *1610*.

(3) *Re A Debtor* (*No. 20 of 1904*), *Ex parte The Debtor* (1904), 91 L.T. 664; 53 W.R. 223; sub nom. *Re Goldberg*, 21 T.L.R. 2, D.C.; affirmed 21 T.L.R. 139, C.A.; 4 Digest (Repl.) 176, *1611*. A

Also referred to in argument:

Re Blythe, *Ex parte Banner* (1881), 17 Ch.D. 480; 51 L.J.Ch. 300; 44 L.T. 908; 30 W.R. 24, C.A.; 4 Digest (Repl.) 355, *3227*.

Re Otway, *Ex parte Otway*, [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 2 Mans. 174; 14 R. 389, C.A.; 4 Digest (Repl.) 176, *1606*. B

Re Bebro, [1900] 2 Q.B. 316; 69 L.J.Q.B. 618; 82 L.T. 773; 48 W.R. 561; 7 Mans. 284; sub nom. *Re M.B.*, *Ex parte G.*, 44 Sol. Jo. 501, C.A.; 4 Digest (Repl.) 176, *1608*.

Small v. *Marwood* (1829), 9 B. & C. 300; 4 Man. & Ry. K.B. 181; 7 L.J.O.S.K.B. 197; 109 E.R. 112; 4 Digest (Repl.) 138, *1237*. C

Re Sedgwick, *Ex parte McMurdo* (1888), 60 L.T. 9; 37 W.R. 72; 5 T.L.R. 4; sub nom. *Re Sedgwick*, *Ex parte Sedgwick*, 5 Morr. 262, C.A.; 4 Digest (Repl.) 110, *981*.

Appeal by petitioning creditors from a decision of a Divisional Court, (PHILLIMORE and HORRIDGE, JJ.), rescinding a receiving order made by the registrar of the Halifax County Court on the ground that "sufficient cause" had been shown why no order ought to be made within s. 7 (3) of the Bankruptcy Act 1883. D

Hansell for the petitioning creditors.

Tindal Atkinson, *K.C.*, and *Alan Macpherson* for the debtor.

Cur. adv. vult.

May 12. **COZENS-HARDY, M.R.**—On Sept. 22, 1910, the petitioning creditors E obtained final judgment for £313 5s., against a debtor for goods sold and delivered. On the following day they served a bankruptcy notice which was not complied with. On Oct. 3 they presented a bankruptcy petition, the act of bankruptcy alleged being non-compliance with the bankruptcy notice. On Nov. 3 a receiving order was made. The Divisional Court rescinded the receiving order, and dismissed the petition on the ground that "sufficient cause" had been shown F why no order should be made on the petition within s. 7 (3) of the Bankruptcy Act, 1883. It is not alleged that there is any defect in the proceedings to which I have referred. But it is contended that by reason of what took place antecedent to the judgment, "sufficient cause" is made out for not making the order. At the beginning of September the debtor was, to his own knowledge, insolvent. He took delivery of some goods, which the petitioning creditors supplied on credit, almost G immediately before his creditors were called together. The petitioning creditors not unnaturally took the view that this was fraudulent on the part of the debtor, and they demanded the return of the goods or their value. This contention was made openly at the preliminary meeting of the creditors, and through their representative they declined to vote in favour of an assignment unless their demand was complied with. The creditors present did not agree to this. By a majority it was resolved H that the debtors should be requested to execute an assignment for the benefit of his creditors. After that resolution for a deed of assignment and for the appointment of a committee of inspection had been passed, the representative of the petitioning creditors suggested the name of a person as a member of the committee. A deed of assignment was subsequently prepared and executed by the debtor. The petitioning creditors declined to execute it, and I am clearly of opinion that they did not I assent to it in such manner as to be bound by it. In my opinion there is not a trace of fraud or extortion in this transaction. There was no secrecy. Everything was open and above board. They declined to come into the assignment unless they got what they considered their due. They did not pretend to come in and then seek some secret advantage. The suggestion of extortion is absurd. A creditor is entitled to use legal process to enforce payment of his just debt, and none the less if he knows that his debtor is in pecuniary difficulties and unable to pay all his

creditors. The issue of the writ and the signing of the judgment were legitimate steps. In saying this I am not overlooking the undoubted fact that the jurisdiction in bankruptcy is discretionary. It may be, and upon the whole I think it is correct to say, that the petitioning creditors could not have relied upon the execution of the assignment as an act of bankruptcy, they having been in some sense privy to it. But they are relying upon a subsequent and independent act of bankruptcy, and it would be wrong to hold that their conduct in connection with the assignment prevented them for all time from presenting a petition in respect of their debt. The case of *Re Mills, Ex parte Mills* (1) is a clear authority on this point. The learned judges in the divisional court thought this case fell within the principle of *Re Shaw, Ex parte Gill* (2) and *Re A Debtor* (3), but, with great respect, I am unable to assent to this view. There is neither fraud nor extortion, either accomplished or intended, and I think there is no "sufficient cause" why a receiving order should not be made. In my opinion the appeal should be allowed, and the order of the registrar restored.

BUCKLEY, L.J.—The question for decision is whether within s. 7 (3) of the Bankruptcy Act, 1883, sufficient cause has been shown why no order should be made on the petition of these creditors. In my opinion no sufficient cause has been shown. A creditor who knows that his debtor is in difficulties is none the less entitled to bring his action, obtain judgment, issue execution, and enjoy the fruits of it (unless he be intercepted by bankruptcy proceedings) and none the less because the result may be that he will obtain payment in full and other creditors will not. This is his legal right. The court sees in it nothing in any way improper. Similarly it seems to me that a creditor who has threatened his debtor with consequences if he does not pay his debt and threatens or takes any legitimate steps for enforcing payment is none the less entitled if his demands are not satisfied to proceed in bankruptcy. On the other hand, the court does not allow the bankruptcy jurisdiction to be invoked for the purposes of fraud or extortion. The principle is best stated I think in the words of RIGBY, L.J., in *Re Shaw* (2) (83 L.T. at p. 755):

> "To use, or even attempt to use, bankruptcy proceedings for the purposes of fraud or extortion, although the attempt may fail, is a sufficient cause for refusing on the petition of that creditor to make a receiving order. . . . A debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."

The decision in *Re Shaw* (2) seems to me to have been misunderstood. There had been a resolution to accept a composition, a creditor subsequently called on the debtor and offered to assent to the composition if the debtor would give him in addition to the amount coming to him under the composition a promissory note for the balance of his debt. He proposed an arrangement secret between himself and the debtor by which he should pretend to accept the composition and at the same time get more than the composition. He proposed to the debtor to be a party to a fraud. The court held that in respect of the particular act of bankruptcy on which the creditor was relying the creditor was under disability to take bankruptcy proceedings. *Re A Debtor* (3) is a like case. The reasons given in the Court of Appeal do not appear. The facts were similar to those in *Re Shaw* (2). The petitioning creditors had been ready to assent to the deed of assignment if they received in addition to the amount coming to them under the deed a further sum of £60. In both these cases the petitioning creditors were persons who were seeking to defraud the other creditors by pretending to share equally with them when in fact they were getting more than they did. They were practising a fraud. Similarly in the words of RIGBY, L.J., they would have been precluded from proceeding in bankruptcy if they had practised extortion. It is not extortion to demand payment of what is due and to enforce by legitimate means payment of what is due. It is not extortion to make openly a claim which cannot be supported in law and to decline to assent to a deed of assignment when the claim is not admitted. On

the facts of this case there was no secret arrangement. There was no arrangement at all, and the attempt to make an arrangement was public and not secret. The petitioning creditors at the meeting made publicly their complaint of the injustice which they asserted had been done them, and of the terms which they thought would be fair. The other creditors did not assent. The resolution in favour of the deed was passed in that position of matters, and no creditor was induced to vote for it by any pretence on the part of the petitioning creditors that they were going to assent. They openly stated that they would not. After the resolution had been passed and a resolution for the appointment of a committee of inspection had been passed, and after the representative of the bank had left the chair it is true that the petitioning creditors did take part in the matter of the nomination of the persons who should serve on the committee of inspection. But there was no conduct on their part which amounted to an assent to the deed. On this it is sufficient to refer to *Re Mills* (1). In my judgment the petitioning creditors have not either by any improper conduct or by any action of assent to the deed precluded themselves from applying to the court in bankruptcy to give them relief in respect of their debt. In my judgment the receiving order which was made in the County Court was right, and this appeal should be allowed and the order restored.

KENNEDY, L.J.—Taking the facts of this case as stated by PHILLIMORE, J., in his judgment in the Divisional Court, the result as to material points appears to me to be as follows: (i) The appellants never placed themselves in the position of creditors who assented to a deed of arrangement. (ii) The effect of their conduct at the meeting was, in the words of VAUGHAN WILLIAMS, L.J., in *Re Mills* (1) ([1906] 1 K.B. at pp. 391, 392) to make them

> "privy to the execution of the deed in this sense—that he could not afterwards use the execution of the deed as an act of bankruptcy upon which to found a bankruptcy petition against the debtor."

(iii) On Sept. 9 after the petitioning creditors had received the circular with the form of assent to the deed of assignment for signature, they by their solicitor, on the telephone, asked the debtor's accountant if they could have the goods in question back or have their value, and threatened that, if this request was not complied with, they would issue a writ. Having regard to the fact that before the meeting of creditors one of the petitioning creditors had made a like demand and suggested secrecy, and that the document for their written assent to the deed of arrangement had, at this time, been placed before them for signature, I can only draw the inference which was drawn by the learned judges in the Divisional Court, that the petitioning creditors were improperly trying to get an advantage over the debtor's other creditors by an express threat of legal proceedings if this suggestion was refused, and an implied offer to sign the deed if it was complied with. It does not appear to me that this attempt by the petitioning creditors was at all less improper because the demand for the return of those goods had been openly made at the meeting of creditors and then disallowed. The facts are not in dispute. They appear in the evidence of witnesses called before the registrar at the hearing of the petition, where the petitioners were represented, and they did not offer any evidence in contradiction. (iv) The petitioning creditors successfully sued the debtor to judgment in an action to which no defence was offered, and duly served upon the debtor a bankruptcy notice, the non-compliance with which was the act of bankruptcy upon which the petitioning creditors based their claim against the debtor for an adjudication of bankruptcy. This being, as it seems to me, a correct summary of the material facts, what was the legal position of the parties which resulted therefrom in regard to the right of the petitioning creditors to have the debtor adjudicated bankrupt? The Divisional Court has found a sufficient ground in the conduct of the petitioning creditors for reversing the order for adjudication made by the registrar of the Halifax County Court, and this judgment of the court

A is based by both the learned judges who composed the court, upon the decision in *Re Shaw* (2) and *Re a Debtor* (3). I am unable to take the same view. If the Act of bankruptcy upon which the petitioning creditors proceeded had been the admission of insolvency which led to the debtor calling his creditors together, or upon the assignment contained in a deed of arrangement I do not think that I should have dissented from the judgment of the Divisional Court. But this was not the case. B The foundation of the petitioning creditors' petition was non-compliance with the notice to pay the amount of the judgment in the High Court obtained against the debtor in the action which was afterwards instituted by the petitioning creditors; and, therefore, I think that the two cases upon the authority of which the decision in the Divisional Court was given do not apply. In each of these cases the petitioning creditor based his petition upon the allegation of an act of bankruptcy C committed by the debtor in the course of the very transaction in which the petitioning creditor himself had acted unfairly; in the first case, by the debtor having given notice to creditors of this inability to pay his debts, which led to the negotiations in the course of which the petitioning creditor had tried improperly to get a preference for himself; and, in the second case, upon the execution of the deed of assignment in regard to which they had tried by the threat of bankruptcy D proceedings, to extort a similar preference. In *Re Shaw* (2) both RIGBY, and VAUGHAN WILLIAMS, L.JJ., laid stress upon the fact that the act of bankruptcy put forward by the petitioning creditor was an act which formed part of the very proceedings in which the petitioning creditors had acted improperly. Here, the petitioning creditors do not rely at all upon the proceedings which led up to or accompanied the deed of arrangement. The act of bankruptcy upon which E they founded their petition is an entirely distinct and subsequent transaction arising out of the judgment against the debtor which was regularly obtained in the High Court, and the non-compliance with the bankruptcy notice following that judgment. In my opinion the cases cited do not apply; and the judgment of this court in *Re Mills* (1) affords clear authority that we ought not to hold that the petitioning creditors' right to an adjudication of the debtor on this subsequent and independent act of bankruptcy is impaired by the fact, as I hold it to be, F that in the earlier proceedings in regard to the deed of assignment, the petitioners so acted that they ought not, had they sought to do so, to have been permitted to obtain an adjudication upon an act of bankruptcy committed in the course of those proceedings and in immediate connection with them.

Solicitors: *Ward, Bowie & Co.*, for *Walter & E. H. Foster*, Leeds; *Robbins & Co.*, for *Longbotham & Sons*, Halifax.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

Re ROBINSON. McLAREN *v.* PUBLIC TRUSTEE

[CHANCERY DIVISION (Warrington, J.), February 13, 1911]

[Reported [1911] 1 Ch. 502; 80 L.J.Ch. 381; 104 L.T. 331; 55 Sol. Jo. 271]

Limitation of Action—Mistake of fact—Trust money paid by trustee under a mistake of fact for fourteen years—Claim by beneficiary entitled against executor of actual recipient—Nature of claim—Lapse of time—Limitation Act, 1623 (1 *Jac.* 1, *c.* 16).

B

The trustee of an annuity paid under a mistake of fact from 1886 to 1900 a moiety of it to R., who was not then entitled to it under the trust, instead of to M., who was entitled to it. R. was not aware of the trustee's mistake. The mistake was discovered in 1909 by which time both R. and M. had died. The plaintiff, the executrix of M., sued the defendant, who was the executor of R., for recovery of the moneys wrongfully paid, and the defendant contended that this was a common law action for money had and received and was barred by the Statute of Limitations. The plaintiff contended that this was a case in which the trust fund had been paid by mistake by the trustee to the wrong cestui que trust, and there was no bar by lapse of time to the recovery of the money.

C

D

Held: as the plaintiff was not the person who made the payments, the action could not have been maintained at common law by reason of the lapse of time; as it was in substance a mere money demand a court of equity acting by analogy to the Statutes of Limitations would apply the same period as limited by the relevant statute, and, accordingly, the plaintiff's claim was barred.

E

Notes. Section 26 of the Limitation Act, 1939, now provides, inter alia, that where there is an action for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff discovers the mistake or could with reasonable diligence have discovered it. There was no corresponding provision in the Limitation Act, 1623, which was the Act under which this case was decided.

F

Applied: *Re Croyden, Hincks* v. *Roberts* (1911), 55 Sol. Jo. 632. Considered: *Re Mason* (1928), 97 L.J.Ch. 321. Distinguished: *Minister of Health* v. *Simpson*, [1950] 2 All E.R. 1137. Referred to: *Re Rivers, Pullen* v. *Rivers*, [1918–19] All E.R. Rep. 273; *Re Blake, Re Petition of Right of A. M. Mingham*, [1931] All E.R. Rep. 372; *Re Diplock's Estate, Diplock* v. *Wintle*, [1948] 2 All E.R. 318; *Phillips-Higgins* v. *Harper*, [1954] 1 All E.R. 116.

G

As to mistake and the limitation of actions, see 24 HALSBURY'S LAWS (3rd Edn.) 320–321; and for cases see 32 DIGEST 518–519. For the Limitation Act, 1623, see 13 HALSBURY'S STATUTES (2nd Edn.) 1158. For the Limitation Act, 1939, see ibid., 1159.

Cases referred to:

H

(1) *Livesey* v. *Livesey* (1827), 3 Russ. 287; 6 L.T.O.S. Ch. 13; 38 E.R. 583; 23 Digest (Repl.) 438, *5079*.

(2) *Dibbs* v. *Goren* (1849), 11 Beav. 483; 50 E.R. 904; 23 Digest (Repl.) 438, *5080*.

(3) *Brooksbank* v. *Smith* (1836), 2 Y. & C. Ex. 58; Donnelly, 11; 6 L.J.Ex. Eq. 34; 160 E.R. 311; 32 Digest 518, *1758*.

(4) *Harris* v. *Harris* (*No. 2*) (1861), 29 Beav. 110; 54 E.R. 568; 32 Digest 506, *1665*.

I

Also referred to in argument:

Re Horne, Wilson v. *Cox Sinclair*, [1905] 1 Ch. 76; 74 L.J.Ch. 25; 92 L.T. 263; 53 W.R. 317; 23 Digest (Repl.) 438, *5082*.

Rogers v. *Inham* (1876), 3 Ch.D. 351; 35 L.T. 677; 25 W.R. 338, C.A.; 23 Digest (Repl.) 439, *5095*.

Baker v. *Courage & Co.*, [1910] 1 K.B. 56; 79 L.J.K.B. 313; 101 L.T. 854; 32 Digest 337, *206*.

A **Action** brought by the executrix of Robert McLaren, deceased, against the Public Trustee who was the executor of Walter Robinson, deceased, to recover moneys paid by a trustee under a trust to Walter Robinson which should have been paid to Robert McLaren. The payments were made from 1886 to 1900, but the trustee's mistake was not discovered until 1909. The trustee was not made a party to the action.

B By deed under the Privy Seal of the twenty-seventh year of his reign, 1675, King Charles II granted to certain persons in fee simple certain fee farm and other rents in trust to stand seised thereof as to (among other sums) the sum of £100 per annum, part thereof (after a life interest to Mary Pendrell, relict of Richard Pendrell), for the use of the heirs of the body of Richard Pendrell begotten, and as to the other parts thereof upon trust for the persons therein named in tail C male. And it was provided that as any of the persons named should happen to die without issue, his or her share should be for the use of the survivors and survivor of them, and the heirs of their respective bodies equally; and for want of such issue in trust for the King, his heirs, and successors. The consideration for the gift was not stated, but it was in fact made for services rendered to the King in furthering his escape after the battle of Worcester. In 1857, in the events which had happened, D the annuity had become vested in two persons, James Withington and Robert McLaren, in moieties, as heirs male of R. Pendrell. By three deeds, the last of which was made in March, 1859, James Withington and Robert McLaren granted their shares in the annuity (that is, in the result both moieties of it) to George Robinson in fee simple, and by each deed the parties purported to bar their respective estates tail. In pursuance of these deeds the trustees of the fee farm E rents paid the annuity to George Robinson until his death in June, 1880, and subsequently to his son Walter Robinson, who was his devisee and his sole executor until 1900, when the payments were stopped, and the question was raised as to how far the deeds were effectual to bar the entails of the grantors, and whether the annuity was still payable to Walter Robinson. In 1901 a Special Case was brought before FARWELL, J. (reported [1903] 1 Ch. 865) upon which he held that the F annuities granted by the Royal Grant of 1675, being for services performed to the King, could not be barred, and that consequently the deeds of conveyance of the annuity to George Robinson were ineffectual to bar the entails, and only passed the respective life interests of the grantors. The result of that judgment was that one moiety of the annuity—namely, that which was originally the moiety of Robert McLaren—was properly payable to Walter Robinson as assignee of Robert McLaren G during the life of Robert McLaren, and the other moiety was not payable to Walter Robinson if James Withington was then deceased, as turned out to be the case. It was certified by the master in November, 1910, in answer to inquiries directed in that case, that James Withington had died in 1874, and that his issue had failed on July 13, 1886. From that latter date, therefore, the moiety of James Withington had become vested under the original grant in Robert McLaren, and the payments H of that moiety of the annuity, which had from that date to 1900 been made to Walter Robinson, should have been made to Robert McLaren.

H. M. Humphrey for the plaintiff.
Cave, K.C., and *Sargant* for the defendant.

I **WARRINGTON, J.**, stated the facts and continued: The main defence, and, as I have said, the only one with which I propose to deal, is the Statute of Limitations. The defendant pleads the statute of James I. He says that this is in reality a common law action for money had and received by Walter Robinson to the use of the plaintiff, and as such it is, of course, barred by the lapse of six years, under the statute of James I. The plaintiff, on the other hands, says that this is a case in which the trust fund has been paid by mistake by the trustee to the wrong cestui que trust, and that on the authorities on which he relies—which I will deal with presently—there was not in the old Court of Chancery any bar by lapse of time

to the recovery of that money, and that accordingly he is now entitled, in this action, to recover the money so paid, and that the Statute of Limitations has no application.

Which of these two contentions is the right one? Prima facie the defendant's contention would appear to be right. What are the facts? They are that A. B., who ought to have paid the money to the plaintiff, has by mistake paid it to the defendant. A. B., who has paid it, could recover it if the mistake was a mistake of fact, in an action as money had and received to his use, but that action is barred by the lapse of six years. But the present claim is not by the man who has paid the money, but by the man whose money has been paid away. Now, whether in strictness such a person can maintain an action at common law for money had and received, may be a matter of some doubt, but at all events he could have maintained such a suit in equity for it, making the trustee a party. In the present case he has sued without making the trustee a party; but whether the claim is treated strictly as a claim at common law for money had and received, or whether it is brought as a claim in equity through the medium of the trustee, whichever way it is put, inasmuch as the court always acts by analogy to the Statute of Limitations, at first sight one can see no good reason why the period fixed by the statute should not bar the right of the plaintiff in such a case to recover. The plaintiff, however, says that there is a special principle of equity which relates to the recovery of trust funds by one cestui que trust from another, where they have been wrongly dealt with by the trustee. In support of that contention he cites certain cases to which I propose to refer. I take them in the order in which the plaintiff cited them.

In *Livesey* v. *Livesey* (1) an executor had by mistake made certain payments to an annuitant before the latter had become entitled to the annuity. The annuitant afterwards became entitled to the annuity, and it was decided that the executor was entitled to treat these payments as having been made on account of the actual annuity, and to retain them out of future payments. That was a case where the court, administering the estate, adjusts the accounts between the several parties entitled, and it certainly is not an authority for any such wide proposition as that put forward by the plaintiff.

Dibbs v. *Goren* (2) was a case of the same kind. There certain payments had been made by trustees under an erroneous view of the effect of a will, and, as the court was administering the estate, the persons to whom these payments had been made were compelled to make restitution out of the annuities to which they were entitled. That case goes no farther than that. The result of the decision of Lord Langdale, M.R., is stated in the last part of his judgment, where he says (11 Beav. at p. 484):

> "The plaintiff is entitled to have these sums deducted from the shares of John and his assignee, and of Henrietta and Charles, with a declaration that until those sums have been recouped they form a lien on the other moneys which may become due to them under the will."

In administering the trusts the court, finding that the persons who had been wrongly paid had other interests, those interests were taken hold of to make good the payments wrongly made. This case again is certainly no authority for anything like the general proposition contended for by the plaintiff.

Brooksbank v. *Smith* (3) is not quite of the same kind as the two cases I have just referred to, and can be explained on a ground which distinguishes it from the case before me. There again the trustees had wrongly transferred a sum of consols to one of the cestui que trust who was not entitled to it, and part of the fund so transferred still remained in the hands of the cestui que trust. A bill was filed to make him re-transfer that sum to the trustee. Alderson, B., there says (2 Y. & C. Ex. at p. 60):

> "On the whole I am satisfied that it was a mistake of fact, and the bill is to re-transfer the remainder of that original stock so transferred, the fund being clearly identified, and consequently the party having a special lien upon it."

There you find a man in possession of a trust fund which when the bill was filed

he knew was a trust fund, and the trustees are held entitled to follow it, and to have it transferred to them as the proper persons to hold it. That again is a simple case decided according to well-known principles.

Harris v. *Harris* (*No. 2*) (4) is the only other case with which it is necessary to deal. Much has been made of this case, and it certainly comes nearer than any of the others to which I have referred to supporting the proposition of the plaintiff. It wants some careful examination. The report of it is very short, and not altogether satisfactory. Under a marriage settlement Mr. Harris, the husband, was entitled to have transferred to him £5,000 Consols, part of the wife's fortune. The trustees, misconceiving the directions given them by the settlement, paid Harris £5,000 sterling, for which purpose they sold £6,117 Consols, and paid him the proceeds amounting to £5,000. Harris accordingly had in his hands £1,117 Consols or the proceeds thereof, forming part of the trust fund. The sum of £1,170 mentioned in the report is a misprint, it should be £1,117. That was in 1848. In 1860 the suit was instituted for various purposes connected with the trust, and not simply to recover the money from Harris. It was a suit in equity for the execution of the trusts of the settlement, the appointment of new trustees and for other relief of that sort. In the course of the formal decree, the Master of the Rolls declared that Harris was liable to make good the £1,117 Consols. It appears from the report that counsel for the defendants insisted that the claim was barred by the Statute of Limitations, for the rights of the plaintiff were only through the trustees, and that their claim was in respect of a simple contract debt for money paid under a mistake, and was barred by the statute. LORD ROMILLY answers that in this way (29 Beav. at pp. 110, 111):

> "I forbear to notice very fully the argument for the defence, except to say that I must dissent from it. It is not in my opinion correct to say that you cannot recover from a person who has received a trust fund the money improperly paid him, except through the instrumentality of the trustees. And further, I dissent from the argument [the contention of the defendants] that being so treated and considered as a simple contract debt between him and the trustees, the Statute of Limitations would apply. According to my experience and to the practice which I have always known adopted any member of a family who has obtained possession of a trust fund has been compelled to pay it at any distance of time, if there have been no improper laches on the part of the person who sought to recover it. There have been no improper laches in this case, and therefore I am of opinion that Mr. Harris is liable to repay the £1,117 Consols, and that this court has power to lay hold of any interest of his in the trust funds for the purpose of enforcing that repayment."

The court in that case was executing trusts, and the money which Harris had received was the proceeds of a trust fund sold out for the express purpose of making that payment. This money was therefore part of the trust fund itself, and was so treated by the Master of the Rolls. There is also to be remarked that the words used by him only go to this, that a "member of a family"—by which I take it he means one of several cestuis que trust interested under a particular trust or a particular will—who has obtained possession of a trust fund may be compelled to repay it—that is to say, to repay the fund at any distance of time. He says that that has been his experience. He cites no case, but it was, perhaps, unnecessary to do that when a judge of such experience as LORD ROMILLY was saying what he did. But, what is more to the point, is that no cases were cited here where a mere money demand such as the present one, has been enforced in a court of equity after such a lapse of time as that if it had been a money demand at common law it would have been barred by the statute. All that the plaintiff can say in regard to this case is that the words used by LORD ROMILLY, or stated in the report to have been used by him, are sufficiently wide to cover a mere order on a cestui que trust who has been overpaid to repay.

I will now turn to the decree, which I sent for to see whether any order was made by LORD ROMILLY for the repayment of the money which had been so wrongly paid to Harris, and I find that no such order was made. It is a decree made on motion for decree. This is the order,

"His Honour doth declare that the defendant Arthur Spencer Douglas Harris is liable"

—for what—

"to replace £1,117 Bank £3 per Cent. Annuities, the proceeds of the sale whereof were received by him in excess of his rights under the settlement in the plaintiff's bill mentioned, dated the 20th day of March, 1848, and that the interest of the said A. S. D. Harris under the trusts of the said settlement is liable to make good such £1,117 Bank £3 per Cent. Annuities."

That is a declaration, not that he is liable to pay followed by an order to pay, but is liable to replace the £1,117 Consols, and that his interest is liable to make good such Consols. Now going on, the decree directs certain transfers to be made, and then it goes on further:

"And the defendant A. S. D. Harris by his counsel proposing that, instead of his replacing and making good the £1,117 Bank Annuities, he should replace and make good the trust funds comprised in the said settlement in manner hereinafter mentioned."

And then after stating that for the benefit of those who are not sui juris such a proposal should be accepted, it goes on:

"It is ordered that the defendant A. S. D. Harris, in lieu of replacing and making good the said £1,117 Bank £3 per Cent. Annuities, do replace and make good such amounts of money (if any), as after the transfers, sales, and investments hereinbefore directed, and the payment and investment directed by the order of the 19th day of Feb. last shall have been respectively made would, if invested in Bank £3 per Cent. Annuities at the average price thereof on Mar. 1, 1861, have purchased £10,959 Bank £3 per Cent. Annuities, being the residue of the £18,100 Bank £3 per Cent. Annuities originally subject to the trusts of the said settlement"

after certain deductions. Certain directions are then given with regard to the funds, and especially the income of the funds, and the decree proceeds:

"And it is ordered that in case there shall be no deficiency in the said £10,950 Bank Annuities after the said transfers, sales, and investments shall have been made then the whole residue of the said rents, profits, and income remaining after such payments as aforesaid be paid to the said defendant A. S. D. Harris during his life, or until the further order of this court."

If there is a deficiency, then he is to receive £200 a year; and the rest is to be applied in making good that deficiency until it has been made good, when the whole of the income is to be paid to him. It is quite true that the actual direction was given in lieu of something which was the strict rights of the parties as declared by the first part of the decree, but it is obvious that they were to have a specific sum of £1,117 Consols made good, and made good out of the other interests of Harris under the settlement. I do not think that it is contemplated by anyone that there should be an order on him to re-transfer that £1,117 as if it were a mere money demand. I think the cases in the books where mistakes have been made by trustees in payment of trust funds fall into these classes: First, cases in equity where you are continuing to administer the funds and you adjust the rights of the parties between themselves in the ordinary course. If you have funds belonging to the person who has been overpaid, you may so adjust the rights of the cestuis que trust as to rectify that overpayment. Next, in cases where you follow trust moneys actually remaining in the hands of the person into whose hands they have

been wrongly paid, there is no difficulty at all. A man has got a fund in his hands which is still impressed with the trust, and he holds it as a trustee, and must transfer it to the person entitled to it. The third class of cases is where the trust funds or the proceeds of the trust funds have been received by a person with knowledge that they have been wrongly paid to him. In such a case he would at all events be treated as a constructive trustee and be liable to repay the value of the trust funds which had been wrongly paid him. The present case certainly does not fall within that last class of cases, for here it cannot be said that between 1886 and 1900 Walter Robinson knew that these moneys were not payable to him. The question was not raised until the year 1900, after the last of the payments had been paid to him. The result is that, owing to the fact that the plaintiff is not the person who made these payments, this is an action which certainly could not have been maintained at common law by reason of the lapse of time, and I think that it is in substance a mere money demand to which a court of equity acting by analogy to the Statute of Limitations will apply the same period as is limited by that statute. I think, therefore, that the plaintiff's claim is barred by the Statute of Limitations of James I. And in all good sense there ought to be that result because in substance there is no difference between the case of the plaintiff in this action who has been wrongly paid by the trustee and the ordinary case of a man to whom money has been paid owing to some mistake.

Judgment for defendant.

Solicitors: *Petch & Co.; W. Muskerry Tilson.*

[*Reported by* NEVILLE TEBBUTT, ESQ., *Barrister-at-Law.*]

Re SIMPSON. CLARKE *v.* SIMPSON

[CHANCERY DIVISION (Swinfen Eady, J.), January 22, 29, 1913]

[Reported [1913] 1 Ch. 277; 82 L.J.Ch. 169; 108 L.T. 317; 57 Sol. Jo. 302]

Settled Land—Sale—Bequest of leasehold house during widowhood—Outgoings to be paid out of general estate—Exercise of power of sale by widow—Right to annuity—Amount of annuity—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38).

By his will a testator bequeathed a leasehold house to his executors and trustees on trust to permit his wife to occupy the house during her widowhood. The outgoings, which amounted to £160 per annum, were to be paid out of the general estate. When the lease had eleven years to run the widow sold the house under the Settled Land Acts, and paid the purchase money to the trustees.

Held: (i) the widow was entitled to be paid such an annuity as would exhaust the proceeds of sale in the eleven years of the lease which remained unexpired: *Askew* v. *Woodhead* (1) (1880), 14 Ch.D. 27, applied; (ii) the provision in the will directing the trustees to pay all the outgoings of the house out of the general estate did not confer on the widow a right to be paid a sum equivalent to that which would have been payable by the trustees as rent and outgoings had the house not been sold, by virtue of s. 51 of the Settled Land Act, 1882 [now s. 106 (1) of the Settled Land Act, 1925] since the extra benefit conferred during residence was not a provision tending to induce her to abstain from exercising her power of sale within the section.

Notes. Followed: *Re Burden*, *Mitchell* v. *St. Luke's Hostel, Trustees*, [1948] 1 All E.R. 31. Approved: *Re Aberconway's Settlement Trusts*, *McLaren* v.

Aberconway, [1953] 2 All E.R. 350. Referred to: *Re Herbert, Herbert* v. *Lord Bicester*, [1946] 1 All E.R. 421.

As to prohibition against exercise of statutory powers of tenant for life see 34 HALSBURY'S LAWS (3rd Edn.) 533, 534, and for cases see 40 DIGEST (Repl.) 810 et seq.

Cases referred to:

(1) *Askew* v. *Woodhead* (1880), 14 Ch.D. 27; 49 L.J.Ch. 320; 42 L.T. 567; 44 J.P. 570; 28 W.R. 874, C.A.; 11 Digest (Repl.) 261, *1396*.

(2) *Re Trenchard* (*deceased*), *Ward* v. *Trenchard* (1900), 16 T.L.R. 525; 40 Digest (Repl.) 800, *2803*.

(3) *Re Trenchard, Trenchard* v. *Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 50 W.R. 266; 46 Sol. Jo. 231; 40 Digest (Repl.) 810, *2896*.

Adjourned Summons.

By his will, dated June 4, 1898, a testator bequeathed a leasehold house known as Fairlawn, situate in Westbourne Road, Edgbaston, to his executors and trustees upon trust to permit his wife to occupy the same during her widowhood,

> "My trustees paying the ground rent and all rates, taxes, and outgoings in respect of the said dwelling-house, doing all necessary repairs, and observing and performing the covenants contained in the lease under which the same is held out of my general estate, it being my wish that my said wife shall be personally relieved from the payment of the ground rent, rates, taxes, and outgoings, costs of repairs, and the observance and performance of the covenants aforesaid, and I declare that from and after the decease or second marriage of my said wife (which shall first happen) the said dwelling-house shall fall into and form part of my personal estate."

The testator died on Aug. 4, 1898. The widow continued to reside in the house, the ground rent and outgoings, amounting to £160 per annum, being paid by the trustees until Sept. 26, 1912. At that date the widow as equitable tenant for life under the Settled Land Act, 1882, sold the house for £450, the purchase money being paid to the trustees. The widow claimed to be paid during her widowhood an annuity which would exhaust the £450 (less costs) in the eleven years of the lease which had not expired. She also claimed £160 per annum out of the general estate during the continuance of the lease and her widowhood. The summons was issued to determine her rights.

Tyrrell for the trustees.
MacSwinney for the widow.
Church for the residuary legatees.

SWINFEN EADY, J.—The first point is covered by *Askew* v. *Woodhead* (1). The widow is entitled to be paid such an annuity as will exhaust the £450 (less costs) in the eleven years the lease has still to run. On the second point, the provision for the payment of outgoings does not, in my opinion, fall within s. 51 of the Settled Land Act, 1882 [now s. 106 of the Settled Land Act, 1925]. It is true that while the widow was in occupation of the house she was free from these expenses, but the provision conferring these extra benefits upon her was not a provision tending to induce her to abstain from exercising her power of sale. *Re Trenchard, Ward* v. *Trenchard* (2) has been relied on as showing that BYRNE, J., took a different view; but *Re Trenchard, Trenchard* v. *Trenchard* (3) shows that the widow was entitled as against "the proceeds of sale" to the same annual benefit as if she had not sold, and that she was not entitled to anything more. I have accordingly arrived at the conclusion that this case is not affected by s. 51 of the Settled Land Act, and that the widow is not entitled to have the £160 per annum.

Solicitors: *H. Tyrrell & Son*, for *J. B. Clarke & Co.*, Birmingham.

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

ELLIS *v.* BANYARD

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), December 4, 5, 1911]

[Reported 106 L.T. 51; 28 T.L.R. 122; 56 Sol. Jo. 139]

Animal—Highway—Animal straying on highway—Liability of owner of land adjoining highway—Cattle—No evidence of vice or negligence—Open gate—Injury to person using highway.

The plaintiff was riding on a bicycle along a highway adjoining a field in which the defendant kept cows. The field communicated by a gate with the highway and at the time when the plaintiff was passing the gate was open. Further along the road were cows which had come from the field, some of which threw the plaintiff down and injured her. There was no evidence by whom the gate had been opened.

Held: the defendant was under no duty at common law to fence in his cattle, they being inoffensive animals, so as to keep them from straying on the highway; even if he had been under a duty to the public, there was no evidence of negligence on his part, and the fact that the gate was open did not raise a presumption of negligence; and, therefore, the defendant was not liable.

Notes. Section 135 (1) of the Highways Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 555) which imposes penalties in connection with straying animals does not confer a civil action for damage caused by animals straying on the highway: see *Heath's Garages, Ltd.* v. *Hodges*, [1916–17] All E.R. Rep. 358.

Considered: *Poulton* v. *Moore* (1913), 109 L.T. 976; *Turner* v. *Coates*, [1916–17] All E.R. Rep. 264. Applied: *Heath's Garages, Ltd.* v. *Hodges*, [1916–17] All E.R. Rep. 358. Considered: *Hughes* v. *Williams*, [1943] 1 All E.R. 535. Referred to: *Brackenborough* v. *Spalding U.D.C.*, [1942] 1 All E.R. 34; *Searle* v. *Wallbank*, [1947] 1 All E.R. 12; *Wright* v. *Callwood* (1950), 66 (pt. 2) T.L.R. 72.

As to animals trespassing on highway, see 1 Halsbury's Laws (3rd Edn.) 670, 671, and for cases see 2 Digest (Repl.) 316 et seq.

Cases referred to:

(1) *Harris* v. *Mobbs* (1878), 3 Ex.D. 268; 39 L.T. 164; 42 J.P. 759; 27 W.R. 154; 26 Digest (Repl.) 500, *1826*.

(2) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, *187*.

(3) *Jones* v. *Lee*, post, p. 313; (1911), 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125; 2 Digest (Repl.) 320, *193*.

Also referred to in argument:

Tillett v. *Ward* (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546; 47 J.P. 438; 31 W.R. 197; 2 Digest (Repl.) 310, *139*.

Hadwell v. *Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, *191*.

Higgins v. *Searle* (1909), 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301; 7 L.G.R. 640, C.A.; 2 Digest (Repl.) 320, *192*.

Fletcher v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 313, *164*.

Appeal by the defendant from a decision of the Divisional Court (Phillimore and Horridge, JJ.), reported 104 L.T. 460, in which the learned judges differed, on an appeal from a decision of Romford County Court awarding the plaintiff £75 damages for injuries sustained by the plaintiff owing to the defendant's cattle

straying on the highway. HORRIDGE, J., held that the fact that the defendant's gate was open at 10.30 p.m., and that his cows strayed on to the highway, afforded some evidence of negligence on the part of the defendant, and that, this not having been displaced by the defendant's witnesses, the decision of the learned judge was right. PHILLIMORE, J., held that the learned judge was wrong in holding that the fact that the defendant's gate was open imposed the burden upon him of showing that it was not so open owing to his negligence or that of his servants, and that the onus was on the plaintiff to prove that such was the case. The defendant's appeal was, therefore, dismissed, but leave was given to appeal further. The defendant appealed to the Court of Appeal.

Hohler, K.C., and *C. E. Jones* for the defendant.
E. B. Charles for the plaintiff.

VAUGHAN WILLIAMS, L.J.—I should be very sorry indeed to say anything in this case which might encourage the notion that there is no duty on the part of farmers or cattle dealers and others to take care and prevent cattle which are under their charge or control from going on to the highway in such a way as to obstruct the user of it and make it unsafe and dangerous to those using it. It is not necessary for me in deciding this case to affirm such a proposition. It seems to me that whether you call it negligence or nuisance the action will not lie unless there has been injury to a particular person or damage to particular property, and you prove that there has been a neglect of duty or that there are such facts as show that the defendant ordered such things to be done with reference to the cattle as would necessarily result in their being a nuisance on the highways. If that is proved, I am hopeful that there is nothing in our law which would relieve those having the control of cattle from their obligation in this respect or make it impossible to enforce abstinence by those who have cattle under their control from any actions which may result in the highway being obstructed and rendered dangerous by such cattle. That proposition is, in fact, affirmed in *Harris* v. *Mobbs* (1), the headnote of which is as follows (3 Ex.D. at p. 268):

> "In an action under Lord Campbell's Act (9 & 10 Vict., c. 93, s. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, and by the inherent vice of the mare combined, and that there was no contributory negligence: Held, that on these findings the verdict and judgment must be for the plaintiffs; for the unauthorised, unreasonable, and dangerous user of the highway by the defendant was the approximate cause of the injury."

That was the case of a van standing in the highway, but the principle is the same as to animals.

I think that if an owner of cattle by his acts makes the highway dangerous, then that case is an authority in point here that he may be sued. At the same time, I am far from saying that it is impossible that a man should be sued for putting his cattle in such a place or position that the natural result is that they go out of that place or position and if in large numbers obstruct the highway and cause damage to those who use it. The difficulty which counsel for the plaintiff has had in this case has been uncomfortably present to him, and it is this—namely, that the judgment of the learned county court judge begins with these words: "The defendant's gate being open it is for him to prove how it became open." I assume that that only means the onus of explaining the open gate. The outcome of all this then is that it is impossible here to state any duty which the defendant owed to the public or those using the highway, and which he neglected. There is no evidence of any negligence on his part at all. I do not agree that the mere fact of the gate being found open will make the defendant liable unless it is proved that it was left open by his negligence.

In my opinion, there is no evidence in which the county court judge could find that the defendant either by an act of his own or by the neglect of any duty which he owed to the public or any individual, produced this obstruction of the road by his cattle. On the evidence as it stands the gate was left by the defendant in such a condition that it was quite safe unless somebody out of mischief or mere thoughtlessness did something which would let the cattle out. In my opinion, there is no duty cast on an owner of cattle in the nature of a warranty that his cattle will not get out of the field. In these circumstances it is not necessary for me to examine all the cases that have been cited. *Cox* v. *Burbidge* (2) is the first of these, and the headnote is as follows (13 C.B.N.S. at p. 430):

> "The defendant's horse being on a highway, kicked the plaintiff, a child who was playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick: Held, no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence."

I do not think it is necessary for me to say more than that the principle laid down in that case, which has never been impeached, covers the present one. Here there is no such act or negligence by the defendant as would render him liable. In my judgment this appeal must be allowed, the judgment of the county court judge set aside, and judgment must be entered for the defendant.

BUCKLEY, L.J.—In my opinion, the defendant is entitled to judgment for reasons which are cumulative. In the first place there is at common law no obligation on the part of the owner or occupier of land who depastures cattle near a highway to provide any fences so as to prevent the cattle from getting into the highway. This was pointed out by BANKES, J., in the recent case of *Jones* v. *Lee* (3). Instances are very common in this country in which cattle are depastured on land which is not fenced at all. The first ground, therefore, is that at common law the defendant is entitled to say that he is not bound to keep his cattle off the highway by a fence, and if in fact, there were evidence that the defendant by his agent had left the gate open, it would not raise any implication of negligence against the defendant. It might be different if he had vicious animals in his field. But even if the facts had been that the defendant himself left the gate open, that alone would not have left the plaintiff entitled to recover. In the second place, whether that is so or not, the defendant may say there is no evidence that he left the gate open. The evidence is that between about five or six o'clock a labourer passed the gate and said it was then closed. At 10.30 it was open because the plaintiff saw the cows coming out in the road. There is no evidence to show what happened in the interval.

Counsel for the plaintiff was driven to say that the negligence of the defendant consisted in this, that he neglected to take steps to prevent the negligence of others. He said the defendant ought to have put a proper padlock on the gate. In my opinion there is no such obligation resting on the defendant. The onus of proof of negligence on the part of the defendant is on the plaintiff: see *Cox* v. *Burbidge* (2). ERLE, C.J., says (13 C.B.N.S. at p. 436):

> "The simple fact found, is that the horse was on the highway. He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some inclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff."

Applying the principles there laid down to the facts of the present case, the simple facts here are that at 10.30 the gate was open and the cattle were on the highway. They may have been there without any negligence on the part of the defendant. There is no evidence of the neglect of any duty owing by the defendant to the public.

The county court judge begins his judgment by saying: "The defendant's gate being open it is for him to prove how it became open," later on he says: "When a man has cattle in his field and the gate is open and the cattle escape, does it put the burden of proof on the defendant to show how that gate came open? I think it does." And further on: "The owner must keep his gate shut, and he must show there was no negligence." I think he put the onus on the wrong shoulders. It is not for him to prove how the gate became open. It is, in my judgment, sufficient for him to prove that when his servant left the field the gate was shut.

But, in the third place, even if he proved that the defendant allowed it to be open it would still remain to be proved that the animals were such as would be likely to injure persons being in the highway, which is precisely the case of *Cox* v. *Burbidge* (2). I can find no evidence here to show that these cows were vicious animals. In my opinion, therefore, the plaintiff failed to make any case, and the defendant here is entitled to judgment.

KENNEDY, L.J.—In dealing with this case I do not wish to make any hypothetical case. I am content to deal with the case on the one point on which it is clear that the appellant is entitled to succeed. I think the learned county court judge was wrong in holding that there was any evidence that the mischief happened to the plaintiff through the negligence of the defendant. He has assumed that there was negligence from the fact that the gate was open without showing that that was caused by any act or omission of the defendant or his servant. I desire to reserve the question of law whether there is a right in existence for travellers along the highway not to have proper gates and fences except in special circumstances. It is a matter of history that it is so in the case of commons where the highway has been dedicated subject to rights of common on both sides. And I should also be slow to infer that because a harmless cow or sheep is allowed to get into the highway without giving rise to a cause of action that rule applies to crowds of cattle whose mass might constitute an obstruction to travellers along the highway. There may be a case of duty arising in the case of a mass or number, even of the most harmless animals which would not apply where it was only the case of a single animal.

I wish to leave all these interesting questions to be dealt with when they arise. What we have to say is whether the learned county court judge was right in saying that there was evidence of negligence against the defendant. I think clearly there was no such evidence. The fact that the defendant's gate was open threw no burden on him to show how it was open. The evidence is that it was a good gate and was properly closed at six that evening so as to prevent cattle coming out and molesting people. That being so, there is nothing to show that either the defendant or his servant were guilty of any negligence. Counsel for the plaintiff suggested that the defendant was at fault in this that he had not provided the gate with a padlock which was a different case. The county court judge has taken no notice of that suggestion. He has said that the mere fact that the gate was open raised a presumption to show negligence on the part of the owner of the cattle. I can see no ground for saying that, and I think, therefore, this appeal must be allowed.

VAUGHAN WILLIAMS, L.J.—I wish to say emphatically that I do not think it is true law that a farmer is entitled to turn out untended cattle on pasture adjoining a highway without a fence to such a number that they are likely to obstruct the highway by day or night without being liable to an action by those who, using the highway, are injured by the obstruction.

Appeal allowed.

Solicitors: *Griffith & Gardiner; R. H. Bentley*, for *Albert H. Symons*, Romford.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

CALEDONIAN RAIL. CO. *v.* GLENBOIG UNION FIRECLAY CO.

[House of Lords (Lord Loreburn, L.C., Lord Macnaghten, Lord Shaw and Lord Robson), April 27, 28, 1911]

[Reported [1911] A.C. 290; 80 L.J.P.C. 128; 104 L.T. 657; 75 J.P. 377]

Minerals—Exception from sale of land—"Mines and minerals"—Fireclay of exceptional use, value and character.

No definition of the word "minerals" is attainable. In deciding whether or not in a reservation of minerals out of a grant of land exceptional substances are minerals the court must ascertain the intention and the relative position of the parties to the contract and whether in the vernacular of the mining world, the commercial world, and the landowner the particular substance is a mineral.

The respondent company conveyed certain lands to the appellant railway company, mines and minerals being reserved under s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845. Fireclay lay in seams at a depth varying from 60 ft. to 140 ft. below the surface in close proximity to the railway line, obtained by underground workings being of special quality and used in making goods capable of resisting a great heat.

Held: applying the above test, the fireclay was a mineral, being of exceptional character as to its properties and value and was not present in such large quantities as to destroy its exceptional character.

Notes. Considered: *Waring* v. *Foden*, *Waring* v. *Booth Crushed Gravel Co., Ltd.*, [1931] All E.R. Rep. 291. Referred to: *Barnard-Argue-Roth-Stearns Oil Co.* v. *Farquharson*, ante, p. 190; *Symington* v. *Caledonian Rail Co.*, [1912] A.C. 87; *Australia Commonwealth* v. *Hazeldell*, [1921] 2 A.C. 373, *A.-G. for Isle of Man* v. *Moore*, [1938] 3 All E.R. 263.

As to meaning of "minerals," see 26 Halsbury's Laws (3rd Edn.) 320 et seq., and for cases see 34 Digest 606 et seq.

Cases referred to:

(1) *North British Rail. Co.* v. *Budhill Coal and Sandstone Co.*, [1910] A.C. 116; 79 L.J.P.C. 31; 101 L.T. 609; 26 T.L.R. 79; 54 Sol. Jo. 79, H.L.; 34 Digest 607, *43*.

(2) *Great Western Rail. Co.* v. *Carpalla United China Clay Co.*, [1910] A.C. 83; 79 L.J.Ch. 117; 101 L.T. 785; 74 J.P. 57; 26 T.L.R. 190; 54 Sol. Jo. 150, H.L.; 11 Digest (Repl.) 162, *358*.

Also referred to in argument:

Glasgow Corpn. v. *Farie* (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 34 Digest 604, *12*.

Great Western Rail. Co. v. *Blades*, [1901] 2 Ch. 624; 70 L.J.Ch. 847; 85 L.T. 308; 65 J.P. 791; 17 T.L.R. 693; 45 Sol. Jo. 707; 34 Digest 608, *50*.

Re Todd, Birleston & Co. and North Eastern Rail. Co., [1903] 1 K.B. 603; 72 L.J.K.B. 337; 88 L.T. 366; 19 T.L.R. 249; sub nom. *Re North Eastern Rail. Co. and Todd, Birleston & Co.*, 67 J.P. 105, C.A.; 11 Digest (Repl.) 162, *357*.

North British Rail. Co. v. *Turners* (1904), 6 F. (Ct. of Sess.) 900; 11 Digest (Repl.) 163, **429*.

Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co. v. *Robinson* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100, H.L.; 11 Digest (Repl.) 162, *353*.

Appeal from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Dunedin), Lord Kinnear, Lord Johnston, and Lord Salvesen, who had affirmed a judgment of the Lord Ordinary (Lord Skerrington), reported 1910 S.C. 951.

The action was brought by the appellant company to restrain the respondent company from working a seam of fireclay under, or in close proximity to their line of railway. The respondents contended that the clay which was found in seams lying at a considerable depth below the surface, and was obtained almost entirely by underground workings, and was of a special quality used for making goods which were capable of resisting great heat, was a "mineral" within the reservation in s. 70 of the Railway Clauses Consolidation (Scotland) Act, 1845, and had not passed to the railway company. The courts below adopted this view, and the railway company appealed.

J. Avon Clyde, K.C., and *W. Watson* (both of the Scottish Bar) for the appellants.

The Dean of Faculty (*Scott-Dickson, K.C.*) and *Macmillan* (both of the Scottish Bar) for the respondents.

LORD LOREBURN, L.C.—This case is one of a class which has been, and I suppose always will be, of exceptional difficulty, as will every case in which the decision really depends upon a question of degree. The principle of the decisions of this House in *North British Rail. Co.* v. *Budhill Coal and Sandstone Co.* (1) and *Great Western Rail. Co.* v. *Carpalla United China Clay Co.* (2) seems to me to have been this: The court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of "minerals" is attainable, the variety of meanings of which the use of the word admits being itself the source of all the difficulty. It must be taken that what the railway company intended to get, and the landowner intended to give, was the land under the line for the object was to give not a wayleave, but a support. I say this speaking generally. On the other hand if anything exceptional in use, character, or value was thereunder, it was reserved, provided that it could be included under the word "minerals," as understood in the vernacular of the mining world, the commercial world, and the landowner.

Now applying that principle to the present case, it is not doubtful that the substance contained in the lowest seam, at least as to three-quarters of it, was a "mineral" within the vernacular which I have mentioned. It is said that the persons who used that language also included not merely the remaining fourth of the lowest seam, but the clay contained in all the other seams. I will assume that it is so; but it is in fact no answer to say that the vernacular has a wider application than it would have if it were restricted solely to "Glenboig fire clay." The evidence given as to common meaning is evidence of the common meaning at the present day. I should assume that it was the same at the time of the sale unless sufficient ground was given for coming to a different conclusion. The particular seam now being worked to which alone the present decision of your Lordships will apply, is certainly of an exceptional character as to its properties and value, upon the evidence before us, and it is not established by the evidence that it is present in such large quantities as to destroy its exceptional character. It is impossible in my opinion, to give further assistance in ascertaining when a substance is to be treated as a "mineral" within the Act of Parliament, than we have endeavoured to give in the cases which have been already cited, and in any observations which may have been made in the course of the present case.

LORD MACNAGHTEN, LORD SHAW and **LORD ROBSON** concurred.

Appeal dismissed.

Solicitors: *Grahames, Currey & Spens*, for *Hope, Todd & Kirk*, Edinburgh, and *Hugh Reid Buchanan*, Glasgow; *Walker, Martineau & Co.*, for *Morton, Smart, Macdonald & Prosser*, Edinburgh, and *Craig & Henderson*, Glasgow.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

MORAN AND ANOTHER *v.* JONES

[King's Bench Division (Lord Alverstone, C.J., Bray and Bankes, JJ.), April 7, May 1, 1911]

[Reported 104 L.T. 921; 75 J.P. 411; 27 T.L.R. 421; 22 Cox, C.C. 474]

Criminal Law—Vagrancy—Rogue and vagabond—"Found upon dwelling-house for any unlawful purpose"—Discovery on premises doing that which constitutes the unlawful purpose—Need for apprehension on premises—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By s. 4 of the Vagrancy Act, 1824 ". . . every person being found in or upon any dwelling-house . . . for any unlawful purpose . . . shall be deemed a rogue and vagabond."

Held: to constitute the offence the accused must be discovered on the premises doing the acts or things which of themselves constitute the unlawful purpose, but actual apprehension on the premises is not necessary to constitute the offence.

Notes. Referred to: *R.* v. *Goodwin*, [1944] All E.R. 506.

As to rogues and vagabonds, see 10 Halsbury's Laws (3rd Edn.) 698 et seq., and for cases see 15 Digest (Repl.) 925 et seq. For the Vagrancy Act, 1824, see 18 Halsbury's Statutes (2nd Edn.) 202.

Cases referred to:

(1) *R.* v. *Simpson* (1851), 15 J.P. 246.

(2) *R.* v. *Howarth* (1828), 1 Mood. C.C. 207, C.C.R.; 15 Digest (Repl.) 990, *9703*.

Also referred to in argument:

Griffith v. *Taylor* (1876), 2 C.P.D. 194; 46 L.J.Q.B. 152; 36 L.T. 5; 41 J.P. 340; 25 T.L.R. 196, C.A.; 14 Digest (Repl.) 207, *1710*.

Clark v. *R.* (1884), 14 Q.B.D. 92; 52 L.T. 136; 49 J.P. 246; 15 Cox, C.C. 666; sub nom. *R.* v. *Clark*, 54 L.J.M.C. 66; 33 W.R. 226; 1 T.L.R. 109, D.C.; 15 Digest (Repl.) 926, *8879*.

Horley v. *Rogers* (1860), 2 E. & E. 674; 29 L.J.M.C. 140; 2 L.T. 171; 24 J.P. 582; 6 Jur. N.S. 605; 8 W.R. 392; 121 E.R. 253; 14 Digest (Repl.) 207, *1716*.

Kirkin v. *Jenkins* (1863), 2 New Rep. 64; 32 L.J.M.C. 140; 9 Jur. N.S. 1013; 15 Digest (Repl.) 927, *8885*.

Case Stated by Southampton justices.

An information was preferred by William Edward Jones (hereinafter called the respondent) under the Vagrancy Act, 1824, s. 4, against Frank Moran and Henry Johnstone Devine (hereinafter called the appellants) for that they on Dec. 11, 1910, unlawfully were found on certain premises—to wit, the South-Western Hotel—for an unlawful purpose.

On Sunday, Dec. 11, 1910, about 9 p.m., the appellant Moran went to the office in the South-Western Hotel which adjoins the docks station and the docks at Southampton. He was with a traveller named Englander. Englander asked the cashier for a room. The appellant Moran then said to the cashier: "I may want a room, I am not sure," at the same time saying that his name was Gordon, which was false. There were quite twenty people mostly boat passengers standing in or about the office at that time waiting to book rooms. Englander, the appellant Moran, and the appellant Devine then went into the bar together. The appellant Devine engaged a room giving his name as Johnstone which was false, and the appellant Moran afterwards engaged a room for himself. One of the rooms so engaged was paid for, but the other was not. A chambermaid went to the room so engaged by Englander on four occasions, and on each occasion there found Englander and the two appellants and supplied them altogether with four drinks each. At 11.45 she saw Englander in his room alone. The appellants did not

sleep at the South-Western Hotel on that night notwithstanding their having engaged the rooms. On the contrary, at one o'clock a.m. the same night the appellants engaged a room at an hotel near the Southampton West Station, a distance of nearly two miles from the South-Western Hotel, and there had three or four drinks which the appellant Devine paid for, changing for that purpose a £5 note. The appellants requested to be and were in fact called at 5.30 a.m., stating that they wished to go to America by an early boat. They then went to bed and subsequently left the hotel last mentioned about 6 a.m. on Dec. 12. The appellants did not go to America, but to Bournemouth, and later in the same day Detective Carter proceeded to Bournemouth, where he found them in custody. The superintendent of police at Bournemouth handed to the detective two 100 dollar bills, a £5 Bank of England note, and 150 dollars in American gold which property had been found by him on the appellant Devine. The detective charged the appellants with stealing two 100 dollar bills and other money the property of Englander at the South-Western Hotel on Dec. 11. The appellant Devine asked the detective if Englander had left Southampton, and on the detective telling him he could not say Devine said: "If he has not left and I can see him, I will try and come to some arrangement with him, and if your can square it for me I will give you ten pounds." Devine did not say that Englander had paid him the money for a debt. Another chambermaid at the South-Western Hotel found dice on the floor in the room so engaged and occupied by Englander on the morning of Dec. 12. The appellants met each other on Dec. 11 aforesaid by design and not by accident in the train that went from London to Southampton, and their destination was the South-Western Hotel at Southampton, where passengers intending to go to America by the boat leaving the next morning would stay the night, and the appellants did not at that time intend to journey to Bournemouth. The appellants met Englander in the train. Englander did not pay money to the appellants or either of them, and the money found upon the appellant Devine by the police at Bournemouth was not money handed over to him by Englander in respect of gaming or other debts, nor was any such money due. The appellants left the South-Western Hotel and walked nearly two miles to and slept the night at the hotel close to the Southampton West Station for the purpose of concealing their whereabouts and leaving the town by the Southampton West Station early the next morning before the passengers for America sailed. The appellants never intended to sail to America on Dec. 12 or at all. The appellants gave false names respectively to hide their identity. The appellant Moran did not give a false name for the purpose of concealing from his wife that he was meeting a woman named Hamilton, nor was he in fact meeting Hamilton or any other woman.

The appellants contended: (i) That they were not found on Dec. 11, 1910, in or upon the South-Western Hotel within the meaning of the Vagrancy Act, 1824, s. 4, they having been arrested on Bournemouth Railway Station on Dec. 12, 1910, upon a charge of felony, and were only charged with the offence of which they were convicted on Dec. 21, 1910, whilst in custody upon the charge of felony; and (ii) that they were arrested in consequence of a complaint that a felony had been committed at the hotel, and evidence was given to the effect that a felony had in fact been committed there, and therefore that they could not be convicted of the lesser offence. They quoted *R.* v. *Simpson* (1). The justices were of opinion that the appellants travelled to Southampton and waited about the South-Western Hotel for the purpose of coming into contact with passengers who they knew were leaving for America by the boat which left the Southampton Docks the next day, and that their purpose in so doing was to obtain unlawfully goods or money from such passengers by fraud or theft, and they convicted the appellants.

Sir F. Low, K.C., and *J. P. Valetta* for the appellants.
S. H. Emanuel for the respondent.

Cur. adv. vult.

May 1, 1911. The following judgments were read.

A **LORD ALVERSTONE, C.J.**—This is an appeal against the convictions of the appellants, F. Moran and H. J. Devine as rogues and vagabonds, under s. 4 of the Vagrancy Act, 1824. The facts which are stated in the Special Case may be shortly summarised. The appellants were on Sunday, Dec. 11, at 9 p.m., in the South-Western Hotel, Southampton, under suspicious circumstances, giving false names and making false statements as to their intentions. They were seen by a B chambermaid on the same evening on four occasions in the room of a person named Englander. Later in the same night, about 1 a.m., they engaged a room at an hotel in Southampton two miles from the South-Western Hotel and were arrested in the afternoon of the next day at Bournemouth, and a quantity of American money was found upon them, which money they were charged with stealing from Englander. There was no evidence of the circumstances under which either of the defendants C became possessed of the money except that it was not handed over by Englander in respect of gaming or other debts. They were not charged under s. 4 of the Vagrancy Act, 1824, until Dec. 21.

In my opinion, the words

> "found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any enclosed yard, garden, or area for any unlawful purpose" D

ought not to be construed too strictly, and if a charge had been made against the defendants under that section on the night of the 11th, or on the next day, the fact that they were not arrested until late the following afternoon would not, in my judgment, prevent the magistrates from convicting. On the other hand, there was not, in my opinion, any evidence that they were supposed on the 11th to have E been in or upon the dwelling-house for any unlawful purpose. It is to be noted that s. 6 of the same Act gives any person a right to apprehend a person so found offending without warrant, and to take him before a justice of the peace; and my present view is that there must be a charge brought against the accused of an offence under the section in respect of which he is taken before the justice, and the Act does not contemplate such a charge being preferred after a considerable F interval of time, and particularly after he has been arrested upon another charge, and was not originally arrested on suspicion of an offence under the section. This view is supported by the decision in *R.* v. *Howarth* (2). For these reasons I think the appeal must be allowed and the conviction quashed.

G **BANKES, J.** (read by **BRAY, J.**, who said he concurred in it).—In this case the appellants were convicted by the justices of Southampton on an information which charged the appellants under the Vagrancy Act, 1824, s. 4, with having been found on Dec. 11, 1910, on the South-Western Hotel at Southampton for an unlawful purpose. The questions which the justices submit for the decision of this court under the Special Case which they have stated is whether, upon the facts set out in that Case they came to a right and correct determination and decision in point H of law. The answer to the question whether the justices have come to a correct decision in point of law depends on what is the true construction to be put upon the words of the section under which the appellants were charged, and which defines the offence as

> "being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area for any unlawful purpose." I

In order to be found upon premises a person must be upon those premises, and the offence, therefore, consists in being upon premises for an unlawful purpose and being found there. It is not, in my opinion, sufficient for a person to be upon the premises for an unlawful purpose unless he is also found there. What constitutes a finding within the meaning of the section? The simplest case would be a case of apprehension upon the premises. Actual apprehension upon the premises is, however, in my opinion, not necessary to constitute the offence. I think that there

may be many cases in which a person is found upon the premises within the meaning of the section although he is not apprehended until after he has quitted the premises. To constitute the offence a person must, in my opinion, be discovered upon the premises doing the acts or things which of themselves constitute the unlawful purpose. It may be that evidence is admissible of what a person did before he entered the premises or after he left them to explain the nature of the acts or things which he was discovered doing upon the premises themselves; such evidence must, however, in my opinion, be strictly confined to this purpose.

In the present case the appellants were arrested on suspicion of having stolen money and valuable securities from a man named Englander, in whose company and in whose room at the hotel they had been on the night in question. The charge was not proceeded with, presumably because Englander had left the country and was not available as a witness, and there was no evidence before the justices that the money or securities were Englander's property, and that they were in his possession at the hotel on the night in question. Any reference to the money and securities found on the appellant Devine must therefore be excluded from consideration. The only acts or things which the appellants were discovered doing at the hotel were (i) the booking of bedrooms in names other than their own names, and (ii) the spending of a considerable time with Englander drinking with him in his room. In my opinion, there was no evidence before the justices upon which they could properly come to the conclusion that these acts by themselves or as explained by the previous or subsequent conduct of the appellants (so far as it was admissible in evidence) constituted an unlawful purpose, and for these reasons I come to the conclusion that the appellants were not found upon the hotel for an unlawful purpose.

Appeal allowed.

Solicitors: *Harry Pfahl & Causton; Church, Adams & Co.*, for *R. R. Linthorne*, Southampton.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

JONES AND ANOTHER *v.* LEE

[KING'S BENCH DIVISION (Hamilton and Bankes, JJ.), November 24, 1911]

[Reported 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125]

Animal—Highway—Animal straying on highway—Liability of owner of land adjoining highway—Horse—No evidence of vice—Gap in hedge—Injury and damage to plaintiff.

At common law the owner of land adjoining a highway is under no duty to fence his land so as to keep his animals (being quiet and inoffensive animals and not known by the owner to be dangerous) off the highway.

A horse, which the defendants had placed in a field adjoining the highway, escaped owing to a defective hedge and strayed on the highway. The plaintiffs, who were riding a tandem bicycle along the highway, slowed down on seeing the horse, but the horse suddenly ran across the road, came into contact with the bicycle, damaging the machine and injuring one of the plaintiffs. There was no evidence that the horse was vicious or in the habit of attacking bicycles or anyone on the highway.

Held: the defendant was under no duty to keep the horse from straying on the highway, and, therefore, was not liable for the damage which resulted.

Per CURIAM: Assuming that the defendant had been under a duty of care, in order to succeed the plaintiffs would have to show not only that the defendant was guilty of negligence in allowing the horse to get on the highway, but that the horse was one which to the owner's knowledge was of the particular disposition to cause the particular damage complained of, and this the plaintiffs had failed to do.

Notes. Section 135 (1) of the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn. 555) which imposes penalties in connection with straying animals does not confer a civil action for damage caused by animals straying on the highway: see *Heath's Garages, Ltd.* v. *Hodges*, [1916–17] All E.R. Rep. 358.

Considered: *Heath's Garages, Ltd.* v. *Hodges*, [1916–17] All E.R. Rep. 358. Referred to: *Ellis* v. *Banyard*, ante, p. 303; *Brackenborough* v. *Spalding U.D.C.*, [1942] 1 All E.R. 34; *Searle* v. *Wallbank*, [1947] 1 All E.R. 12.

As to animals trespassing on the highway, see 1 HALSBURY'S LAWS (3rd Edn.) 670, 671, and for cases see 2 DIGEST (Repl.) 316 et seq.

Cases referred to:

(1) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, *240*.

(2) *May* v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, *216*.

(3) *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, *219*.

(4) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 328, *215*.

Also referred to in argument:

Hadwell v. *Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, *191*.

Higgins v. *Searle* (1909), 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301; 7 L.G.R. 640, C.A.; 2 Digest (Repl.) 320, *192*.

Ellis v. *Banyard* (1911), 104 L.T. 460; 27 T.L.R. 417; 55 Sol. Jo. 500; reversed 106 L.T. 51; 28 T.L.R. 122; 56 Sol. Jo. 139, C.A.; 2 Digest (Repl.) 320, *195*.

Appeal by the plaintiffs from the decision of His Honour JUDGE REGINALD BROWN, K.C., at Market Drayton County Court in an action by the plaintiffs for damages for injuries caused by the defendant's horse straying on the highway and coming into contact with the plaintiffs' tandem bicycle.

H. Brandon for the plaintiffs.

Herman Cohen for the defendant.

HAMILTON, J.—On April 2, 1911, the two plaintiffs were riding a tandem bicycle somewhere on the road between Market Drayton, Salop, and Audlem, Cheshire, and as they came down an incline on a curving road they espied a cart-horse unattended in front of them, alone upon the road. They applied their brakes and slowed down, but according to their account of it—the only account that could be given—"the horse turned round suddenly and ran across to the other side into us and its front legs fixed in the front wheel. Then it jumped up suddenly and lashed out to get free, and the machine was wrecked." The horse was knocked down by the bicycle. It turned to the left, as I understand it, towards the bicyclists. It was startled, and in falling the horse fell on the wheel, and the plaintiffs further said that "if the horse had waited an instant longer, we should have crossed it." Under those circumstances, this action was brought in the county court for damages which the learned county court judge assessed at £15. We have the judge's note of the evidence. We have not any note of his judgment, but we have a report, verified by affidavit, taken by an experienced report. It is not a verbatim report, but the ordinary condensed report such as an experienced reporter takes, which reports the language of the learned judge in indirect speech and, to a large extent, undoubtedly condenses it. That is what we have to rely upon for ascertaining the conclusion of the judge, which was that he gave judgment for the defendant. Against that judgment the plaintiffs now appeal, upon the ground that the judge was wrong in law and misdirected himself as to the law applicable to the facts before him.

I think the plaintiffs are right in saying that the learned judge negatived contributory negligence in fact, and negatived also any suggestion that the accident was the plaintiffs' fault. The horse was found by the judge to be free from vice, and it was said it had not been shown that it was in the habit of trespassing on the highway, or going for bicyclists or anyone else upon the high road. For some unexplained reason it took it into its head to go across the road at the very moment the bicycle was passing. The learned county court judge, in giving judgment, said

> "that he must find as a fact, supposing the case should go any further, that the defendant was guilty of negligence in law in turning the young horse, although a quiet animal, into a field the hedges of which were defective. In that respect there was negligence on the part of the defendant. The question then arose whether the plaintiffs, in law, could recover for that negligence."

Now I fail to understand what the learned judge meant by saying that he must find as a fact the defendant was guilty of negligence in law, and I cannot help thinking that possibly the reporter has failed quite to appreciate the learned judge's meaning and to express it so as to do justice to what he said. But assuming that the learned judge came to a conclusion of law in this matter which we should have to consider, his conclusion of law is that the defendant was guilty of negligence in law because he put a quiet young horse into a field with defective hedges. Stopping there and without any qualifications as to where the horse might go if it got out, and what it might do if it got out, and to whom it might cause injury if it got out, it seems to me that the proposition is much too wide to be sustainable. But he passes on to say: "The question then arose whether the plaintiffs in law could recover for that negligence." If the plaintiffs were to recover in law for that negligence, apart altogether from the authorities that have been discussed, it is quite plain that the learned judge had to find what would be a matter of fact, viz., that it was the natural and direct consequence of putting the horse into the field

with defective hedges that the horse would foul the plaintiffs' bicycle. It does not appear from the evidence how long the horse had been upon the road, what it had been doing since it escaped, or anything, except that it was upon the road and except one scrap of evidence that somebody said the defendant said that he had just turned the horse into the field. I think, however, it is quite clear that the learned judge did not find as a fact that it was the direct consequence of putting the horse into the field that it got across the bicycle of the plaintiffs. It is said that the learned judge's next words must be supposed to fill up that gap:

> "He confessed until those authorities were quoted he should have said if asked that the plaintiffs would have been entitled to recover, but he was quite unable to distinguish the case from the authorities that had been cited to him. The only question was whether the present case was distinguishable from *Cox* v. *Burbidge* (1)."

I certainly cannot read that myself as equivalent to a finding of fact that there was a direct and natural cause or connection between any negligence in law, as he calls it, in putting the horse into the field, and the accident to the plaintiffs' bicycle. That in itself seems to me to be enough to dispose of the appeal, because the plaintiffs' cause of action clearly was negligence and nothing else. The plaintiffs had to get a finding of fact from the learned judge sufficient to carry their case home, and without that finding of fact their case necessarily failed.

The learned judge, however, goes on to say that he did not think there was any distinction that could be usefully drawn between *Cox* v. *Burbidge* (1) and the present case. What I think was in the learned judge's mind was this, that there were two classes of liability which are quite distinct, and which frequently, at any rate, depend on different considerations. One is the class of liability that arises from keeping a dangerous animal—an animal not feræ naturæ, but an animal of which the law takes cognisance of as having dangerous propensities. As for that class of case the question of liability has been frequently discussed and theories laid down. *Cox* v. *Burbidge* (1), *May* v. *Burdett* (2) and *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (3) are the well-known authorities upon that. There is then another class of case where animals, be they tame or be they ferocious, have escaped on to another man's land and there done damage as to which the law is clear enough and need not be recalled. This case is neither the one nor the other of those, but the learned judge had before him passages in *Cox* v. *Burbidge* (1) in which it is said (I am reading now from ERLE, C.J., 13 C.B.N.S. at p. 436):

> "The simple fact found is that the horse was on the highway. He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it."

The context shows the court is not referring there to the natural habit of a horse to stroll along instead of standing still, or to its being startled if some strange vehicle comes upon it from behind, but to the propensity of dogs which worry sheep and the propensity of bulls and cows to attack passers-by. Then WILLIAMS, J. (it is true in a like connection), says:

> "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary

consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognisable by law."

Then the judgment of WILLES, J., is to the like effect.

"The important circumstance in this case is, that the act was not in accordance with the ordinary instinct of the animal which was not shown to be of a mischievous disposition. Does, then, the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine. But that is not the cause of the mischief here. It comes round, therefore, to the question, whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief."

In this connection the well-known judgment of BLACKBURN, J., in *Fletcher* v. *Rylands* (4) may be referred to. He there said (L.R. 1 Exch. at p. 280):

"The law as to 'cattle' seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too."

The learned judge had *Cox* v. *Burbidge* (1) and other similar cases before him and I take it has said to himself "This is not the case of injury done by a vicious horse with proof of scienter on its owner's part. It is the case of a domestic animal which is in fact not vicious. It is not the case of trespass on the adjoining owner's property and injuries done by the trespass through defects in the defendant's fence. It is not a case of an attack upon the person of the plaintiff by some ferocious animal; it is simply what is called an action for damages for negligence where the injury resulted from some breach of duty towards the plaintiff on the part of the defendant." The learned county court judge goes on to say,

"Having had those cases brought to my attention, I do not think that the circumstances of this case connect the injury done with the negligence which I have found in turning a young horse, though a quiet animal, into a field the hedges of which were defective."

If that is so his judgment was rightly entered for the defendant, and it becomes unnecessary to consider what qualifications ought to have been added to his proposition to make it right in law to say that there was negligence in the sense of a breach of duty towards the plaintiff in putting the young horse, though a quiet animal, into a field the hedges of which were defective.

The result is that the plaintiff's appeal fails because, without discussing at large authorities which I think are well settled and well known, it is plain that they never obtained from the county court judge an integral part of the finding of fact which constituted a proper cause of action. The appeal will therefore be dismissed with costs.

BANKES, J.—I agree. This case is no doubt one of very considerable importance to owners and occupiers of land adjoining a highway. I think that the law really with regard to such persons and their liability for straying animals upon the highway is very well settled, and I think that the learned judge quite correctly

appreciated what the law was and correctly applied it. The law undoubtedly is different with regard to a straying animal which is known by its owner to be a dangerous animal and the law applicable to an animal which is a quiet inoffensive domestic animal, or, at any rate, an animal not known by its owner to be dangerous. I do not propose to say anything with regard to the liability of an owner of a dangerous animal which is found straying on the highway and causes damage to a passer-by, because that question does not arise in this case. The question in this case has reference only to an ordinary domestic animal which the county court judge has found to have been a quiet animal, and, at any rate, not known to be dangerous. The plaintiffs were ordinary passers-by on the highway, and if they meet with an accident on the highway from collision with a straying animal, in order to succeed against the owner of that animal, assuming it to be a quiet inoffensive animal, and not known to its owner to be dangerous, they have got to establish that the injury of which they complain was the result of some breach of duty towards them on the part of the owner of that animal.

First of all, what is the duty of an owner or occupier of land adjoining a highway with regard to keeping animals off the highway or fencing his land so as to prevent animals getting on to the highway? By common law there is no such duty at all, and we have not today heard any argument as to whether any duty can be created under the Highway Act. I am not going to consider that for the purpose of my judgment. Suffice it to say by common law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highways. The plaintiffs therefore in this case seem to me to fail in establishing the first point which it is necessary to establish—namely, any duty as between the owner of this animal and themselves. The county court judge in my opinion was wrong in saying that he thought the defendant was guilty of negligence in law in turning the young horse, although a quiet animal, into a field the hedges of which were defective. But be that as it may, in order to succeed in this case the plaintiffs would certainly have to show, even assuming that the owner of this horse had been guilty of negligence in allowing it to get on to the highway, that the horse was one which to its owner's knowledge was of a disposition likely to cause the particular damage complained of. The county court judge has according to my reading of his judgment found that fact against the plaintiffs, and, therefore, whether he was right or wrong in his first finding, in my opinion it was necessary for the plaintiffs to establish the second proposition to which I have referred. Not only did they fail to establish it, but the county court judge upon the evidence found against them on it.

On those grounds I think the learned county court judge was quite right, and in this particular case the plaintiffs have entirely failed to show that there was any duty on the owner of this animal as between himself and the plaintiffs, and that the plaintiffs therefore wholly fail in establishing the case which they sought to establish against the defendant.

Appeal dismissed.

Solicitors: *Norris, Allens & Chapman*, for *T. H. Smith*, Audlem; *J. M. Voss*, for *A. E. Whittingham*, Nantwich.

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

WOODS *v.* WINSKILL

[CHANCERY DIVISION (Astbury, J.), June 10, 13, 16, 26, 1913]

[Reported [1913] 2 Ch. 303; 82 L.J.Ch. 447; 109 L.T. 399; 57 Sol. Jo. 740; 6 B.W.C.C. 934; 20 Mans. 261]

B

Company—Receiver and manager—Appointment by debenture holders—Notice of preferential claim—Assets exhausted by payments to non-preferential creditors—Liability of receiver.

A receiver and manager of a company appointed by debenture holders is liable for damages in tort if, after notice of a preferential claim, in breach of his statutory duty under s. 107 of the Companies (Consolidation) Act, 1908 [now s. 94 of the Companies Act, 1948], he exhausts the assets of the company in making payments to the ordinary creditors without first applying the assets or a sufficient part thereof in satisfying the preferential claim.

C

Notes. Considered: *Re Glyncorrwg Colliery Co., Ltd., Railway Debenture and General Trust Co., Ltd.* v. *The Company*, [1926] All E.R. Rep. 318; *Westminster City Council* v. *Haste*, [1950] 2 All E.R. 65. Referred to: *Leicester Permanent Building Society* v. *Butt*, [1943] 2 All E.R. 523.

D

As to preferential payment of debts, see 6 HALSBURY'S LAWS (3rd Edn.) 506, 507, and for cases see 10 DIGEST (Repl.) 827, 828. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

E

(1) *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87, C.A.; 42 Digest 759, *1858*.

(2) *Pulsford* v. *Devenish*, [1903] 2 Ch. 625; 73 L.J.Ch. 35; 52 W.R. 73; 19 T.L.R. 688; 11 Mans. 393; Digest (Repl.) 1060, *7361*.

(3) *Re Debenture-Holders' Actions*, [1900] W.N. 58; 16 T.L.R. 256; 10 Digest (Repl.) 841, *5535*.

F

Also referred to in argument:

Re Newspapers Proprietary Syndicate, Ltd., Hopkinson v. *Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349; 69 L.J.Ch. 578; 83 L.T. 341; 16 T.L.R. 452; 8 Mans. 65; 10 Digest (Repl.) 995, *6839*.

Action for breach of statutory duty.

G

An employee of Stone-Ground, Ltd. met with a fatal accident arising out of and in the course of his employment on Dec. 23, 1911, and died on Dec. 25, 1911. His widow's brother gave the company formal notice of the accident and death on Feb. 6, 1912, and stated that the amount of compensation payable to the widow under the Workmen's Compensation Act, 1906 [repealed] was £234. On Feb. 15, 1912 the defendant and Mead, who held a majority of the company's debentures, appointed the defendant receiver and manager of the assets and business under a condition in the debentures providing that the receiver should have all the powers conferred by the Conveyancing Act, 1881 upon a receiver appointed under that Act, and should have, in addition, power to take possession of the property charged, and carry on therewith the business of the company, appointing and employing managers, servants, and agents, and fixing and paying their remuneration, and also power to sell the property, and so that the receiver should be the agent of the company, who should alone be responsible for his acts and defaults. At the date of the appointment the principal of the debentures had become payable. The widow's brother wrote to the company again on Feb. 16, 1912. The defendant took possession as receiver and manager on Feb. 19, 1912, and it was held by the court that he had knowledge of the widow's claim. The assets consisted of £61, including £30 bad debts and £27 unpaid calls on the shares of H. M. Hyndman. Edgcome, another debenture-holder, was the managing

H

I

director of the company, at a salary of five guineas a week. The defendant acquiesced in his continuing to act and manage the concerns of the company, and the assets were applied in continuing the business. On Feb. 28, 1912 Edgcome informed the widow that a receiver was in possession, and advised her to wait. On Mar. 23, 1912, the widow's brother gave the defendant notice of the widow's claim for £234, and pointed out that it was a preferential claim. On April 1, 1912, the widow applied for an arbitration, and on May 14, 1912 she was awarded £234 and costs, taxed at £22, by the Bloomsbury County Court. Notice of the award was given to the defendant on May 24, 1912 and to the company on May 31, 1912. On July 20, 1912 a transfer of H. M. Hyndman's shares to Edgcome was passed at a board meeting. Twenty-seven pounds was still unpaid, but Edgcome was allowed to set it off against his salary. The company was wound-up on the widow's petition on Nov. 12, 1912, and the defendant went out of possession on Mar. 20, 1913. The accounts showed that the business was carried on at a loss, and no payment was made to the debenture-holders. The widow, on Jan. 23, 1913, sued the defendant on the ground that in breach of his statutory duty under s. 107 of the Companies (Consolidation) Act, 1908 [now see s. 94 (1) of The Companies Act, 1948] he had applied the company's assets in payment of ordinary creditors without priority for the preferential claim of £100.

The Workmen's Compensation Act, 1906 [repealed, but see s. 319 (f) of the Companies Act, 1948] provided by s. 5 (3):

> There shall be included among the debts which under s. 1 of the Preferential Payments in Bankruptcy Act, 1888, and s. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889 are in the distribution of the property of a bankrupt, and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefore accrued before the date of the receiving order or the date of the commencement of the winding-up, and these Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897 shall have effect accordingly.

Daw for the plaintiff.
Moses for the defendant.

Cur. adv. vult.

June 26, 1913. **ASTBURY, J.,** stated the facts and continued: In *Groves* v. *Lord Wimborne* (1) VAUGHAN WILLIAMS, L.J., said ([1898] 2 Q.B. at p. 415):

> "It cannot be doubted that where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

This was illustrated in *Pulsford* v. *Devenish* (2). A company went into voluntary liquidation and appointed a liquidator, and its business and assets were transferred as a going concern to a purchasing company in consideration of fully paid shares in the purchasing company, who covenanted to pay all the debts and liabilities of the liquidating company. The liquidator received the purchase consideration of fully-paid shares and distributed them among the shareholders of the liquidating company without making any provision for the creditors. FARWELL, J., said:

> "Now the defendant has told me that he did not pay one single creditor, that he took no steps whatever to see to the payment of any creditors of any sort, but left everything to the new company, and trusted entirely to their covenant of indemnity and proceeded to call the final meeting of the old company, which would involve dissolution at the end of three months, without inquiring whether the new company had paid all the debts or not. He received, moreover, the

consideration from the new company as liquidator for distribution among the shareholders of the old company, and he did so distribute it. A more gross dereliction of duty by a liquidator I have seldom heard of."

He held that as the creditors' remedy by application in the liquidation had expired on the dissolution, a common law action for breach of the statutory duty would lie, and he gave damages against the liquidator.

In *Re Debenture-holders' Actions* (3), STIRLING, J., stated that all the judges of the Chancery Division were agreed that where a receiver is appointed in a debenture-holder's action, a direction should be inserted that the receiver do forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture-holders under the Preferential Payments in Bankruptcy Act, 1897 [repealed, now s. 94 (1) of the Companies Act, 1948].

It has been contended before me that a receiver and manager with notice of a preferential claim is liable for damages in tort if he exhausts the then assets of the company in making payment to the ordinary creditors without first applying the same or a sufficient part thereof in satisfying such preferential claims. On the other hand, it is said that his only obligation is to avoid applying such assets, after notice, in actual payment of principal or interest to debenture-holders before satisfying the preferential claim. There seems no direct authority, but I think that the first view is correct. I have been asked by both parties to assess the damages caused by the breach of the defendant's statutory duty under s. 107 of the Companies (Consolidation) Act, 1908, and I assess them at £50, and give judgment for that sum and the costs of the action.

Solicitors: *G. H. Barber & Son; R. G. Davis.*

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

STATHAM *v.* STATHAM AND GAEKWAR OF BARODA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bargrave Deane, J.), December 11, 21, 1911]

[Reported [1912] P. 92; 81 L.J.P. 33; 105 L.T. 991; 28 T.L.R. 180]

Constitutional Law—Foreign State—Sovereign—Immunity from suit—Liability to be made co-respondent in divorce suit in England—Evidence of sovereignty—Conclusiveness of certificate of government Department.

A foreign sovereign cannot be made a co-respondent in a suit for divorce in the High Court in England, and, if he is so named, on proof of his status the court will give leave for his name to be struck out. In the case of an Indian prince the certificate of the India Office [now the Commonwealth Relations Office] is conclusive as to the fact that the prince is the sovereign ruler, albeit with a limited sovereignty, of the State in question.

Notes. The Commonwealth Relations Office is the proper Ministry for the court to approach regarding the sovereignty of an Indian prince and their certificate is conclusive, within the limits stated, as to his status: see *Sayce* v. *Bahawalpur State* (*Ameer*), [1952] 2 All E.R. 64.

Referred to: *Duff Development Co.* v. *Kelanton Government*, [1924] A.C. 797; *Sayce* v. *Bahawalpur State* (*Ameer*), [1952] 2 All E.R. 64.

As to immunity of foreign sovereigns and governments from being sued in our courts, see 7 HALSBURY'S LAWS (3rd Edn.) 265, and for cases see 1 Digest (Repl.) 54–56, 22 DIGEST (Repl.) 142 et seq., 311 et seq., 11 DIGEST (Repl.) 473 et seq.

Cases referred to:

(1) *Rayment* v. *Rayment and Stuart*, *Chapman* v. *Chapman and Buist*, [1910] P. 271; 79 L.J.P. 115; 103 L.T. 430; 26 T.L.R. 634; 53 Sol. Jo. 721; 11 Digest (Repl.) 473, *1041*.

Also referred to in argument:

Mighell v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 1 Digest (Repl.) 55, *409*.

Boger v. *Boger*, [1908] P. 300; 77 L.J.P. 151; 99 L.T. 881; 24 T.L.R. 744; 52 Sol. Jo. 552; 11 Digest (Repl.) 474, *1049*.

Motions one on behalf of the petitioner, who asked for leave to serve the co-respondent by substituted service, and one on behalf of the co-respondent, who asked to be dismissed from the suit and that the citation against him should be returned to the registry, on the ground that he was an independent ruling prince.

In respect of the first motion it appeared that the co-respondent, his Highness Maharaja Gaekwar Sir Saraji Rao III. of Baroda, in the Empire of India, was the ruling prince of Baroda, and as such he had been recognised by His Majesty's Government in India. The adultery charged against him was alleged to have taken place in Scotland. In the month of October, 1911, an attempt had been made to serve him at a hotel in London, but it had proved unsuccessful, and, the Gaekwar having departed for India, it was sought to serve him by substituted service. It was practically conceded at an early stage of the hearing of the summonses that in ordinary cases there was no doubt that it was the practice to grant substituted service on the authority of *Rayment* v. *Rayment and Stuart*, *Chapman* v. *Chapman and Buist* (1); but with respect to the status of the Gaekwar a certificate from the India Office was put in, the said certificate having been supplied in reference to an action in the King's Bench Division in October, 1911 in which the Gaekwar was a defendant. The certificate was as follows:

"India Office Certificate.—The Gaekwar of Baroda has been recognised by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, s. 18 (5), as that of Native Princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat his Highness' territory as being part of British India or of His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty. But, though his Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the ruling chief of Baroda, subject, however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces, &c."

There was also put in an announcement in the official "Gazette" of India (No. 1700 E.) for Aug. 21, 1891 with regard to the position of the rulers of Native States. This was as follows:

"The principles of international law have no bearing upon the relations between the Government of India, as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter."

It was contended on behalf of the petitioner that the co-respondent held his position under the suzerainty of His Majesty, and was not an independent ruler, whereas the opposite was urged on behalf of the co-respondent.

Bayford for the petitioner.
Willis for the co-respondent.

BARGRAVE DEANE, J,—In this case Mr. George Wellington Statham has filed a petition praying the court to dissolve his marriage on the ground of the adultery of his wife, Beatrix Alice Statham, with his Highness Maharaja Gaekwar Sir Saraji Rao III. of Baroda, who has been added as a co-respondent in the suit under s. 28 of the Matrimonial Causes Act, 1857.

The first question which I have to determine is raised by summons on behalf of the co-respondent, in which the court is asked to dismiss him from the suit on the ground that he is a reigning Sovereign, and by the rules of international law is not amenable to the jurisdiction of this court. The second question is the subject of a motion for leave to serve the co-respondent by substituted service, as it has been found impossible personally to serve the petition and citation upon him. This would follow almost as a matter of course if I were to find against the contention of his Highness raised on the summons.

There is no doubt that an independent reigning Sovereign cannot by the rules of international law be made against his will a party to proceedings in our courts. He may choose to sue, and if he does so, a counter-claim may be raised against him as plaintiff; but he cannot be made a defendant.

His Lordship described the status of the Gaekwar of Baroda as being that of a prince independent of all except the British Crown, and continued:] In October, 1911 an action was brought in the King's Bench Division of the High Court in England by one Ernest Emmanuel against the present reigning Gaekwar, and Lush, J., upon hearing counsel for both sides, and having obtained a certificate from the India Office as to the true status of the Gaekwar of Baroda, ordered that the writ in the action should be set aside and all proceedings stayed, on the ground that the defendant was an independent Sovereign and not a subject of His Majesty the King. The certificate is as follows. [His Lordship read the certificate, as above, and proceeded:] What is the meaning of the word "suzerainty"? And what are its essentials? Sir Courtenay Ilbert, in his work on the Government of India, gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889 and the Indian General Clauses Act, 1897; and in a note says the expression "suzerainty" is substituted by the Interpretation Act for the older expression "alliance," as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India. Thus "suzerainty" is a term applied to certain international relations between two Sovereign States whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief—or conventional, i.e., by some treaty of peace or alliance—in contrast with the fief—i.e., a sovereignty granted by a lord paramount over some defined territory, accompanied with an express grant of jurisdiction.

Grotius, in De jure Belli et Pacis, says:

> "Unequal leagues are made not only between the conquerors and the conquered, but also between peoples of unequal power, even such as never were at war with one another."

Grotius, Puffendorf and Vattel agree that in unequal alliances the inferior power remains a Sovereign State. Its subjects or citizens own allegiance only to their own Sovereign. Over their disputes and internal dissensions the suzerain power,

as such, has no jurisdiction. In short, the weaker power may exercise the rights of sovereignty so long as by so doing no detriment is caused to the interests or influence of the suzerain power. It follows that the inferior power must in all alliances with other States be controlled by its suzerain. VATTEL says:

"A weak State which, in order to provide for its safety, places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty, that State does not cease to rank among the Sovereigns who acknowledge no other law than the law of nations."

In my opinion this aptly states the true status of the present Gaekwar of Baroda, and is applicable to the status of that Sovereign Prince as defined by the certificate from the India Office; and it follows that his Highness by international law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England, and his name must be struck out as a co-respondent. I, however, give leave to the petitioner to proceed without making any co-respondent as to those paragraphs of the petition in which his Highness' name appears. There will be no order as to costs, and, although I have no doubt whatever upon the point, I will give the petitioner leave to appeal if he desires to do so.

Solicitors: *Faithfull & Owen; Horne & Birkett.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* PAGE AND OTHERS

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Lawrance and Darling, JJ.), July 25, 1911]

[Reported [1911] 2 K.B. 946; 80 L.J.K.B. 1346; 105 L.T. 827; 75 J.P. 548]

Licensing—Compensation authority—Power to state Case—Supplemental meeting—Division of compensation money.

A committee of quarter sessions appointed under the Licensing Act, 1904, and holding a supplemental meeting for the purpose of settling among the persons interested the shares into which the compensation money was to be divided, **held** to have power to state a Case for the opinion of the High Court.

Notes. The Licensing Act, 1904, has been repealed. See now the Licensing Act, 1953, as amended.

As to the power of quarter sessions to state a Case in licensing matters, see 22 HALSBURY'S LAWS (3rd Edn.) 614; and for cases see 30 DIGEST (Repl.) 63.

Cases referred to:

(1) *R.* v. *Southampton Justices, Ex parte Cardy*, [1906] 1 K.B. 446; 75 L.J.K.B. 295; 94 L.T. 437; 70 J.P. 175; 54 W.R. 484; 22 T.L.R. 236; 50 Sol. Jo. 206, D.C.; 30 Digest (Repl.) 76, *583*.

(2) *Dartford Brewery Co.* v. *London County Quarter Sessions*, [1906] 1 K.B. 695; 75 L.J.K.B. 597; 94 L.T. 782; 70 J.P. 197; 22 T.L.R. 491; 50 Sol. Jo. 441, D.C.; 30 Digest (Repl.) 57, *428*.

Case Stated by the committee of the Bedfordshire Quarter Sessions appointed under and pursuant to s. 5 of the Licensing Act, 1904, to exercise the powers and perform the duties delegated to the committee by the quarter sessions as provided by the Act and hereinafter called "the compensation authority."

At a supplemental meeting of the compensation authority at Bedford on July 28, 1910, for the purpose, amongst other things, of considering whether their approval should be given to the agreed amount of compensation money in respect of certain licensed premises known as The Cross beerhouse at Langford, in the county of Bedford, and for the purpose of settling the shares or fixing the proportions in which the compensation money should be divided among the persons entitled to compensation, the appellants appeared and claimed to be entitled to a share of the compensation money, and on hearing the claim, which was opposed by the respondents, the compensation authority held that the appellants were not entitled to any share in the compensation money subject to the opinion of the court on the following Case:

The appellants were the lords of the manor of Holme-with-Langford, in the county of Bedford, and the freehold of and in all the copyhold lands, tenements and hereditaments within the manor was vested in the appellants, who were also entitled to all the usual manorial rights. The respondents Joshua Page, Mary Constance Temple, and Frank Peters Wood (trustees of the will of the late Mrs. Alberta Frances Page) were the copyhold tenants of certain licensed premises known as The Cross beerhouse at Langford, within and parcel of the manor, and held the same by copy of court roll under an admittance dated April 30, 1910. The respondents Messrs. Page & Co. were the lessees and the respondent Frederick Charles Bartram was the licensee of the premises. The manor was a fine arbitrary one, and the lords of the manor were entitled to a fine of two years' improved annual value on the admittance of a single tenant on death or alienation, but it was the practice to accept one and a half years' annual value on the admittance of a single tenant on alienation. The respondents Joshua Page, Mary Constance Temple, and Frank Peters Wood (trustees of the will of the late Mrs. Alberta Frances Page) paid to the appellants as lords of the manor on their admittance as copyhold tenants of the licensed premises on April 30, 1910, a fine of £42, based on the annual value of the licensed premises as licensed premises being £12. The usual practice on the admittance of joint tenants of halving the fine of the first tenant for the admittance of the second, and halving the fine of the second tenant for the admittance of the third was observed, and the sum of £42 was arrived at as follows: First tenant, £24; second tenant, £12; third tenant, £6. The compensation authority at their principal meeting held on June 23, 1910, refused the renewal of the licence of the premises subject to compensation, pursuant to s. 1 (2) of the Licensing Act, 1904. In consequence of the compensation authority having refused the renewal of the licence of the premises, the annual value thereof was considerably reduced. The appellants and the respondents Mrs. Page's trustees and the respondents Messrs. Page & Co. were entered as the registered owners of the licensed premises in the register of licences kept pursuant to s. 36 of the Licensing Act, 1872. The total amount of the compensation money was agreed at £139 18s., and it was further agreed that, if the appellants were entitled to a share of the compensation, they should receive the sum of £15 out of the sum of £139 18s.

It was contended on behalf of the appellants that, as the amount of the fines depended on the annual value of the premises and the refusal of the renewal of the licence had reduced the annual value, they were persons interested in the premises within the meaning of s. 2 (1) of the Licensing Act, 1904, and, therefore, entitled to a share of the compensation money. Further, they were the owners of the fee simple and the registered owners of the licensed premises, and, therefore, persons interested in the same within the meaning of the section and entitled to a share of the compensation money. It was contended on behalf of the respondents that the appellants were not persons interested in the licensed premises within the meaning of s. 2 (1) of the Licensing Act, 1904, and were not entitled to any share of the compensation money.

The compensation authority held that the appellants were neither owners nor in the position of owners of the licensed premises, and were not persons interested in

the same within the meaning of s. 2 (1) of the Licensing Act, 1904, and, therefore, were not entitled to any share of the compensation money, and, having approved the agreed sum of £139 18s. as the total amount of compensation money in respect of the premises, ordered payment thereof as follows: To Mrs. Page's trustees, the registered owners, £11; to Messrs. Page & Co., lessees, £108 10s.; to Frederick Charles Bartram, the licensee, £20 8s.; total, £139 18s.

By s. 2 (2) of the Licensing Act, 1904:

> "The amount to be so paid [of compensation on renewal of licence] shall, if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises and is approved by quarter sessions, be that amount, and in default of such agreement and approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions. Provided that in the case of the licence-holder regard shall be had not only to his legal interest in the premises or trade fixtures, but also to his conduct and to the length of time during which he has been the holder of the licence, and the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises."

The Licensing Rules, 1904, provide:

> "37. The compensation authority may, if and to such extent as they think fit, require any evidence given before them at any meeting held under these rules to be given on oath."

Foote, K.C., and *Dyer* for the appellants.
H. St. J. Raikes for the respondents.

LORD ALVERSTONE, C.J.—Counsel for the respondents has raised two points, and the preliminary point is certainly an important one. The suggestion is that, in the jurisdiction that is exercised by the committee under s. 2 (2) of the Licensing Act, 1904, the committee are not acting judicially, and, therefore, there is no power to state a Case and no power to revoke their decision. The words are:

> "The amount to be so paid shall . . . be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions."

I wholly fail to understand why it can be suggested that, when an agreed amount of x pounds is being divided between people whose interests are hostile, or may be hostile, to one another (the brewer, who may be the owner claiming so much, the leaseholder under the brewer claiming so much, and the licence-holder claiming so much) that is to be otherwise than a judicial decision. These questions are always strenuously contested, and, on the face of the statute, it is not suggested that there is anything to indicate that the committee are determining them otherwise than as the Court of Quarter Sessions. Then counsel for the respondents, with great ingenuity, relies on r. 37 of the Licensing Rules, 1904, which gives the compensation authority power to such extent as they think fit to require any evidence given before them at any meeting held under these rules to be given on oath—that is to say, giving them the power to take it on oath; and he ingeniously suggests that, because they have the power to act otherwise on evidence not on oath, they cannot be acting judicially. That was the question raised and determined in *R.* v. *Southampton Justices, Ex parte Cardy* (1) and *Dartford Brewery Co.* v. *London County Quarter Sessions* (2), where it was pointed out that, whatever might be the power of the compensation authority to get information not on oath, when

they came to act judicially they must have it on oath. Therefore, as I pointed out to counsel in the course of his argument, he was attributing to r. 37 a meaning which is inconsistent with the decisions of this court as to the evidence on which the tribunal should act when they are dealing with these questions. Therefore, in my opinion, there is no ground for suggesting that the determination under s. 2 as to the division of the shares is otherwise than a judicial decision.

[His Lordship then dealt with the contention that the appellants were not entitled to compensation at all as they were not owners and held that the fact that they were lords of the manor by copy of court roll or custom of the manor made no difference. They were registered owners and, therefore, were persons interested in the licensed premises and entitled to share in the compensation money. He continued:] I think this appeal ought to succeed and judgment be entered for the appellants on both points.

LAWRANCE and **DARLING, JJ.**, concurred.

Appeal allowed.

Solicitors: *F. A. Manley; G. Passingham*, Hitchin.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

COOKE AND OTHERS *v.* COOPER AND OTHERS

[King's Bench Division (Lord Alverstone, C.J., Hamilton and Bankes, JJ.), November 28, 1911]

[Reported [1912] 2 K.B. 248; 81 L.J.K.B. 648; 105 L.T. 818; 76 J.P. 67]

Licensing—Licence—Renewal—Refusal to renew—Appeal—Death of licensee before appeal heard—Right of representative of deceased licensee to maintain appeal—"Person aggrieved"—Right of owners of licensed premises to appeal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 25), *s.* 29.

Licensing justices refused to renew the licence of certain premises to sell by retail intoxicating liquor on the grounds that the premises had been ill-conducted and that the licence holder was not fit to hold a licence. The licence holder appealed to the quarter sessions. The owners of the premises also appealed as being persons thinking themselves aggrieved by the refusal under the Licensing (Consolidation) Act, 1910, s. 29. Before the hearing of the appeal, the licence holder died and letters of administration were granted to his widow.

Held: both the widow (*McDonald* v. *Hughes* (1), [1902] 1 K.B. 94, applied), and the owners had the right to maintain the appeal.

Notes. The Licensing (Consolidation) Act, 1910, s. 29, has been repealed. See now the Licensing Act, 1953, s. 35 (1).

Applied: *R.* v. *Confirming Authority of the Derby Borough Justices, Ex parte Blackshaw*, [1957] 2 All E.R. 823. Referred to: *R.* v. *Salford Hundred Justices*, [1912] 2 K.B. 567.

As to the transfer of a justices' licence, see 22 Halsbury's Laws (3rd Edn.) 562 et seq., and as to appeals against refusal to renew a licence, see ibid., 606 et seq.; and for cases see 30 Digest (Repl.) 64 et seq. For the Licensing Act, 1953, s. 35, see 33 Halsbury's Statutes (2nd Edn.) 181.

Case referred to:

(1) *McDonald* v. *Hughes*, [1902] 1 K.B. 94; 71 L.J.K.B. 43; 85 L.T. 727; 66 J.P. 86; 50 W.R. 318; 18 T.L.R. 79; 46 Sol. Jo. 152; 20 Cox, C.C. 131, D.C.; 30 Digest (Repl.) 54, *403*.

Case Stated by the justices of the quarter sessions for the Salford Hundred division of the county of Lancaster held at Manchester.

The appellant James L. Cooke was formerly occupier and licensee of certain licensed premises situate at Mealhouse Lane, in the county borough of Bolton, and known as "the Central Hotel," and the appellants, the Manchester Brewery Co., Ltd., were and are owners of those premises. The appellants appealed to the court of quarter sessions against the refusal of the respondents as justices acting in and for the county borough of Bolton at the general annual licensing meeting for the borough on Feb. 8, 1911, to grant and renew to the appellant Cooke a justices' licence authorising him to hold an excise licence to sell by retail intoxicating liquor at the licensed premises aforesaid. The grounds of objection to the renewal of the licences were (a) that the licensed premises had been ill-conducted, and (b) that the fitness of the appellant Cooke was unsatisfactory. Notice of appeal by each of the appellants against the refusal was duly served. The notice of appeal was dated Feb. 11, 1911. After the service of the notice of appeal and before the hearing of the appeal, namely, on Feb. 19, 1911, the appellant Cooke died. On Feb. 25, 1911, Margaret Cooke, widow of the appellant Cooke, applied to the justices for the borough for a temporary transfer to her of the licence of the licensed premises pending the hearing of the appeal and without prejudice to any question pending therein. The justices refused the application, and, on Mar. 4, 1911, the Court of Appeal made an order nisi calling upon the justices to show cause why a writ of mandamus should not issue directed to the justices commanding them to hear and determine the application of Margaret Cooke according to law. These proceedings were still pending on April 10, 1911, when the appeal of the appellants came on for hearing before the court of quarter sessions. On Mar. 11, 1911, letters of administration of the estate of the appellant Cooke were duly granted to his widow, Margaret Cooke. On the hearing of the appeal, it was objected by counsel for the respondents that, by reason of the death of the appellant Cooke, the licence of the premises had become extinct, and, therefore, that no appeal lay from the refusal to renew the licence above referred to, and that the owners had no right of appeal as they were not persons aggrieved within s. 29 of the Licensing (Consolidation) Act, 1910. The licence held by the appellant Cooke came to an end by effluxion of time on April 5, 1911, and no licence was actually in existence at the time when the appeal came on for hearing.

The appellants by their counsel contended that the licence was not extinct and, on the contrary, that Margaret Cooke should for the purposes of the appeal be deemed to be in the position in which the appellant Cooke would have been if he had lived until the hearing of the appeal, and that, in any event, the appellants, the Manchester Brewery Co., Ltd., as owners of the premises, had a right of appeal notwithstanding the death of the appellant Cooke. The court of quarter sessions was of opinion that the objection taken by the respondents was correct in law and that the appeal failed, and accordingly, without fully hearing the evidence for the appellants, the court of quarter sessions dismissed the appeal, subject to a Special Case to be stated for the opinion of the court.

The section under which the brewery company as owners of the premises claimed the right to appeal was s. 29 of the Licensing (Consolidation) Act, 1910, which provided as follows:

> "(1) Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, transfer, or special removal of a justices' licence, in cases where the power of refusal is vested in those justices, may appeal against the refusal to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated, and the appeal shall be to the court of quarter sessions for the county although the premises are situated in a borough having a separate court of quarter sessions. . . . (2) The appeal shall be to the court next held after the

refusal, unless that court is held within nineteen days thereafter, and in that case the appeal shall lie to the next subsequent court. (3) Notice in writing shall be given by the appellant of his intention to appeal, and of the grounds thereof, to the clerk of the licensing justices whose decision is appealed against, within five days next after the decision has been given, and at least fourteen days before the holding of the quarter sessions to which the appeal is made. . . . (4) The court of quarter sessions shall hear and determine the matter of the appeal, . . . and may, if necessary, grant the renewal, transfer, or special removal of the licence in the same manner as the licensing justices."

Ashton, K.C. (*J. M. St. John Yates* with him), for the appellants.
The respondents did not appear.

LORD ALVERSTONE, C.J.—I do not think there is any reason why this case should not go back to the justices to be dealt with. In my opinion, the case is governed by the principles of *McDonald* v. *Hughes* (1) and I think that, for certain purposes of the Licensing Acts, the licence is not void. For the purposes of the representatives of the deceased licensee getting a renewal and standing in the place of the deceased man, I think the licence is not void; and, being made liable if they carry on the business contrary to the Licensing Acts, in my opinion, they have the right to maintain this appeal. I think the Manchester Brewery Co. also have the right to maintain the appeal. Therefore, the appeal will be allowed, and the case will go back to be dealt with at quarter sessions.

HAMILTON, J.—I agree.

BANKES, J.—I agree.

Appeal allowed.

Solicitors: *Fielding & Fernihough*, Bolton.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

HARBIN *v.* GORDON

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), October 14, November 24, 1913]

[Reported [1914] 2 K.B. 577; 83 L.J.K.B. 322; 109 L.T. 794; 58 Sol. Jo. 140]

Costs—Taxation—Travelling and personal expenses—Plaintiff living abroad—Right of taxing master to require acknowledgment of sum for expenses before inclusion in allocatur.

The plaintiff, who lived in Florence, brought an action in England against the defendant, came to this country to give evidence therein, and in the result recovered judgment against the defendant. On taxation of the plaintiff's costs as between party and party, the taxing master fixed a sum as a proper allowance to the plaintiff for his time, maintenance and travelling expenses, but required that, before he included the sum in his allocatur, the plaintiff's solicitor should produce to him either a voucher signed by the plaintiff acknowledging that the sum had been paid to him or a letter from the plaintiff intimating that he knew that the sum had been allowed to him.

Held: (Vaughan Williams, L.J., dissenting): the taxing master was entitled to impose the requirement that such an acknowledgment should be made by the plaintiff.

Per Curiam: Since the taxing master had not issued his allocatur, the plaintiff was wrong in taking out a summons before the judge in chambers.

Notes. Considered: *Ammar* v. *Ammar*, [1954] 2 All E.R. 365. Referred to: *Bock* v. *Bock*, [1955] 2 All E.R. 793.

As to costs, see 30 Halsbury's Laws (3rd Edn.) 419 et seq.; and for cases see 42 Digest 125 et seq.

Cases referred to:

(1) *Sellman* v. *Boorn* (1841), 8 M. & W. 552; 10 L.J.Ex. 433; 151 E.R. 1158; sub nom. *Selwood* v. *Boore*, 5 Jur. 846; 42 Digest 211, *2350*.

(2) *Re Le Brasseur and Oakley*, [1896] 2 Ch. 487; 65 L.J.Ch. 763; 74 L.T. 717; 45 W.R. 87; sub nom. *Re L. & O.*, 40 Sol. Jo. 637, C.A.; 42 Digest 209, *2330*.

Appeal from an order of Scrutton, J., at chambers.

The plaintiff brought an action on certain bills of exchange against the defendant, and recovered judgment. The plaintiff, who was resident in Florence, came to England to give evidence on his own behalf. On taxation of the plaintiff's bill of costs as between party and party, the taxing master decided that £33 12s. was a proper allowance to the plaintiff for his time, maintenance and travelling expenses from Florence, but he required, before he included that amount in his allocatur, that the plaintiff's solicitors should produce to him either a voucher signed by the plaintiff acknowledging that the amount had been paid to him, or a letter from the plaintiff intimating that he knew that the amount had been allowed to him. The plaintiff carried in the following objections to the taxation,—First, as to the voucher:

"(a) The solicitor in an action cannot be called upon to finance his client. There can be no possible obligation on the solicitor to provide money to enable his client to attend the trial, nor to pay to the client money which the client has disbursed for this purpose, relying on the unsuccessful party to pay the amount of the allocatur in full. The master has treated the amount proper for allowance to the plaintiff exactly in the same manner as if plaintiff were a witness who was not a party to the action. It was never the practice in affidavits of increase for the attorney to swear that he had paid the sum allowed

for the attendance of the successful party to the cause, though he had to swear to the payments to all other witnesses. (b) The voucher required would represent as a fact that the money had passed hands or at the least had been actually credited in account. Although it would be no fraud on the client for the solicitor to obtain his voucher without actual payment or credit, it is submitted that it would be misconduct in the solicitor to utter to the taxing master a voucher containing a false representation of fact. Credit in account bona fide given would practically place the solicitor in the same position as actual payment."

Secondly, as to the letter from the plaintiff intimating that he had knowledge of the amount allowed to him by the master:

"(c) Upon a taxation as between party and party this is not a requirement which can properly be made, as the functions of the master on such a taxation are limited to ascertaining that the charge presented for allowance has been incurred and is proper in its nature and reasonable in amount, and that the charge should then be allowed against the defendant. (d) There is no better reason for the requirement in regard to this particular item than in regard to any other item or to the total of the bill. The solicitor must as a matter of course carry into account for credit of the client the full sum which he receives for taxed costs, and the client in this way obtains due and proper credit for the sum which the solicitor collects in respect of allowance for client's expenses just in the same way as he obtains credit for every other portion of the taxed bill."

The master's answers were as follows:

"(a) and (b) The only claim that the plaintiff has for reimbursement is as a witness. Apart from that he has no other claim, and he must be treated on the same footing as other witnesses, and the masters have decided that the solicitors must produce a voucher for the amount allowed to the plaintiff or defendant as a witness. (c) and (d) Having regard to the fact that the solicitors may not receive the amount allowed to them on this taxation for this witness from the defendant, I have stretched a point and stated that I should be satisfied if the solicitors produced a letter signed by the plaintiff that he is cognisant of the amount awarded to him as a witness, but this they have refused. It is obvious that a solicitor might receive the amount allowed to the plaintiff or defendant as a witness on the certificate and not disclose it to his client, and it is only, I believe, of recent years that the plaintiff or defendant as parties to an action have been allowed any remuneration as witness therein."

The taxing master did not issue an allocatur, but the plaintiff took out a summons before SCRUTTON, J., to show cause why the decision of the taxing master disallowing the objections of the plaintiff should not be set aside, and the items in respect of which objections had been carried in should not be allowed. SCRUTTON, J., dismissed the summons (without costs) on the ground that he did not "propose to interfere with the rule on which the taxing master acted," but gave leave to appeal. The plaintiff appealed.

Rayner Goddard for the plaintiff.
The defendant did not appear.

Cur. adv. vult.

Nov. 24, 1913. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In the present case, there was a taxation in progress between party and party in an action in which Guy Philip Harbin, the plaintiff, had obtained judgment against Herbert M. Gordon and H. C. Rigaud, the defendants. The taxing master had expressed an intention to allow £33 12s. as the proper allowance for the plaintiff's loss of time, maintenance and travelling

expenses from Florence to give evidence in support of his own case, but had required as a condition of this inclusion in the allocatur (which has never been made) that the plaintiff's solicitors produce either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum, or a letter from the plaintiff intimating that he has knowledge of the amount as allowed.

It was decided in *Sellman* v. *Boorn* (1) that an application to review the taxation of costs ought not to be made before the master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow. PARKE, B., says:

> "The master has not finally decided as to the costs until he has made his allocatur. Until he has done so, it is still open to him to alter his mind, and he is not bound by any declaration he may have made as to what costs he intends to allow."

The plaintiff entitled to the taxation of party and party costs is entitled as against the defendant to an allocatur for party and party costs. The object of taxation is to protect the defendant from undue claims by the plaintiff for costs. If the plaintiff has reason to suppose that his solicitor is overcharging him, he can get protection by a solicitor and client taxation.

What has happened in the present case may be stated briefly as follows: [HIS LORDSHIP stated the facts, and continued:] In my judgment, the plaintiff ought not to have taken out the summons before SCRUTTON, J.,

> "to show cause why the decision of the taxing master disallowing the objections of the plaintiff should not be set aside, and the items, in respect of which objections have been carried in should not be allowed,"

because in form this is a summons to review taxation, and I will assume that there is no other basis on which this summons can be recognised. The summons came before SCRUTTON, J., and he dismissed it, not on the ground that he had no jurisdiction, but on the ground that he did not propose to interfere with the rule on which taxing masters act, that "solicitors may not receive the amount allowed to them on taxation unless they produce the client's voucher for his expenditure as a witness and loss of time, or, in the alternative, produce a letter signed by the client that he is cognisant of the amount awarded to him as a witness." The master to this answer appended the statement that a solicitor might receive the amount allowed to the client as a witness on the certificate and not disclose it to his client.

What is the legal outcome of the state of things which I have recited? First, let me consider whether there was any jurisdiction in the judge to hear the summons, or whether he should have declined to hear it, and have dismissed it altogether. I am of opinion that there was no jurisdiction in the judge to make the order, and that the order which he made was not only wrong on the ground of want of jurisdiction, because such an order could only be made on a review of taxation, but also was wrong because, assuming the judge had jurisdiction, the order of the taxing master on which it was based was itself wrong. The master's jurisdiction on a party and party taxation is to insist on vouchers being given by the witness, be he plaintiff or otherwise, for the items of expenditure. It is no part of the duty of a taxing master on taxation of costs as between party and party to protect the client from anticipated possible frauds of the solicitor. I will assume that the summons before the judge was without jurisdiction, but assuming that the judge took on himself jurisdiction, and made the wrong order, what ought the aggrieved person to do? Has he no remedy? Or may he appeal? I think that he must have a right of appeal, but whether he has or not, and whether the appeal is dismissed or not, in my judgment no costs should be given against him. All this is of small importance as far as the litigants are concerned, but, as a matter of practice, the case is of great importance, for it involves the question whether the master had any jurisdiction or authority to make the order on which SCRUTTON, J., based his judgment.

In my judgment, the masters had no jurisdiction to make the rule which they have made, and which has been applied in a party and party taxation. The object of the rule is to prevent solicitors from dishonestly failing to disclose the amounts that they may have received from the party liable to pay costs on a party and party taxation. The rule casts an uncalled-for slur on solicitors as a profession.

I desire to refer to *Re Le Brasseur and Oakley* (2), where LINDLEY, L.J., says ([1896] 2 Ch. at pp. 490, 491):

> "Now, first as to the procedure. The learned judge himself said that the procedure had been all wrong, and that with regard to the supposed order of the taxing master, which in the notice of motion is treated as an order of April 21, 1896, by which the master directed the solicitors to file an affidavit and to produce documents, there never was any such order, and the whole thing is a myth. As I understand the facts, there was only an expression by the taxing master of his intention to require these things to be done. The application, therefore, to the judge for an expression of his opinion was utterly irregular. KEKEWICH, J., felt that and said so. But he said that, inasmuch as the case had been discussed before him and the matter was one of some importance, he would, notwithstanding the irregularity of the procedure, express his opinion on the point, and he did so. I cannot help thinking it would have been very much better if the learned judge had declined to hear the motion at all."

I think that SCRUTTON, J., should have declined to hear the summons. LINDLEY, L.J., continues (ibid. at p. 491):

> "It is entirely contrary to the present practice. I do not say such a thing was never done in the old times—perhaps it was. But ever since the present rules have been in existence—I refer to Ord. 65, r. 27, sub-rr. 39–42—the mode of procedure on questions of this kind is this: the taxing master has to make his certificate; the party who is dissatisfied has to carry in objections to the certificate; the taxing master has to answer the objections, and then the dissatisfied party appeals. . . . I do not propose to go into [the rules]—they are perfectly clear; and I can only venture to express my regret that the learned judge did not decline to hear the motion, and dismiss it altogether. However, inasmuch as the learned judge did go into the merits of the case and we have also heard the merits fully discussed, I am not prepared to say that it is our bounden duty to be such martinets as to dismiss the appeal without saying anything about the controversy which is really at the bottom of it. I shall therefore state my opinion on the merits of the case. At the same time, I protest against any procedure of this kind, and venture to express a hope that it will not be made a precedent. If it is, the Court of Appeal will not be so indulgent as it is now."

I think under these circumstances the order should be that the appeal should be dismissed.

BUCKLEY, L.J.—The plaintiff in this action was called as a witness. The taxing master arrived at the conclusion that £33 12s. was a proper allowance to him for his time, maintenance and travelling expenses from Florence to give evidence in the case. The question is whether the taxing master was right in requiring, before he included that amount in his allocatur, that the plaintiff's solicitors should produce to him either a voucher signed by the plaintiff acknowledging that the amount had been paid to him, or a letter from the plaintiff intimating that he knew that the amount had been allowed to him. The plaintiff, as a party litigant, was not entitled to any allowance, but, as a witness, he was entitled to an allowance like any other witness, and none the less because he was also a party litigant. If he had not been a party litigant, but an ordinary witness, the taxing master would have been entitled to require evidence that the amount had been paid before he included it in his allocatur for recovery from the defendant. The whole question

is whether, when he is a party litigant, the taxing master is not also entitled to be satisfied that the amount has been paid or that the plaintiff knows that it is going to be recovered for him from the defendant. In my opinion, he is so entitled.

During the argument, confusion has repeatedly arisen between the question what evidence ought to be adduced to show what the witness's out-of-pocket expenses have been, and what is proper evidence to be required to show that the amount allowed him has been paid. On the former question, his hotel bills, his receipts (if he has any) for his railway tickets, and so on, are relevant. To the amount ascertained from those materials would be added the amounts which the taxing master thinks right as an allowance for his time. All has been done in the present case that the master requires in this respect, with the result that he is satisfied that £33 12s. is the proper sum to be allowed. What remains is that the master, before charging the defendant with the amount, should be satisfied that this sum has been expended in payment to the plaintiff or, when recovered, will be recovered for the plaintiff. The plaintiff, no doubt, cannot sign a receipt for the amount unless the amount is actually paid to him. This could be done by his solicitor personally paying him the amount out of his own pocket. But to require that would be unreasonable, for the solicitor might pay the sum and the defendant might then fail to pay the taxed bill, and the solicitor might not get the sum back. The requirement of the taxing master under these circumstances to be satisfied that the plaintiff knows that the amount has been allowed seems to me perfectly reasonable, and so reasonable that I am surprised that it is disputed. The acknowledgment is something less than a voucher, but it is a protection both to the defendant and to the plaintiff which no solicitor can reasonably refuse. I think the appeal fails and should be dismissed.

It is true that the summons is wrong in point of form. The taxing master has not issued his allocatur, and there is at present no concluded taxation which can be made the subject of review. That such procedure was wrong was pointed out by LINDLEY, L.J., in *Re Le Brasseur and Oakley* (2). But I think, as the court thought in that case, that we ought not to refuse to deal with the matter on that ground. The question for decision lies in the smallest compass; we have all the materials for determining it; the judge has determined it; and I see no reason why we should not pronounce an opinion on it. To refuse to do so would be merely to occasion a new application which must first come before the judge, and then before this court, when the decision of this court would be already known. At the same time I hope that this case will not be treated as a precedent for such irregularity in the future.

KENNEDY, L.J.—I agree with BUCKLEY, L.J., that the appeal must be dismissed, and I concur in the reasons which he has given for that conclusion. I will say only this: The plaintiff, in my judgment, has been wrong throughout. His original proceeding by summons, instead of applying to review the taxation after the allocatur had been given, was irregular, and, in regard to the merits, there was no good ground for his objection to the master's decision. That decision was, in substance, that as a voucher, in the sense of a formal receipt for the item of expenses and compensation for the loss of the plaintiff's time for which his solicitors claimed allowance, could not, or, at least could not without great practical inconvenience, be produced, an equivalent in the form of a written and signed acknowledgment by the plaintiff that he was cognisant of the amount awarded to him as a witness should be sufficient. It appears to me that the course adopted by the master, which I understand to be in accordance with the usual practice, was not open to any objection; that SCRUTTON, J., rightly refused to accede to the plaintiff's application; and that this appeal against the refusal, therefore, fails.

Appeal dismissed.

Solicitors: *Chester, Broome & Griffithes.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

PULLAN *v.* KOE

[CHANCERY DIVISION (Swinfen Eady, J.), October 30, 1912]

[Reported [1913] 1 Ch. 9; 82 L.J.Ch. 37; 107 L.T. 811; 57 Sol. Jo. 97]

Settlement—Marriage settlement—Covenant to settle after-acquired property—Effect of covenant in equity—Property acquired by wife paid to husband—Death of husband—Right of settlement trustees to claim property from husband's estate.

A marriage settlement of 1859 contained a covenant by the husband and the wife for the settlement of after-acquired property of the wife beyond a certain value. The wife subsequently received a present of a sum of money of more than the stipulated amount, which was paid into the husband's banking account in breach of the covenant part of it being invested in certain bonds in 1879. The bonds remained at the bank until the husband's death in 1909, and then passed into the possession of his executors. The trustees of the marriage settlement claimed delivery up of the bonds and payment of interest received since the husband's death.

Held: as soon the the wife received the money it became in equity bound by and subject to the trusts of the settlement and the trustees were entitled to follow and claim the bonds as trust property.

Spickernell v. *Hotham* (1) (1854), Kay, 669, distinguished.

Notes. Considered: *Re Pryce, Neville* v. *Pryce*, [1916–17] All E.R. Rep. 573. Referred to: *Re Lind, Industrials Finance Syndicate* v. *Lynd*, [1914–15] All E.R. Rep. 527; *Re Kay's Settlement, Broadbent* v. *Macnab*, [1939] 1 All E.R. 245; *Carron* v. *Hartley*, [1949] 1 All E.R. 50.

As to covenants for settlement of after-acquired property in marriage settlements, see 34 HALSBURY'S LAWS (3rd Edn.) 450 et seq., and for cases see 40 DIGEST (Repl.) 533 et seq.

Cases referred to:

(1) *Spickernell* v. *Hotham* (1854), Kay, 669; 2 Eq. Rep. 1103; 2 W.R. 638; 69 E.R. 285; 6 Digest (Repl.) 478, *3372*.

(2) *Smith* v. *Lucas* (1881), 18 Ch.D. 531; 45 L.T. 460; 30 W.R. 451; 20 Digest 424, *1549*.

(3) *Collyer* v. *Isaacs* (1881), 19 Ch.D. 342; 51 L.J.Ch. 14; 45 L.T. 567; 30 W.R. 70, C.A.; 40 Digest (Repl.) 566, *720*.

(4) *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch.D. 228; 49 L.J.Ch. 756; 43 L.T. 135; 28 W.R. 930, C.A.; 40 Digest (Repl.) 569, *750*.

(5) *Re Plumptre's Marriage Settlement, Underhill* v. *Plumptre*, [1910] 1 Ch. 609; 79 L.J.Ch. 340; 102 L.T. 315; 26 T.L.R. 321; 54 Sol. Jo. 326; 40 Digest (Repl.) 539, *497*.

(6) *Colyear* v. *Countess of Mulgrave* (1836), 2 Keen, 81; 5 L.J.Ch. 335; 48 E.R. 559; 12 Digest (Repl.) 47, *255*.

Action.

By a settlement dated May 3, 1859, and made in consideration of the marriage then intended and shortly afterwards solemnised between William Henry Bliss and Mary Jane Wray the younger, certain funds belonging to the husband and wife respectively were vested in Edward Freeman, William Henry Lowden, and William Whitelegge, their executors, administrators and assigns, on trust for the husband and wife and the children of the marriage as therein mentioned. The indenture contained a covenant for the settlement of the after-acquired property of the wife as follows:

"And each of them the said William Henry Bliss and Mary Jane Wray the younger for himself and herself, his and her executors and administrators,

doth hereby covenant with the said Edward Freeman, William Henry Lowden, and William Whitelegge, their executors, administrators, and assigns, that if the said Mary Jane Wray the younger now is or if at any time or times during the said intended covertures she or the said William Henry Bliss in her right shall become beneficially entitled by descent, transmission, devise, bequest, gift, representation, purchase, or otherwise to any real or personal property of the value of £100 or upwards from any estate or interest whatsoever (except jewels, trinkets, ornaments, plate, pictures, prints, and books which it is hereby declared shall belong to the said Mary Jane Wray the younger for her separate use) then and in every such case the said William Henry Bliss and Mary Jane Wray the younger and their respective heirs, executors, and administrators, and all other necessary parties shall at the cost of the said trust estate as soon as circumstances will admit and to the satisfaction of the said trustees or trustee for the time being convey, assign, surrender, and assure the said real and personal property or otherwise cause the same to be well and effectually vested in the said trustees or trustee for the time being"

on trusts thereby declared of and concerning the same. On Nov. 13, 1879, the wife received a present from her mother of £285, which was bound by the after-acquired property clause and should have been paid over to the trustees of the settlement. Instead of being so paid, the amount was paid into the bank of Messrs. Parsons & Co. at Oxford (since incorporated with Barclay & Co., Ltd.), to the credit of an account which stood in the name of the husband, but on which the wife had authority to draw, and for many years nearly all the cheques on the account were in fact drawn by her. In December, 1879, part of the sum of £285 was invested in the purchase of two Cape of Good Hope 4½ per cent. bearer bonds or debentures of £100 each, numbered respectively 9,668 and 10,195, and the interest from time to time accruing on the bonds was regularly collected by the bank and credited to the account. The bonds remained at the bank until the death of the husband on May 8, 1909, and then passed into the possession of his executors. There were ten children of the marriage, nine of whom were living.

This action was brought by the present trustees of the marriage settlement against the executors of the husband, claiming a declaration that the plaintiffs were entitled to the bonds under the provisions of the covenant for the settlement of the after-acquired property of the wife contained in the settlement, delivery up of the bonds, and payment of the interest thereon received by the defendants since the death of the husband.

The defendants did not dispute that a portion of the gift of £285 was clearly traced as being invested in and represented by the two bonds, and they admitted at the hearing for the purposes of that action that the bonds were so purchased and belonged to the wife. They abandoned the plea of laches and acquiescence which they had raised, but relied on the defence that the plaintiffs' only remedy was damages for breach of covenant committed in 1879 which was long since barred. A list of securities at the bank on Aug. 12, 1880, in the husband's handwriting was produced in evidence, in which the two bonds were entered as belonging to the wife, and also a pass-book in which the debit of the purchase money for the bonds was entered as "Mrs. Bliss, £275 17s. 6d.," as a payment to the wife.

Micklem, K.C., and *Pepys* for the plaintiffs.
Frank Russell, K.C., and *H. S. Preston* for the defendants.

SWINFEN EADY, J., stated the facts, and continued: The defendants insist that, although they still retain the bonds, they are under no liability to the plaintiffs. They put their case in this way: that the plaintiff trustees could not follow the bonds into their hands, that the only liability of the husband was on his covenant, and the claim of the trustees was for damages only, and that, as this claim accrued in 1879, it was long since barred by the Statute of Limitations.

Having regard to the authority of the wife in respect of the banking account, and to the difficulty of ascertaining now the exact extent of it (the old papers of Messrs. Parsons & Co. being no longer available), there is some doubt whether these bonds were in the husband's lifetime in his sole possession or under his sole control, but, having regard to the allegations in the statement of claim, I must deal with the case on the footing that the bonds were in the possession of the husband at his death. He received the bonds, purchased with his wife's money, with full notice of the trusts of the settlement, and knowing that the £285 and the bonds purchased with part of it were bound by the covenant, and, moreover, gave no value, but is in the position of a volunteer. The trustees, having traced the property into his hands, are entitled to claim it from his executors.

It is contended that the bonds never in fact became trust property, as both the wife and the husband were only liable in damages for breach of covenant, and that the case was different from cases where property which has once admittedly become subject to the trusts of an instrument has been improperly dealt with and is sought to be recovered. In my opinion, as soon as the £285 was paid to the wife it became in equity bound by and subject to the trusts of the settlement. The trustees could have claimed that particular sum, could have obtained at once the appointment of a receiver of it if they could have shown a case of jeopardy, and, if it had been invested and the investment could be traced, could have followed the money and claimed the investment. This point was dealt with by SIR GEORGE JESSEL, M.R., in *Smith* v. *Lucas* (2), where he said (18 Ch.D. at p. 543):

> "What is the effect of such a covenant in equity? It has been said that the effect in equity of the covenant of the wife, as far as she is concerned, is that it does not affect her personally, but that it binds the property: that is to say, it binds the property under the doctrine of equity that that is to be considered as done which ought to be done. That is in the nature of specific performance of the contract no doubt. If, therefore, this is a covenant to settle the future-acquired property of the wife, and nothing more is done by her, the covenant will bind the property."

Again, in *Collyer* v. *Isaacs* (3), SIR GEORGE JESSEL, M.R., said (19 Ch.D. at p. 351):

> "A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, e.g., in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son."

The property being thus bound, these bonds became trust property and can be followed by the trustees and claimed from a volunteer.

Again, the trustees are entitled to come into a court of equity to enforce a contract to create a trust contained in a marriage settlement for the benefit of the wife and the issue of the marriage, all of whom are within the marriage consideration. The husband covenanted that he and his heirs, executors and administrators should, as soon as the circumstances would admit, convey, assign and surrender to the trustees the real or personal property to which his wife should become beneficially entitled. The trustees are entitled to have that covenant specifically enforced by a court of equity. In *Re D'Angibau, Andrews* v. *Andrews* (4) and in *Re Plumptre's Marriage Settlement, Underhill* v. *Plumptre* (5), it was held that the court would not interfere in favour of volunteers, not within the marriage consideration, but here the plaintiffs are the contracting parties, and the object of the proceeding is to benefit the wife and issue of the marriage. In *Re D'Angibau* (4), as COTTON, L.J., said (15 Ch.D. at p. 242):

"as a rule the court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract: *Colyear* v. *Countess of Mulgrave* (6). The court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement."

It was contended (and the argument was much pressed) that *Spickernell* v. *Hotham* (1) established that, where a settlor covenanted in a marriage settlement to transfer forthwith to the trustees of the settlement a sum of stock then belonging to him and failed to do so, the trustees could not claim to follow the stock, if still remaining in the covenantor's control, but that their only remedy was in damages for the breach of covenant. This argument is not well founded. The only claim of the trustees in that case was to rank as specialty creditors, and, as such, their claim was barred by the Statute of Limitations. I have referred to the master's report and the other papers in that case from which it appears that the testator, G. V. Drury, died owing large sums of money; his personal estate was small and had been exhausted, and the object of the suit was to obtain payment of his debts out of his real estate. There was no question of following the £962 New Four per cent. Annuities. At the date of the proceedings New Four per cent. Annuities had been converted into New Three and a Quarter per cent. Annuities, but there was no such stock standing in the name of the testator or in the names of his executors, and the claim was limited to a money demand, as specialty creditors, with a view to the payment of the amount out of the real estate.

The result is that the plaintiffs have established their claim to the two bonds or debentures in question and the interest which has accrued thereon since the testator's death. There must, therefore, be a declaration that the plaintiffs are entitled to the bonds, and an order that the defendants do deliver up to the plaintiffs the bonds and the coupons attached thereto and pay to the plaintiffs the interest received since the death of the husband.

Solicitors: *Sharpe, Pritchard & Co.*, for *W. C. Cripps, Son & Daish*, Tunbridge Wells; *Dollman & Pritchard*.

[*Reported by* J. TRUSTRAM, ESQ., *Barrister-at-Law.*]

A

LANDAUER & CO. *v.* CRAVEN AND SPEEDING BROS.

[KING'S BENCH DIVISION (Scrutton, J.), January 25, 26, 1912]

[Reported [1912] 2 K.B. 94; 81 L.J.K.B. 650; 106 L.T. 298; 56 Sol. Jo. 274; 17 Com. Cas. 193]

B

Sale of Goods—Contract—C.i.f. contract—Cash in exchange for shipping documents—Shipment by steamer or steamers direct or indirect to port of destination—Transhipment—Tender of bills of lading from port of transhipment—Right of buyers to reject goods.

C

By a contract in writing dated May, 1909, the sellers agreed to sell to the buyers 500 bales of hemp on c.i.f. terms, to be shipped from a recognised port in the Philippine Islands or from Hong Kong by steamer direct or indirect to London between Oct. 1 and Dec. 31, 1909. Payment was to be made by cash in exchange for shipping documents, and any dispute was to be settled by arbitration. One hundred bales were duly tendered to and accepted by the buyers and paid for by them. The sellers purchased 400 bales from B. Brothers on c.i.f. terms. These bales had been shipped from Manila, a recognised port in the Philippine Islands, under two bills of lading dated at Manila Dec. 28, 1909, for delivery to shipper's order at Hong Kong. They were intended for transhipment to London, but, due to circumstances beyond the control of the shippers, were not transhipped from Hong Kong to London until Mar. 25, 1910, under two bills of lading dated at Hong Kong Mar. 25, 1910. The bales were insured by the shippers from Manila to Hong Kong and thence to London. The sellers tendered to the buyers the two bills of lading dated in Hong Kong Mar. 25, 1910, and the policy of insurance covering the goods from Manila to London. The buyers claimed that these documents were not a good tender under the contract, and the dispute was referred to arbitration. The umpire found that it was quite usual for goods shipped from Manila for London to be carried via Hong Kong, but that such goods were usually shipped at Manila under a through bill of lading providing for the carriage on the whole journey from Manila to London via Hong Kong. In so far as it was a question of fact, he found that, on a c.i.f. contract, it was by mercantile usage, unless otherwise agreed, the seller's duty to provide a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an enclosed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination.

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Held: the tender of the documents was not a good tender under the contract and the buyers were entitled to reject the goods because they were entitled to a through contract of affreightment covering the whole adventure and made before Dec. 31, 1909, and that they had not got.

H

Notes. Followed: *Hansson* v. *Hamel and Horley, Ltd.*, [1922] All E.R. Rep. 237. Referred to: *J. Aron & Co.* v. *Comptoir Weigimont*, [1921] 3 K.B. 435; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R. Rep. 283; *Foreman and Ellams, Ltd.* v. *Blackburn*, [1928] 2 K.B. 60; *Meyer (N.V. Arnold Otto)* v. *Aune*, [1939] 3 All E.R. 168.

I

As to c.i.f. contracts, see 34 HALSBURY'S LAWS (3rd Edn.) 164 et seq.; and for cases see 39 DIGEST 575 et seq.

Cases referred to:

(1) *Cox, McEuen & Co.* v. *Malcolm & Co.*, [1912] 2 K.B. 107, n.; 17 Com. Cas. 205, n.; 39 Digest 577, *1810*.

(2) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214; 80 L.J.K.B. 584; 103 L.T. 661; 27 T.L.R. 47; 55 Sol. Jo. 47; 16 Com. Cas. 8; reversed [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp. M.L.C. 1; 19 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens Horst Co.* v. *Biddell Bros.*, ante p. 93; [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp. M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801*.

(3) *Sanders* v. *Maclean* (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462; 31 W.R. 698; 5 Asp. M.L.C. 160, C.A.; 39 Digest 595, *1936*.

(4) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp. M.L.C. 389, H.L.; 39 Digest 560, *1677*.

Award in the form of a Special Case.

By a contract in writing dated May 5, 1909, the sellers sold to the buyers 500 bales of Manila hemp at the price of £21 10s. plus half per cent. per ton of eight bales cost, freight and usual f.p.a. insurance on the following, amongst others, terms: (a) Shipment to be made from a recognised shipping port or ports in the Philippine Islands or from Hong Kong or Singapore by steamer or steamers direct or indirect to London between Oct. 1 and Dec. 31, 1909, both inclusive; (b) declaration to be made with due dispatch, but not later than sixty days from date of bill of lading; (c) extension of time for shipment to be allowed to the sellers at a reduction of price of 1¼ per cent. up to seven days and 2½ per cent. up to fourteen days; (d) bills of lading to be made out in sets of not exceeding 250 bales each; (e) by cl. 15 of the contract, payment was to be made by cash within fourteen hours of the vessel reporting at the Custom House in exchange for shipping documents, but should the arrival of the vessel be delayed beyond the due date of the draft at three months' site drawn against the original Manila invoice, the sellers were to have the right to call on the buyers to take up the documents at the maturity of the draft; (f) a provision for arbitration under the Arbitration Act, 1889, and (g) the date of the bill of lading attached to the shipper's draft to be conclusive evidence of the date of shipment.

One hundred bales of the 500 bales of hemp were duly tendered to and accepted by the buyers, and were paid for by them on Feb. 18, 1910. A dispute arose between the parties whether two parcels of 150 and 250 bales respectively tendered by the sellers to the buyers under the contract to make up the balance of the 500 bales were a good tender under the contract. Both parties appointed arbitrators who appointed an umpire to whom the dispute was referred, the arbitrators being unable to agree. The umpire awarded and determined that the 150 and 250 bales were not a good tender and that the buyers were not bound to accept them and were entitled to recover damages from the sellers for breach of the contract. The award was made subject to the opinion of the court on the following:

CASE.

1. On or about Dec. 28, 1909, Warner, Barnes & Co., of Manila, shipped on board the steamship *Rubi* at Manila under two bills of lading, both dated Manila, Dec. 28, 1909, 150 and 250 bales of Manila hemp for delivery to shipper's order at Hong Kong. Manila is a recognised shipping port in the Philippine Islands. 2. The hemp was invoiced by Warner, Barnes & Co. to Bibby Brothers & Co., London, under two invoices on printed forms, both dated Manila, Dec. 28, 1909, and reading: "Shipped on board the steamship *Rubi*, . . . bound for Hong Kong, for transhipment thence per other steamers to London per account and risk of the concerned and consigned to order." The hemp at the time of shipment was bona fide intended by the shippers to be transhipped at Hong Kong to London, and the shippers caused to be forwarded to Mr. J. C. Moxon, a shipping agent in Hong Kong, the Manila bills of lading with the requisite instructions for him to ship the goods forthwith to London. He did not, however, procure ship room for forwarding the hemp from Hong Kong to London until Mar. 25, 1910. 3. The

umpire found as a fact that there was no want of due diligence on the part of Warner, Barnes & Co. or J. C. Moxon in endeavouring to find room for the forwarding of the hemp from Hong Kong to London, and that the delay of nearly three months at Hong Kong was due to causes beyond the control of Warner, Barnes & Co. and J. C. Moxon. 4. Warner, Barnes & Co. drew two bills of exchange, dated Dec. 28, 1909, on Bibby Brothers & Co. in respect of the hemp. The bills of exchange were attached to duplicates of the Manila bills of lading dated Dec. 28, 1909, and the policies mentioned in the next clause. 5. Warner, Barnes & Co. on Dec. 28, 1909, effected insurances on the hemp on the usual f.p.a. terms "at and from Manila to Hong Kong per steamship *Rubi* and thence per other steamer to London with leave to call at ports en route, including risk of transhipment and of fire while at transhipping port." The two policies by which such insurances were effected were both in the same form. 6. The sellers purchased the 250 and 150 bales of hemp from Bibby Brothers & Co. on cost freight and insurance terms. 7. On Feb. 3, 1910, the sellers declared in writing to the buyers in part and further part fulfilment respectively of the above contract the 250 and 150 bales of Manila hemp per steamship *Rubi* to Hong Kong thence per steamer to London. Bill of lading dated Dec. 28, 1909. 8. On Mar. 25, 1910, the 250 and 150 bales were shipped by J. C. Moxon on board the steamship *Antilochus* at Hong Kong for London under two bills of lading for 250 and 150 bales respectively to order, both dated Mar. 25, 1910. 9. By letter dated May 4, 1910, the sellers gave notice to the buyers that the 150 and 250 bales of Manila hemp per steamship *Rubi* and steamer c/o 5.5.09 were arriving per steamship *Antilochus* "due in London on the 12th inst.," and that "as shipper's draft covering these goods will expire tomorrow, we beg to inclose invoice herewith which we trust you will find in order." 10. On May 7, 1910, the buyers paid the sellers for the hemp, but without prejudice to the buyers' rights, and before the arrival of the goods under cl. 15 of the contract, and subsequently claimed arbitration on the ground that the goods were not a valid tender against the contract. 11. The steaming distance from Manila to Hong Kong is 630 miles or thereabouts, and the goods after arriving in Hong Kong lay in warehouse there until shipment on board the *Antilochus* on or about Mar. 25, 1910. The steamship *Antilochus* arrived in London on May 17 with the goods on board. 12. The only bills of lading in London on which delivery of the goods could be taken and on which delivery was in fact taken were the two duly indorsed bills of lading for 250 and 150 bales of hemp respectively per steamship *Antilochus*, both dated in Hong Kong, Mar. 25, 1910, and these were the only bills of lading held by the sellers and the benefit of which they were in a position to transfer to the buyers. 13. "It is quite usual for goods shipped from Manila to London to be carried via Hong Kong and to be there transhipped to London. Such goods are usually shipped at Manila under a through bill of lading providing for the carriage on the whole journey from Manila to London via Hong Kong. No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale of goods on cost, freight, and insurance terms. If and so far as it is a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading or otherwise to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from port of shipment to port of destination, so that if during any part of that voyage the goods should be lost or damaged by default of the shipowner or of those for whom he is responsible, the buyer may have a remedy against the shipowner." 14. The buyers contended that the tender of the 250 and 150 bales of hemp by the sellers was not a good tender on the ground that the goods were not shipped to London

direct or indirect between Oct. 1 and Dec. 31, 1909, both inclusive, and that, even if they were so shipped, the documents in London which were transferred to the buyers under cl. 15 of the contract did not include any bill of lading from Manila, but only bills of lading from Hong Kong dated Mar. 25, 1910, and that the documents so transferred were, accordingly, not the documents to which the buyers were entitled under the contract. 15. The sellers contended that the tender of the hemp was a good tender under the contract, and alleged that the hemp was shipped directly or indirectly from Manila to London between Oct. 1 and Dec. 31, 1909, within the meaning of the contract, and that the buyers were only entitled to a bill of lading entitling them to take delivery in London from the ship, and were not entitled to a bill of lading for the whole voyage from Manila to London. 16. The question for the opinion of the court was whether the tender of the goods on May 4, 1910, was a good tender under the contract.

Bailhache, K.C., and *Leck* for the plaintiffs, the sellers.
Atkin, K.C., and *Chaytor* for the defendants, the buyers.

SCRUTTON, J.—This is a Special Case stated by the umpire, a well-known commercial solicitor, to determine whether a tender of certain hemp on May 4, 1910, was, as regards the hemp and the documents tendered, a good tender. The original sellers shipped the hemp at Manila, which is a recognised shipping port in the Philippines, to Hong Kong, per steamship *Rubi*, on Dec. 28, 1909, under bills of lading to the shippers' order at Hong Kong. They sent copies of the bills of lading forward to London, attached to the seller's draft to the original buyer. They had at the time of shipment no contract for conveyance of the hemp to London, but intended to tranship the goods at Hong Kong and make such a contract there. But, owing to circumstances beyond their control, they were unable to make such a contract until Mar. 25, 1910, when the goods were shipped from Hong Kong by the steamship *Antilochus* under fresh bills of lading, dated Mar. 25, 1910, and arrived in London about May 12, 1910. Meanwhile, the sellers in this case, on Feb. 3, 1910, declared the goods per *Rubi* to the buyers, referred by date to the Manila bills of lading of Dec. 28, and on May 4 the sellers, under cl. 15, tendered as shipping documents the Hong Kong bills of lading of Mar. 25, and the policy of insurance covering the goods from Manila to London. The Manila bills of lading were not in London at the time. The buyers subsequently claimed to reject, on the grounds that the goods were not good tender under the contract (i) because they had not been shipped to London within the contract time, as at the time of the shipment to Hong Kong there was no contract for carriage to London, but only an intention to make such a contract in the future; (ii) because the documents tendered did not include a contract of affreightment covering the goods from Manila to Hong Kong. The umpire found that the bales were not a good tender, without specifically stating his view as to the two contentions put forward, and he states a Case on the first question whether the tender of the goods on May 4, 1910, which was a tender by the documents referred to, was a good one.

Counsel for the sellers called my attention to a decision of HAMILTON, J., in *Cox, McEuen & Co.* v. *Malcolm & Co.* (1), decided in the Commercial Court on July 1, 1910. This was a Special Case relating to hemp, the contract being in the same terms. The goods were shipped within the contract period at Manila, but under a contract to Hong Kong, and with no contract for carriage to London. They were forwarded to Hong Kong, and rejected in London on the ground that they had not been shipped to London within the contract period, and that the date of the Hong Kong bill, which was after the contract period, was conclusive. HAMILTON, J., held that there was no necessity in law for the shipment to be under a through bill of lading. He said ([1912] 2 K.B. at p. 110):

"In my opinion the contract does not require, in order that a shipment may be made from Manila indirect to London, that there shall be a through bill of

lading, or a bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transhipment by the carrier to a London steamer."

If on this point I had only to deal with law, I should, of course, follow this decision, leaving it to be examined, if the parties desired, in the Court of Appeal. But I should very respectfully express my doubts of its correctness. HAMILTON, J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (2) ([1911] 1 K.B. at p. 220), states the first two duties of the seller c.i.f. as follows:

"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract."

I should myself add to the first requisite the words "within the time named in the contract"; and, to the second, that such a contract must be procured on shipment. I should make the last addition for the reason that the seller must, as soon as possible after he has sent the cargo, send forward the documents to the consignee; see per LORD ESHER in *Sanders* v. *Maclean* (3) (11 Q.B.D. at p. 337). If, when he ships goods sold c.i.f. London, he has no contract for carriage to London, but only an intention to make one, he cannot forward this and tender an intention to the buyer. Further, the buyer frequently wants not to take delivery of the goods, but to sell them afloat to other people. And, but for the decision of HAMILTON, J., I should have thought that the seller c.i.f. must ship his goods under a contract for conveyance to the port of destination which can be transferred, not under a contract part of the way and an intention to make another which cannot be transferred, which, as in this case, may not become effective for three months. I should have been disposed to read the words of this contract, "shipment at the port in one or more steamers which are going to London direct or indirect," or, at any rate, "shipment to London, that is, under a contract to carry to London either direct by the same steamer or indirect by transhipment to another steamer," in other words, under a through bill of lading, which both arbitrators find is the usual method of forwarding.

But, while prepared to follow HAMILTON, J.'s, judgment on this point as deciding the question of law in this court, I have a finding of the umpire on (I was told) evidence given before him, which, in my view, leaves me free to follow my own opinion. The umpire finds:

"No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale of goods on cost, freight, and insurance terms. If and so far as it is a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract."

I read this as a finding of fact that, by mercantile custom, a seller c.i.f. must obtain on shipment a through contract of affreightment to the ultimate destination. If so, what would be the law in the absence of mercantile custom does not apply. If, therefore, the decision of the umpire proceeded on the ground that there was no contract to carry to London made before Dec. 31, 1909 in respect of goods shipped at Manila, I hold it is correct.

But the other objection was to the documents tendered, which only included the bill of lading from Hong Kong, and not the bill of lading from Manila to Hong Kong. This point might have been raised in *Cox, McEuen & Co.* v. *Malcolm & Co.* (1), but was not. HAMILTON, J., does not deal with it, and, indeed, expressly limits himself to the points raised by the arbitrator. If the umpire's decision has proceeded on this ground, I am of opinion it was also correct. The buyer wants the

bill of lading for two purposes: (i) to take delivery, for which purpose the Hong Kong bill will suffice; (ii) to claim on the shipowner for any breach of the contract of affreightment. As LORD BLACKBURN says in *Ireland* v. *Livingston* (4) (L.R. 5 H.L. at p. 407):

> "Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner."

He, therefore, wants a policy and contract of affreightment, covering the whole adventure. Supposing in this case the transhipment had been at Hamburg, would it have been enough to tender the bill of lading from Hamburg to London? If the transfer of the bill of lading from Manila to Hong Kong is necessary to enable the buyers to sue the shipowners, it should have been tendered; if, being spent, its indorsement will not have that effect, this is another argument in favour of the tender of one contract of affreightment of the whole voyage. On this point, counsel for the sellers suggested that, while it need not be tendered, the buyer might be entitled to claim its transfer afterwards, and he cited a sentence from KENNEDY, L.J.'s, judgment in *Biddell's Case* (2) in the Court of Appeal. He said (ante p. 97):

> "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied, in case the goods have been lost in transit by the policy of insurance."

I shall not be supposed to be lacking in appreciation of a judgment which has not been adopted by the House of Lords when I say that I am unable to follow this obiter dictum. At the time of tender, the goods are generally at sea, and nobody knows whether they are afloat or at the bottom, and, in my view, the buyer is entitled to require the policy in his shipping documents, whether it is known that there has been a loss or not.

In my view, therefore, the umpire was right on both the grounds argued before him, and his award must stand. The buyers must have the costs of the hearing.

Award confirmed.

Solicitors: *Waltons & Co.; Druces & Attlee.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

A

MOSS STEAMSHIP CO. *v.* WHINNEY

[House of Lords (Lord Loreburn, L.C., the Earl of Halsbury, Lord Ashbourne, Lord Atkinson, Lord Shaw, and Lord Mersey), February 13, 14, June 26, 1911]

[Reported [1912] A.C. 254; 81 L.J.K.B. 674; 105 L.T. 805; 27 T.L.R. 513; 55 Sol. Jo. 631; 12 Asp. M.L.C. 25; 16 Com. Cas. 247]

B

Company—Debenture holders' action—Receiver and manager—Supersession of directors in management of company—Transactions by receiver and manager personal transactions with personal liability.

The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, but it does entirely supersede the company in the conduct of its business and deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of the receiver and manager. The business of the company is carried on by the receiver and manager, but not as the company's agent. He supersedes the company, and the transactions on which he enters in carrying on the business are his transactions on which he is personally liable, with a right to be indemnified out of the assets of the company in respect of liabilities which he may incur.

C

D

Shipping—Shipowner's lien—Lien for previous unpaid freight—Freight owed by company—New shipment by receiver and manager—Liability of receiver and manager for freight owed by company.

E

A limited company, I. C. & Co., had for many years shipped goods by the appellants' steamers to their agents abroad under bills of lading which contained a clause giving the shipowners a lien on the goods, not only for freight due under the particular bill, but also for any previously unsatisfied freight due from the shippers or the consignees. The respondent, A. F. W., was appointed receiver and manager of the company in a debenture-holders' action, and he shipped goods by a ship of the appellants with instructions to "deliver as below, charging to yours respectfully, I. C. & Co., Ltd., by A. F. W., Receiver and Manager." The address given for delivery was to the company, care of the local agents. The appellants informed the respondent of the amount of freight, and inclosed a bill of lading in the same form as that used on previous shipments by the company. On the arrival of the goods, the shipowners claimed a lien in respect of unpaid freight due from the company on shipments before the appointment of the receiver.

F

G

Held by Lord Loreburn, L.C., the Earl of Halsbury, Lord Ashbourne, and Lord Atkinson, Lord Shaw and Lord Mersey dissenting: on the true construction of the shipping instructions and the bill of lading the shipment of the goods was a transaction by the respondent in respect of which he was personally liable both as shipper and consignee, and, therefore, the appellants were not entitled to a lien against him for freight unpaid by the company.

H

Per Lord Atkinson: The receiver and manager had no power to create a lien on the goods which he shipped.

Notes. Referred to: *Parsons* v. *Sovereign Bank of Canada*, [1913] A.C. 160; *Meigh* v. *Wickenden*, [1942] 2 All E.R. 68; *Gyton* v. *Palmour*, [1944] 2 All E.R. 540.

I

As to the shipowner's lien for freight, see 35 Halsbury's Laws (3rd Edn.) 470–475, and for cases see 41 Digest 582 et seq.

Cases referred to:

(1) *Burt, Boulton and Hayward* v. *Bull*, [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, *5463*.

(2) *British Mutual Banking Co.* v. *Charnwood Forest Rail Co.* (1887), 18 Q.B.D. 714 56 L.J.Q.B. 449, 57 L.T. 833; 52 J.P. 150; 35 W.R. 590, C.A.; 9 Digest (Repl.) 263, *1662*.

(3) *Balfour* v. *Ernest* (1859), 5 C.B.N.S. 601; 28 L.J.C.P. 170; 32 L.T.O.S. 295; 2 Jur. N.S. 439; 7 W.R. 207; 141 E.R. 242; 6 Digest (Repl.) 90, *711*.

(4) *Kearns* v. *Leaf*, *Aldebert* v. *Kearns* (1864), 1 Hem. & M. 681; 3 New Rep. 455; 10 L.T. 185; 12 W.R. 462; 71 E.R. 299, 10 Digest (Repl.) 1158, *8054*.

(5) *Chapleo* v. *Brunswick Permanent Benefit Building Society* (1881), 6 Q.B.D. 696; 50 L.J.Q.B. 372; 44 L.T. 449; 29 W.R. 529, C.A.; 1 Digest (Repl.) 764, *2997*.

Appeal by the shipowners from a decision of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., FLETCHER MOULTON, L.J., dissenting), reported, [1910] 2 K.B. 813, reversing a decision of HAMILTON, J., sitting without a jury, reported 102 L.T. 177, in favour of the appellants, the defendants below.

The facts and arguments appear sufficiently from the judgments of their Lordships.

Bailhache, *K.C.*, and *Robertson Dunlop* appeared for the appellants.

Sir A. Cripps, *K.C.*, and *Leck* for the respondent.

Their Lordships took time for consideration.

June 26, 1911. The following opinions were read.

LORD LOREBURN, L.C.—In this case FLETCHER MOULTON, L.J., and HAMILTON, J., were of one opinion, while VAUGHAN WILLIAMS and BUCKLEY, L.JJ., held a different view. Your Lordships have, I am sure, felt the difficulty presented by such a conflict of judicial authority. This is eminently one of those cases in which it is most important to appreciate the true business character of the transaction, and to examine the communications between the parties in that light.

Messrs. Ind, Coope Co. had for some time shipped beer on the vessels of the Moss Steamship Co., and taken bills of lading which provided that the shipowner should have a lien on the goods, not only for the stipulated freight, but also for any unsatisfied freight due on other shipments either from shipper or consignee to the shipowner. That was the course of business between them up to January, 1909. On Jan. 5, an order was made in a debenture-holder's action that Mr. Whinney should be receiver and manager of Ind, Coope & Co. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, the entire conduct of which passed into the hands of Mr. Whinney. Mr. Whinney did not close down the business, but continued it, and, among other things, he resolved to send some of Ind, Coope & Co.'s beer to Malta to the company's representatives there. Accordingly, on Jan. 13, he sent an order to the Moss Steamship Co. directing them to ship the beer to Ind, Coope & Co., care of Turnbull, jun., and Somerville of Malta, and he signed as follows: "Ind, Coope & Co., Ltd., by Arthur F. Whinney, Receiver and Manager." Upon this, Messrs. James Moss & Co., as agents, shipped the beer and made out the bill of lading in the terms theretofore in use, which, as I have said, gave to the shippers a contractual lien, not merely for the freight of £56 payable for this particular beer, but also for any unsatisfied freight due, either from shipper or consignee. Now, there was at that time due from Ind, Coope & Co. to the shipowner the sum of £171 for unsatisfied freight, and the dispute which your Lordships have to decide is this: Can Mr. Whinney claim delivery of this beer on payment of the stipulated freight of £56 or must he also pay the additional £171 unsatisfied freight due upon earlier contracts from Ind, Coope & Co. in accordance with the lien clause in the bill of lading? Obviously, if the lien holds good for this sum of £171 the effect of what Mr. Whinney has done is that he has given security to the unsecured creditors of Ind, Coope & Co. which placed them in front of the debenture-holders after the latter had got a receiver appointed in order to realise their floating security over the undertaking of Ind, Coope & Co. Questions have

been raised as to the power of a receiver and manager to hypothecate assets of the company for the payment of unsecured creditors. It is said that such a proceeding would be ultra vires, or at all events an excess of authority, of which a trader who knew the position could not avail himself. I do not think that such a question arises in the present case. This is an action between the shipowners on the one side and Mr. Whinney on the other. If Mr. Whinney has contracted so to hypothecate these goods—I say if he has done so—he cannot himself compel the shipowners to deliver them without first satisfying the charge which he has created. As between the litigating parties there is a charge. It may be that Mr. Whinney had no power to create it, but if so, then it is for the company to claim the goods and to raise the question of his authority.

Of course, a decision upon the ground so taken by counsel for the appellants would really settle nothing as to the true rights of the shipowners. In my opinion, there is another ground upon which this case ought to be decided in favour of the respondent. The shipowners can claim a lien for the sum of £171 unsatisfied freight only if this unsatisfied freight was due by the shippers or consignees of this particular shipment of beer. Who were the shippers and consignees respectively? We must look at the order of Jan. 13 and the bill of lading together. The order is signed Ind, Coope & Co. by Mr. Whinney, receiver and manager. Unless qualified by other circumstances absent here, this means that Mr. Whinney ordered the shipment and contracts for it on his personal credit, looking, of course, for indemnity to the assets of the company, of which he is receiver and manager. He is the shipper in the name, it is true, of Ind, Coope & Co. The shipowners know, from the terms of the order, or to know, that Ind, Coope & Co. are no longer conducting the business, but that Mr. Whinney is conducting it and making contracts for it. So again, when in the bill of lading Ind, Coope & Co. are named as consignees, the shipowners know that they are so only in name, the real consignee being the same as the real shipper—namely, Mr. Whinney, the receiver and manager. I agree with Fletcher Moulton, L.J., that the company was still alive and its business was being still carried on by Mr. Whinney, but he was not carrying it on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. No doubt, there may be cases in which a receiver and manager is in all senses the agent of the company, and a question may then arise as to the extent of his authority. But here he was not such agent, and this was sufficiently conveyed to the shipowners by the notice that he was receiver and manager. Had they doubted or desired further information they could have asked for it before contracting to carry the goods. They would have found that the person contracting with them was Mr. Whinney. Accordingly, I move your Lordships that the order appealed from be sustained.

THE EARL OF HALSBURY.—I think for more reasons than one, that it is desirable to state the circumstances under which this case comes for adjudication, chiefly because the very sensible arrangement made by the parties to have the real question in dispute disposed of before the courts might be defeated if questions of pleading or forms of action should interfere with the determination of the real question as I think that it has interfered with the arguments. Another reason is that I think that if the appellants' argument should prevail, it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court of Chancery, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company, and places it in the

hands of a manager and receiver, who thereupon absolutely supersedes the company itself, so that the company becomes incapable of making any contract on behalf of the company or exercising any control over any part of any property or assets of the company.

Now in this case a joint stock company, Ind, Coope & Co., Ltd., a brewery carrying on an extensive business, part of which consisted in exporting beer, &c., to Malta, became embarrassed in its affairs; the debenture-holders became alarmed; such an application as I have described was made to the Court of Chancery on Jan. 5, 1909, and on that day an order was made appointing Mr. Whinney, the respondent, receiver and manager. On Jan. 13, an order was given by Mr. Whinney to the shipowners for the shipping of the beer which is the subject of this action, but the order was signed by "Arthur F. Whinney, Receiver and Manager," and on the 15th shipping documents were sent from Moss & Co. with a note that one bill of lading had been sent to the consignee by the ship *Rameses*, the exact date when she started on her voyage not being given. Two bills of lading were issued, one stamped, the other an unstamped copy sent to Ind, Coope & Co., Ltd., Burton-on-Trent. No one has suggested that Mr. Whinney ever saw the bill of lading himself; indeed, HAMILTON, J., finds that that form of bill of lading was probably not read by anybody. The letter of Jan. 16, which inclosed it, bore the statement:

> "One bill of lading sent to consignee. Please check the inclosed bill of lading, and if found incorrect, return to us immediately, as otherwise we can take no responsibility."

That is a warning and request that the bill of lading should be checked. I am satisfied that it has no reference whatever to the terms of the bill of lading and only meant matters to be filled in pursuant to the instructions of Jan. 13, but that included the description of the consignee and the address of the consignee, and I assume that to that extent the bill of lading was duly checked, and certainly no exception was taken. No doubt Mr. Whinney did not read the bill of lading; it is not proved that he did not, but I think that I should be shutting my eyes to the ordinary course of business if I believed that he did. This is certainly what I should infer, and when the witness at the trial is challenged with this notice of the 16th he says that of course it had reference to the number of the casks.

Now, if actual knowledge of this particular stipulation in this particular bill of lading is negatived, as I think it is here, I am unable to take the view that, with all respect to this very learned and experienced judge, and my respect for any judgment of his is very great indeed, that there was any evidence of such a contract as would enable Messrs. Moss & Co. to exercise a lien. Such a phrase as "the usual bill of lading" is entirely misleading unless it is explained with respect to what the word "usual" is to be applied. No doubt there are some things which are so common in commerce as, even when not specially called to the attention of the contracting parties, to be assumed by every business man to be included in a common and well-known form of contract, but no one, I should have thought, could contend that, when a company has been so altered in its management that a receiver has been appointed who is the only person who can contract, its former course of business is to be considered as making the very first consignment made to be subject to the forms which were in use when the company and not the receiver were conducting the business. It would be quite intelligible that such a clause as we are here discussing should be included in dealings with the company itself, and the practice would be used justly as proof against those who had been in the habit of using it for ten years. But once a receiver and manager is appointed things are changed, and every man of business would know, and ought to know, that the only person with whom he could contract safely would be the manager appointed by the Court of Chancery. To say of such a person that the stipulation in question would form a likely clause would be ridiculous. If it were to be inserted at all, it certainly

would require that it should be expressly pointed out to the receiver ond manager, who, as every business man would know, is placed in his position of receiver and manager to protect the rights of the debenture-holders. One would suppose, from some of the arguments, that one was dealing here with some quite inexperienced persons, who had never heard of a debenture action before, whereas, as I have already pointed out, we are dealing with thoroughly experienced business men, and I observed that, when Mr. Waller was challenged at the trial as to whether he had not heard of a manager and receiver being appointed, his only answer is that he had not been officially informed. As LUSH, L.J. pointed out, a bill of lading refers primarily to legal relations between the parties as applicable to the particular consignment to which it relates. The question what would be the consequence if Mr. Whinney had known and understood the contract, which he was supposed to have done, but I find as a fact that he did not, does not arise in this case. I agree with the Lord Chancellor that it is unnecessary to discuss it, and I think that this appeal should be dismissed.

LORD ATKINSON.—The action out of which this appeal has arisen was not an action to recover damages for breach of a warranty given by Arthur F. Whinney of his authority to make a contract, still less an action to recover damages for a false representation made by him of his authority to make any contract. It was a proceeding instituted by him to try the validity, as between him and the appellants, of a lien given to them, and already enforced by them, on certain goods of which he had possession, the property of Ind, Coope & Co., shipped on the appellants' ship the *Rameses*, and carried by her to Malta. The lien was given in respect of a simple contract debt, owed by Ind, Coope & Co., for freights theretofore earned; and in the circumstances of this case must, I think, be taken prima facie to have had the effect of giving to an unsecured creditor of that company priority over its secured creditors.

Arthur F. Whinney was, by order of the Court of Chancery, dated Jan. 5, 1909, made in an action instituted by the debenture-holders of this company, appointed receiver and manager over "all the undertaking and property whatsoever and wheresoever of the company." The company was directed to deliver over to him, among other things, "all the stock-in-trade and effects of" their business, and the possession of the said properties, so far as was necessary for the purposes of such receivership and managership; and it was further ordered that Whinney should forthwith, out of any assets coming to his hands, pay the debts of the company which had "priority over the claims of the debenture stockholders, under the Preferential Payments in Bankruptcy Amendment Act, 1897, and be allowed all such payments on his account." It is not pretended that the debt due for back freights, for which the lien was given, was one of these latter, or that any order had been obtained from the court authorising the giving of the lien, and I do not think that it can be contended successfully that under this order Whinney had any power to give a lien valid at law against everybody on assets of the company coming to his hands, part of its stock in trade, which would have the effect of giving the priority above mentioned. This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it does entirely supersede the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance. Of all these facts the appellants had notice before this lien was created. That notice was conveyed to them by the description given by Whinney of himself in his letter to them of Jan. 13, 1909. He describes himself as receiver and manager of Ind, Coope & Co. That is sufficient: *Burt, Boulton and Hayward* v. *Bull* (1).

Now, as I understood, the appellants contend that, despite this notice, Whinney could enter into a contract with the appellants, valid and binding as between themselves, that the company should do that which at law it is disabled from doing, and that he himself, Whinney, should do something which at law he is also disabled from doing—namely, that the company should intermeddle with their own goods, that they should become the consignees, if not the shippers of these goods, and should exercise dominion over, and deal with, them in the character of consignees—and that he, Whinney, should, in defiance of the order of the court, give a valid lien over the goods of the company, part of its stock in trade, of which he got possession and control as such receiver and manager in respect of a simple contract debt in the manner and with the result above mentioned; and further, that the lien so given could be enforced, and the receiver be estopped, as it were, in a suit such as this from relying upon its invalidity. It is admitted on both sides that the bill of lading in this case is only evidence of the contract entered into between the shipowner and the shipper, not the complete contract in itself. It is further admitted that it must be construed together with the respondent's letter of Jan. 13, 1909. It is not denied that the bill of lading is similar in form to those invariably or generally used by the appellants in their business as shipowners, but there is no evidence which I can discover either that its terms were specifically brought to the knowledge of Whinney, or that he was under any necessity of pressure to ship this beer by the *Rameses*, or by any other of the appellants' ships, or indeed, to ship it at all. It is not, therefore, in my opinion, open to the appellants to contend that there was some object to be gained by shipping the goods by this ship or by the appellants' line so important in character that it would have been but reasonable and proper for him, in the efficient and zealous conduct of the business entrusted to him, to accept deliberately the terms contained in the bill of lading, rather than not effect this object. The debt for which the contested lien was given was, by the terms of the bill of lading, a debt due either by the shipper or "consignee." The contention of counsel for the respondent on this point was that Whinney was both shipper and consignee of the goods; and that he owed nothing for back freights. That of counsel for the appellants was, as I understood it, that, at all events, between the contracting parties the company which did owe back freights is the consignee, and must be so treated; and the judgment of FLETCHER MOULTON, L.J., is, apparently, to the effect that the company must, for the purposes of this case, be treated both as shipper and consignee, and that Whinney was only in the position of a general manager of the company appointed by the company itself. This latter point has not, as I gather, been relied upon on behalf of the appellants in argument before your Lordships.

The decision of the question turns upon the construction of the letter of Jan. 13, 1909, since it is admitted that the bill of lading must be read in conjunction with it. In my opinion, the respondent is right. I think it obvious that the company were not the shippers. The very words "receiver and manager" convey, according to the above mentioned authority, that Whinney was not an agent of the company, but that he was managing their affairs under the order of the court, and that all their powers were in abeyance. It would seem to me plain, therefore, that the Ind, Coope & Co., designated as consignee, must be the same company as that first mentioned in this letter—that is, the disabled and superseded company whose powers were dormant; so that the letter must be read as if, after the words Ind, Coope & Co., Ltd., where the same occur for the second time, the words "over whose business the above-mentioned A. F. Whinney has been appointed receiver and manager by the Court of Chancery" had been written into it. Read with that interpolation this letter, in my view, amounts in effect to a direction to consign the beer to Whinney, receiver and manager, care of Turnbull, jun., and Somerville, Strado, Reale, Malta. And if the same interpolation be made in the bill of lading, as I think it must be, then Whinney is himself, under the contract, the consignee, and as he owes nothing for back freights there is no lien.

As regards the second point, the money sued for was paid under protest to obtain the delivery of the goods, and the question must be determined as if this was a proceeding, instituted by the appellants, to enforce this lien. The question for decision, then, would resolve itself into this: Would Whinney be estopped in such an action as against the appellants from asserting that he had no power to create the lien, and that it was invalid in law? It is to be observed that no evidence whatever was given to show that the appellants refused to ship the goods, or would not have shipped them, except upon the terms of getting this lien. It may well be that the way in which Whinney did this business was the ordinary way in which such business was done by the superseded firm. That, however, in my view, is not enough. He was not the agent of the company, but the officer of the court. His powers were those of such an officer, not those of the company or of an agent or manager appointed by them, who might possibly be held by implication to have conferred upon him power to conduct the business in the mode, and on the lines upon which, it had been theretofore conducted by them. His position would appear to me, therefore, to resemble somewhat that of the directors of a company, who, as I understand the authorities, are not estopped at law from relying on the fact that a contract which they made or act which they did was ultra vires and invalid (whether it was an act which could be ratified by the shareholders or not), as against a person who knew, or should be taken to have known, what their powers were, and, therefore, knew, or should be taken to have known, that the contract or act was ultra vires: see LINDLEY ON COMPANIES (6th Edn.), pp. 217, 351, 671. In *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (2), BOWEN, L.J., says (18 Q.B.D. at p. 718):

> "In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?"

FRY, L.J., says (ibid. at p. 719): "No corporate body can be bound by estoppel to do something beyond their powers" and see *Balfour* v. *Ernest* (3); *Kearns* v. *Leaf* (4); *Chapleo* v. *Brunswick Permanent Benefit Building Society* (5). The first two cases turned upon the ignorance of the plaintiffs of the defendants' want of authority to accept bills. But for that ignorance it is obvious that the plaintiffs must have failed to establish personal liability against the directors.

It was contended on behalf of the appellants that the inability of the receiver to create the lien contended for was merely a matter between him and the debenture-holders. They may, no doubt, dispute, before the court which appointed him, his claim to be reimbursed out of the assets of this firm for the sum paid to obtain delivery of the goods, but with this the appellants have no concern. If that reasoning be sound, the receiver could pledge the goods for a personal debt of his own. I do not think that it is sound. The creation of a lien such as that given was not shown to be incidental to or consequential upon those things which the respondent was authorised to do. It was prima facie ultra vires as the appellants must be taken to have known. In my opinion, therefore, the lien was invalid, and the respondent is, on this ground as well as on the other, entitled to receive back the money sued for. The appeal should, I think, be dismissed.

LORD SHAW.—The opinion which I have formed in this case differs from those just delivered. I have arrived at it with diffidence, and only after repeated consideration. I shall express briefly how the matter strikes me.

The appellants own a line of steamships trading between Liverpool and Malta. For a good many years Messrs. Ind, Coope & Co., brewers, have been in the habit of sending by the appellants' steamers consignments of beer to themselves, care of their agents, Messrs. Turnbull, jun., and Somerville. In the course of trade the custom had arisen of shipping upon contracts which provided that the shipowner should have a lien over the consignments for the freight applicable to the cargo and

for all freights unpaid. In the present case it is admitted that £171 was due from Ind, Coope & Co. to the appellants in respect of previously unsatisfied freights. A lien was claimed under the terms of the contract accordingly. The lien has been released by payment, subject to the determination of the point whether such a lien was, in the circumstances, enforceable. There can be no doubt that, under the contract and by the terms of the bill of lading, the payment is due; and no one questions that, had certain events not occurred in the history of Ind, Coope & Co., the lien was good. A few days, however, before this contract was made, a receiver and manager was appointed of the estate of Ind, Coope & Co., at the suit of debenture-holders. The fact that there was such a receiver and manager was brought home to the appellants, because a week after his appointment—namely, on Jan. 13, 1909—the shipping instructions to the appellants were: "Please deliver ale as below, charging to, Yours, respectfully, Ind, Coope & Co., Ltd., By Arthur F. Whinney, Receiver and Manager, C.C.C." In the instructions the consignees were stated to be, "Ind, Coope & Co., Ltd., c/o Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta," and the bill of lading which followed named the consignees as "Messrs. Ind, Coope & Co., Ltd., c/o Messrs. Turnbull, jun., and Somerville, or to his or their assigns." The bill of lading, following in this the previous practice of the business, created a lien which covered "any previously unsatisfied freight . . . due either from shippers or consignees to the shipowner." It is plain, accordingly, to my mind that, if Messrs. Ind, Coope & Co. were either shippers or consignees, the contract which Mr. Whinney made would cover debts due by Ind, Coope & Co., unless either of two things had occurred—namely (i) that the entity known as Ind, Coope & Co., had ceased to exist in law, or (ii) that, Ind, Coope & Co. still subsisting in law, a contract entered into at that date, naming them as consignees, was a contract made sub conditione, and the condition was of such a character as to wipe out completely that part of the contract which stipulated for a lien in respect of all previously unsatisfied freights.

With regard to the first point—namely, whether Ind, Coope & Co., as a legal entity, was continued after the appointment of a receiver—I respectfully agree with the judgment of Fletcher Moulton, L.J.:

> "It was suggested that Ind, Coope & Co., Ltd., after the appointment of the receiver and manager, was a different entity from that which it was before that date. To my mind this is a complete fallacy. The company then was, and still is, a going concern. No steps had been taken to wind it up. The debenture-holders found that it was to their interest to keep the company alive, and so long as it lives it is, and must be, one and the same company. No one but the limited company of that name can carry on the business of Ind, Coope & Co. so long as that company exists. The whole beneficial interest in its assets may have passed to the debenture-holders and others, and this may fundamentally change the position of those who seek to enforce legal rights against it; but its identity is unchanged, and as the consignee under the bill of lading is Ind, Coope & Co., Ltd., it is the same consignee, to whom the previous consignments were sent, and these unpaid freights come within the lien clause exactly as they would have come if the debenture-holders had not taken steps to enforce their security."

I do not desire to put the point in any language of my own, adopting as I do in its entirety this paragraph of the learned lord justice's opinion.

The second question is: Was a contract containing a clause so specific and clear, a clause which included within the scope of the lien freights previously unsatisfied by Ind, Coope & Co.—was that clause substantially excised from the contract by reason of the appointment of a receiver? I cannot see my way clear to hold that it was. It may be quite true that the effect of the appointment of a receiver would be to place all creditors for debts of the company outstanding at the date of the appointment in a class separate from those who made advances or rendered service

to the company after or during the receivership. But in point of fact what Mr. Whinney did in this contract was himself to make—even although he were considered a different person in law from Ind, Coope & Co.—a shipping contract, one of the terms of which was that the outstanding debts of the appellants should be paid as the agreed-upon return for the then present service of conveying certain goods under the bill of lading to Malta. It was free to him to make that bargain; and it was free to the appellants, the shipping company, to decline to carry the goods or to stipulate for higher freights or different terms. But, in my humble opinion, with the utmost deference to the learned judges who reached a different result, it is not free for him to say that he is not bound by an integral portion of the bargain, or to put forward the plea that he had not read a certain part of the contract which quoad ultra, he admits must stand. They were satisfied to go on as before, and the contract was thus made in circumstances which I find clearly expressed in the judgment of HAMILTON, J.:

> "He [Mr. Whinney] instructed the goods to be shipped on the terms that the contract was to contain the usual clause under the bill of lading, so long in use, and he gave instructions for the shipment of the goods in continuation of a course of business and with no such indication that the terms of that business were to be limited as would lead to the inference that any different contract arose in the case of this shipment from the contract that has arisen in the case of prior shipments."

The question is raised in several of the judgments of the courts below whether the shippers, Ind, Coope & Co., formerly, and Ind, Coope & Co. per Whinney, latterly, were the same shippers. There is much to suggest that substantially they were—the continued entity of Ind, Coope & Co. being as stated. But I do not think it necessary to deal separately with that point, for, in my judgment, it is sufficient to say that by the express terms of the contract, Ind, Coope & Co. were the consignees of this cargo—stated as such by name. Although the fact of a receivership had occurred in the history of that concern, that fact did not, as I have observed, disable the receiver from making the contract in these terms, or from shipping goods in accordance with the custom which had obtained previously. I do not find sufficient in this case to entitle me to say that I can upset that contract or import into its conditions something foreign to the previous relations of the parties, or excise from the contract what it itself stipulates—namely, that the lien was to cover past freights due to the appellants by the shippers. I admit the difficulties of the case; but I tender my respectful assent to the conclusions reached by HAMILTON, J., and FLETCHER MOULTON, L.J.—remarking, finally, that I take it to be somewhat serious that the holders of contracts of that kind should find them substantially modified by events which impinge upon and cut down their terms, and leave it thus open to a receiver to make contracts in comprehensive terms, which he had an undoubted power to make, but upon the construction of which it is open to him to maintain that they are less comprehensive in law than they appear to be on the face of the statement, and, therefore, that the carriers must, on the one hand, stand bound by the contract of carriage, but, upon the other, be limited in their rights of lien and recovery under that contract.

LORD MERSEY.—It is unnecessary to re-state the facts of this case. It is important, however, to consider two preliminary matters before turning to examine the terms of the contract out of which the action arises. The first is as to the position and powers of Mr. Whinney as receiver and manager of Ind, Coope & Co., Ltd., and the second is as to the nature of the action itself. Mr. Whinney was a receiver and manager appointed by the court; he was not appointed by the debenture-holders, although, no doubt, he was appointed at their instance; nor was he appointed by the company. He was agent for neither the one nor the other, and, therefore, could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The

A debenture-holders could certainly not be sued upon it, for they as a body never had power to carry on the business or to contract in relation to it, nor could the company be sued upon it for they had ceased to be able to make any contracts by an agent or otherwise. Thus no question of ultra vires arises. Mr. Whinney was merely an officer of the court, directed by the court, and by the court alone, to do a certain thing—namely, to carry on the business of Ind, Coope & Co., Ltd., in the B ordinary way, until such time as the court might otherwise direct. An obligation was placed on him of making the contracts which might be necessary for so carrying on the business, and annexed to that obligation was a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur. If he were to make contracts not necessary for the carrying on of the business, as, for instance, if he were to buy an excessive quantity of malt C or if he were to sell an unduly large quantity of beer, so as to cripple the business, he would be personally liable on the contracts, and when he came to pass his accounts, the court might refuse him any indemnity out of the assets in respect of the liabilities which he had thereby incurred, and might also condemn him in damages for the loss resulting to the business in carrying out the contracts. It would not be for the persons contracting with him to inquire whether the contracts D were such as came within the ordinary course of the business. Mr. Whinney, who alone could ascertain whether they were so or not, would have to take the risk of making a mistake in that connection. This was the position of Mr. Whinney with regard to the company of which he was appointed receiver and manager, and with regard to third parties with whom he might contract. As to the nature of the action brought by him, it is sufficient to say that it was an action brought by him E in his personal capacity to recover back money of his own which he had paid to the defendants in order to obtain possession of goods on which the defendants alleged, and he denied, that he had created a lien in their favour. The action was not brought to try the right of the company or of the debenture-holders to the possession of the goods. There was nothing in it in the nature of interpleader, and it raised one simple question—namely, had Mr. Whinney created in the F defendants a right to hold the goods as against himself, not as against the company, until the alleged lien was discharged? Such was the position of Mr. Whinney in the litigation, and such was the nature of the action brought by him. I have only referred to these matters because I think that some confusion arose during the argument in respect to them. The respondents did not take a different view of them from mine in the courts below, nor do I think that they intended to put G forward a different view before your Lordships' House.

I come, therefore, to the question in the case—namely, did Mr. Whinney create a lien on the goods in respect of the back freights? It is said in the first place, that he did not because he could not, inasmuch as the goods were not his. To this contention there are two answers—first, that he was in lawful possession of the goods with power to pass the property in them by virtue of the order of the court H under which he was acting. He could certainly sell them and give a good title to a buyer; he could also, as part of the carrying on of the business, forward them to the Maltese agency and make such contracts as might be necessary or usual in that behalf; and in the next place it appears to me that if by the contract of affreightment he purported to give a lien, it does not lie in his mouth to deny that the goods were his. It is not a case of warranty that he had an authority from I someone else to give a lien. In such a case he would only be liable in damages for breach of the warranty. It is a case in which the goods for all relevant purposes were his own and had been shipped as his own.

In the next place it is said that the words of the contract did not create the lien alleged, and this I conceive to be the real question in the case. Now the terms on which the goods were carried are to be found only in the bill of lading, a document which, in the ordinary course of business, would be filled up by Mr. Whinney or his clerk, and then presented to the steamship owners for signature. The terms

were the same as those on which the steamship company had carried goods for Ind, Coope & Co. for many years past. The contract, therefore, was one which it was in the ordinary course of Ind, Coope & Co.'s business to make. These terms gave to the steamship company "a lien and right of sale over the goods shipped in respect of any previously unsatisfied freight, due either from the shippers or consignee to the shipowners." Then who were the consignees? Now, no business man looking at this bill of lading could have any doubt on that point. The goods are "to be delivered (at Malta) to Ind, Coope & Co., Ltd., c/o Messrs. Turnbull, jun., and Somerville, or to his or their assigns." The reference to Turnbull, jun., and Somerville amounts to no more than a notification of an address at which Ind, Coope & Co. are to be found, and the word "order," which appears in this part of the bill of lading, merely means that the document must be endorsed before the goods can be delivered up in exchange for it. Ind, Coope & Co. were thus the consignees, and Mr. Whinney did, by the very terms of the contract of affreightment, give to the defendant shipowners the lien which they set up. Both HAMILTON, J., and BUCKLEY, L.J., were of opinion that Ind, Coope & Co. were the consignees mentioned in the bill of lading. HAMILTON, J., says "Mr. Whinney had this beer forwarded upon the terms that it should be consigned to Ind, Coope & Co., Ltd." and BUCKLEY, L.J., says: "I agree that the company were in this transaction the consignees," BUCKLEY, L.J., however adds: "but not in the sense in which the defendants seek to affirm that they were such"; and he then goes on to state in what sense the words "consignees" is used in this bill of lading. He says, in effect, that the consignees mentioned in the bill of lading are Ind, Coope & Co., "by Mr. Whinney as receiver and manager." Here the learned lord justice is doubtless referring to the order for shipment of Jan. 13, 1909, which is an order addressed by Mr. Whinney to the agents of the steamship company directing them to deliver the ale to Ind, Coope & Co., Ltd., Malta. This order is signed "Ind, Coope & Co., Ltd., by Arthur Whinney, Receiver and Manager." But I am at a loss to understand how the fact that the shipper describes himself in the shipping instructions as a receiver and manager can affect the question as to who are the consignees. Ind, Coope & Co. do not, and, indeed, cannot, exist in two different senses. The company has not been wound-up, nor is it even in liquidation. The only change that has happened is that, instead of the business being managed by an official appointed by the board of directors, it is managed by an official appointed by the court; but the company is still the same company and the business is still the same business. Mr. Whinney started no new business; he merely continued the old one, and Mr. Whinney himself clearly understood this when on Jan. 6 he telegraphed to Turnbull, jun., and Somerville: "We continue to do business as heretofore, Receiver, Ind, Coope & Co." It was said during the argument that to let the shipowners have the benefit of the lien would be to make them secured creditors, taking priority over the debenture-holders. The answer is that the shipowners are not concerned with the debenture-holders. They made their contract with Mr. Whinney, and it is the money of Mr. Whinney which they are claiming a right to keep in this action. If Mr. Whinney has provided the money in order to free the goods from a lien, which as against the company he ought not to have created, he will not get the amount allowed in his accounts, and the company will be none the worse. To construe the bill of lading contract as the Court of Appeal has construed it is, in my opinion, to twist it from its plain meaning and to deprive the shipowners of part of the consideration for the carriage of the goods for which they stipulated, which was conceded to them.

Another point was taken by the learned lord justice in the course of the argument in the Court of Appeal—namely, that Mr. Whinney could not, without the leave of the court, bind the debenture-holders by charging the goods with the back freights. It was a point which had not been taken before HAMILTON, J. I think it sufficient to say of it that the same considerations which dispose of the earlier points dispose of this point also. If this contract was one which came within the meaning of

carrying on the ordinary business of the company (as I think it was), Mr. Whinney required no leave; the making of it was authorised and, in fact, enjoined by the order of the court appointing him; and if it did not, it is he, and not the shipowners, who must bear the consequences. For these reasons I think this appeal ought to be allowed and the judgment of Hamilton, J., restored.

THE LORD CHANCELLOR.—LORD ASHBOURNE, who is not able to be present today, desires me to say that he concurs in the view taken by the majority of your Lordships.

Appeal dismissed.

Solicitors: *Rowle, Johnstone, Gregory, Rowcliffe & Rowcliffe*, for *Hill, Dickinson & Co.*, Liverpool; *Davidson & Morriss.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

FRANCE, FENWICK & CO., LTD *v.* PHILIP SPACKMAN & SONS

[King's Bench Division (Bailhache, J.), December 12, 1912]

[Reported 108 L.T. 371; 12 Asp. M.L.C. 289; 18 Com. Cas. 52]

Shipping—Charterparty—Lay days—Loading—Steamer to be loaded at G. and discharged in thirty-six running hours, time not to commence between 6 p.m. and 6 a.m.—Written clause that when steamer loaded at H. seventy-two running hours to be allowed for loading and discharging—Steamer loading at H.—When time began to run.

Shipping—Demurrage—Exception clause—"Strikes . . . or any cause whatsoever beyond the control of the charterer"—Deficiency in railway waggons causing delay in discharge.

By a charterparty dated April 7, 1911, the steamer was to proceed to G. or H., as ordered, and it was provided by a printed clause: "The steamer to be loaded . . . at G., and discharged in thirty-six running hours . . . time . . . not to commence between 6 p.m. and 6 a.m." The following clause was written in the margin: "When steamer loads at H., seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth." The charterparty further provided: "Strikes of workmen, lock-outs, pay days, idle days, or cavilling days, or riots, or frost, rain, or floods, or any accident or any cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading excepted." The steamer arrived at a loading berth at H. at 7.30 p.m. She loaded a cargo of coal which was discharged at Q., but not within thirty-six hours owing to a shortage of railway waggons to carry the coal away, the railway company, because of abnormal circumstances, being unable to supply them within that time.

Held: (i) the words in the printed clause in the charterparty "time . . . not to commence between 6 p.m. and 6 a.m." referred exclusively to the discharging time, and, therefore, when the steamer arrived at H., time began to run when she was at her loading berth; (ii) the words in the exception clause "or any cause whatsoever" were wide enough to exclude the ejusdem generis rule and to bring the charterers within the exception, and, therefore, the charterers were not liable for demurrage.

Notes. Considered: *S.S. "Induna" Co.* v. *British Phosphate Comrs., The Loch Dee*, [1949] 1 All E.R. 522; *Reardon Smith Line, Ltd.* v. *Ministry of Agriculture*, [1959] 3 All E.R. 434. Referred to: *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 3 All E.R. 127.

As to charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 247 et seq.; and for cases see 41 DIGEST 316 et seq. A

Cases referred to:

(1) *Larsen* v. *Sylvester & Co.*, [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp. M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, *1682.*

(2) *Thorman* v. *Dowgate Steamship Co., Ltd.*, [1910] 1 K.B. 410; 79 L.J.K.B. 287; 102 L.T. 242; 11 Asp. M.L.C. 481; 15 Com. Cas. 67; 41 Digest 307, *1685.* B

Also referred to in argument:

Postlethwaite v. *Freeland* (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 28 W.R. 883; 4 Asp. M.L.C. 302, H.L.; 41 Digest 539, *3666.* C

Action.

The plaintiffs, owners of the steamship *Stanton*, claimed from the defendants, the charterers, demurrage alleged to be due under a charterparty dated April 7, 1911. By the charterparty it was provided, inter alia, that the *Stanton* should proceed to Goole or Hull, as ordered by the charterers, and load a full and complete cargo of coal, and proceed direct to Spackman's Wharf, Queenborough, and there deliver D the same alongside any vessel, wharf, pier, or floating depots, or with lighters in the river, dock, or port, as ordered by the receivers of the cargo. The following written clause appeared in the margin of the charterparty:

"When steamer loads at Hull seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock E owing to congestion, time to commence from first high water after arrival off the dock."

The charterparty also contained the following printed clauses:

"The steamer to be loaded in usual turn, with customary dispatch at Goole, and discharged in thirty-six running hours, commencing first high water on or F after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between 6 p.m. and 6 a.m., nor commence or count between 4 p.m. Saturdays, and 6 a.m. Mondays, nor on any general holiday.

"Strikes of workmen, lock-outs, pay days, idle days, or cavilling days, or riots, or frost, rain, or floods, or any accident or cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading G excepted."

The vessel loaded a cargo of coal at Hull, which she discharged at Queenborough. The owners claimed that, when the vessel loaded at Hull, time began to run from the time she got to the loading dock, and that the loading time was, therefore, exceeded by eleven hours. The charterers' contention was that, whether the vessel was loaded at Hull or Goole, time between 6 p.m. and 6 a.m. was not to count, and H that there had been a delay of seventeen hours at Queenborough owing to a deficiency of railway waggons, due to abnormal circumstances prevailing at the time, which they said was beyond their control and within the exceptions in the charterparty.

Roche, K.C., for the plaintiffs, the owners.

Leck, K.C., for the defendants, the charterers. I

BAILHACHE, J.—In this case I am not going into any question of figures. The first question I have to deal with is as to the time the steamer took to load and discharge at Hull and Queenborough respectively, the difference between the parties being twenty-eight hours, made up as to eleven hours at Hull, and as to seventeen hours at Queenborough. The question as to the eleven hours at Hull depends, when one fact is ascertained, on the construction of the charterparty. The

Stanton arrived at a loading berth at Hull at 7.30 p.m. on Aug. 24, 1911. The charterparty, which was originally intended to be applicable only to Goole as the loading port, was altered so as to be applicable at Hull as well, the material words inserted for this purpose being as follows:

> "When steamer loads at Hull, seventy-two running hours will be allowed for loading and discharging, which time is to commence when steamer is at or off loading berth, but should steamer be prevented from entering the loading dock owing to congestion, time to commence from first high water after arrival off the dock."

In speaking of "time to commence," that clause obviously means time for loading. Before the alteration, the clause in the charterparty was as follows:

> "The steamer to be loaded in usual turn, with customary dispatch at Goole, and discharged in thirty-six running hours, commencing first high water on or after arrival at or off the berth, unless berthed before, but time, unless used, not to commence between 6 p.m. and 6 a.m., nor commence or count between 4 p.m. Saturdays and 6 a.m. Mondays, nor on any general holiday."

The steamer having arrived at a loading berth at Hull at 7.30 p.m. on Aug. 24, the charterers say that the time did not begin to count until 6 a.m. on Aug. 26. The owners, on the other hand, say that the words "time . . . not to commence," &c., have in this case nothing to do with the loading time, but that they refer exclusively to the discharging time. On that, I think the owners are right, and that the time of the *Stanton* began to count when she got to the loading berth.

The other question relates to what happened at the discharging port. The vessel was to be discharged in thirty-six hours, and that is the fixed time, but there is this exception clause:

> "Strikes of workmen, lock-outs, pay days, idle days, or cavilling days, or riots, frost, rain, or floods, or any accident or any cause whatsoever beyond the control of the charterer, which may prevent or delay her loading or unloading excepted."

The only words in that clause which can assist the charterers are these: "or any cause whatsoever beyond the control of the charterer." If these words are to be construed ejusdem generis, I do not think that, on the facts, the charterers were excused. The facts, as I understand them, are these: At Queenborough the coal is not discharged immediately into waggons, but into a kind of hopper, which sifts the coal, and the coal is then taken away in waggons. No delay is caused by this operation, and if, at the time in question, there had been a sufficiency of railway waggons there would have been no delay at the port of discharge. There was, however, a deficiency in the supply of railway waggons, and that deficiency, I am told, was due to the fact that there was an abnormal demand for railway waggons. As we all remember, the summer of 1911 was quite exceptional; the fruit crop was heavy and the hops were moved some fourteen days before the usual time. There were about this time some manœuvres, partly of the territorial forces and partly of the regular army, and, in addition, there was the dislocation of the railway traffic owing to the few days' serious strike in August. Owing to all these circumstances, as counsel for the charterers contends, the railway company were unable to supply waggons sufficient for the purpose of discharging the *Stanton* within thirty-six hours. Counsel for the owners says that there was nothing at all abnormal, and that, in truth and in fact, the railway company never could, under any circumstances, supply the necessary number of waggons to discharge the *Stanton* within the thirty-six hours.

On the facts, I have come to the conclusion that the circumstances were abnormal, and I adopt counsel for the charterers' view that it was owing to the abnormal demands on the railway company that trucks could not be got to discharge the

vessel within the thirty-six hours. On that finding of fact, the question remains whether the charterers have brought themselves within the words of the exception clause: "any cause whatsoever beyond the control of the charterer." If these words are to be construed ejusdem generis with "strikes of workmen," &c., the charterers have not, in my opinion, brought themselves within them. I do not intend to go at length into the cases which, during the last few years, have dealt with the ejusdem generis rule of construction; it is sufficient for me to refer to *Larsen* v. *Sylvester* (1) and *Thorman* v. *Dowgate Steamship Co., Ltd.* (2). In the former of these cases, the general words were "of what kind soever," and the House of Lords held that, by the use of those words, there was a sufficient expression of intention to exclude the ordinary ejusdem generis rule. In *Thorman* v. *Dowgate Steamship Co., Ltd.* (2), the general words were "any other cause," and HAMILTON, J., decided that there was no sufficient indication to override the well-known ejusdem generis rule. In the present case, the words are not "any other cause" or "of what kind soever," but "or any cause whatsoever." In my opinion, these words are, as the words in *Larsen* v. *Sylvester* (1) were held to be, sufficient to exclude the operation of the ejusdem generis rule. If I had not found that the circumstances at the time of the discharge were exceptional I should have acceded to counsel for the owners' argument, that to bring themselves within the exception clause it is not enough for the charterers to say that they were prevented, but they must say that they were prevented by some cause which was exceptional. If a person contracts to discharge in thirty-six hours unless prevented by some cause beyond his control, and if the cause beyond his control always would prevent the discharge within that time, then, in my opinion, it is not an exception at all, and if in such a case he fails to discharge within the thirty-six hours he is not within the exceptions clause.

In the present case, as I have said, I think the circumstances were abnormal and unusual, and, for that reason the charterers come within the exceptions clause. I decide in favour of the owners as to the eleven hours at Hull, and in favour of the charterers as to the seventeen hours at Queenborough.

Solicitors: *Botterell & Roche; William A. Crump & Son.*

[*Reported by* L. C. THOMAS, ESQ., *Barrister-at-Law.*]

SHRIMPTON *v.* HERTFORDSHIRE COUNTY COUNCIL

[House of Lords (Lord Loreburn, L.C., Earl of Halsbury, Lord Ashbourne, Lord Atkinson and Lord Shaw), November 14, 1910, February 9, 10, 1911]

[Reported 104 L.T. 145; 75 J.P. 201; 27 T.L.R. 251; 55 Sol. Jo. 270; 9 L.G.R. 397]

Education—Local education authority—Negligence—Provision of transport for children living more than two miles from school—Child living within one mile of school permitted to use transport—Injury to child—Liability of local education authority.

A local education authority authorised the provision of transport for children living over two miles from a school. With or without their authority the school attendance officer allowed a child who lived within one mile of the school to use the transport. The child was injured by reason of the negligence of the driver of the vehicle, coupled with the fact that there was no conductor or adult person to accompany the vehicle. In an action for damages for negligence, the jury found that it was negligent on the part of the education authority not to provide a conductor or adult person.

Held: the education authority were bound by the action of the school attendance officer in giving permission to the child to use the transport and it was their duty to provide a reasonably safe mode of conveyance; in the circumstances, they had not done so, and, accordingly, they were liable for negligence.

Notes. Applied: *Smith* v. *Martin and Kingston-upon-Hull Corpn.*, post p. 412. Considered: *Purkis* v. *Walthamstow Borough Council*, [1934] All E.R. Rep. 64.

As to the provision of transport for school children, see 13 Halsbury's Laws (3rd Edn.) 649, 650; and for cases see 19 Digest 570.

Cases referred to in argument:

Hillyer v. *St. Bartholomew's Hospital* (*Governors*), [1909] 2 K.B. 820; 78 L.J.K.B. 958; 25 T.L.R. 762; 53 Sol. Jo. 714; sub nom. *Hillyer* v. *London Corpn.* (*St. Bartholomew's Hospital, Governors*), 101 L.T. 368; 73 J.P. 501, C.A.; 36 Digest (Repl.) 168, *906*.

Gautret v. *Egerton*, *Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

Bolch v. *Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur. N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett* v. *Smith*, 76 L.T. 158; 36 Digest (Repl.) 66, *358*.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.), reversing a judgment of Channell, J., at the trial before him with a special jury at the Hertford Assizes.

The appellant was an infant, and lived with her father at Croxley Green, Herts., and was a scholar at a school at Croxley Heath. The respondents were the education authority for the county. The school attendance officer had, with the consent of the respondents, entered into a contract with a jobmaster, Burridge, for the conveyance of children, and Burridge received a list of the children to be so carried to and from school. The appellant was not on the list. The action was brought to recover damages for personal injuries sustained by the appellant, who was being conveyed in a vehicle provided by the respondents on her journey home from the school. The respondents contended that they were under no obligation to convey the appellant, and that the person who conveyed her was not their servant or agent. The jury found that the accident was due to the negligence of the driver

and the non-provision of a conductor, and that the appellant was carried by consent of the county council. On these findings, judgment was given for £277 3s. 6d. This judgment was reversed by the Court of Appeal, and the appellant appealed.

Sir F. Low, K.C., *Henlé*, and *W. V. Ball* for the appellant.

Lord Robert Cecil, K.C., and *B. Lailey* (*Danckwerts*, K.C., with them) for the respondents, the county council.

LORD LOREBURN, L.C.—I think that the House is very much indebted to all the learned counsel who have assisted us in this difficult case. I am anxious myself not to allow the sympathy which everyone must feel with the parents of this child, and with the child herself, to affect the opinion to which I come. I believe that I have arrived at a conclusion simply according to my view of the facts and of the law applicable to them without allowing any such feeling to affect me. Now, what are the facts? Adopting as I do the findings of the jury, which were, I think, founded on sufficient evidence, it is not our right nor our duty to convert ourselves into a jury to find the facts in a case of this kind. If there is sufficient evidence to support the actual conclusion of the jury, your Lordships are bound to adopt and apply it. The appellant lived within a mile of the school. The county council authorised the sub-committee to provide a conveyance for children living upwards of two miles from the school. The attendance officer made the necessary arrangements. It was also his duty to communicate with the parents as to the carriage of the children, and no one else seems to have acted in any way in that capacity. With or without the authority of the county council, he did in fact give leave to the appellant to ride in the conveyance, and she did so for a considerable period of time. In March, 1909, she was injured by reason of the negligence of the driver, coupled with the fact that there was no conductor or adult person to accompany the vehicle. The jury thought that it was negligence not to provide such a person under the circumstances. The jury say nothing about the vehicle or its condition, but its condition was, most probably, one of the circumstances which led them to the conclusion that there ought to have been a conductor or adult person accompanying and taking care of the children on their journey. Really two questions are raised on this state of facts. The first is whether the appellant was driven on the occasion in question in this conveyance by the consent or licence of the county council? It was the business of the attendance officer to communicate with the parents as to what children should ride. He did authorise the appellant to ride. He did not tell the appellant's parents that there was any difference between the position of the appellant in the conveyance and that of any of the other children, and it was reasonable that the parents should suppose, as I have no doubt that they did suppose, that the only education officer whom they saw was acting by the authority of the education committee, who were themselves acting by the authority of the county council. I think, therefore, that when the attendance officer sanctioned or permitted the conveyance of the appellant in this vehicle, he thereby bound the county council. The next question is, Did the appellant enter, and was she conveyed in this vehicle on the terms of using it tale quale, such as it was, and was the only duty of the county council a negative duty, not to lay what is called a trap for the children who used the vehicle? It was argued that their only duty was not to lay a trap, because there was no obligation on them to take the appellant, she living within one mile of the school, and not being able to be excused from attendance by reason of the distance of her home from the school. Let us see how this vehicle came to be provided. There is a duty on the part of the county council to carry out the Education Act, including as one object, at all events, the procuring of children to come to school. There may be an excuse on the part of those children arising from the distance of their homes from the school, and, accordingly, the county council have the power of providing, if they think fit, a vehicle for children living more than two miles away from the school, and also of

providing out of the rates a vehicle for the service of children living not more than two miles away, but within a mile, if they do so within the fair discretion given to them under this statute. I agree with the learned counsel for the respondents that here there was no duty or obligation whatever on the county council to provide for the carriage of the appellant, but if they did agree to do so, and did provide a vehicle, then it is clear to my mind that their duty was also to provide a reasonably safe mode of conveyance. This was not done according to the findings of the jury. They have found that it was not a reasonable and proper way for the county council to convey children to school in this vehicle without a conductor or some adult person to take care of them. It is said that there is no evidence in support of this finding. To my mind, it is a question which any man of the world can answer by the exercise of his own common sense and his knowledge of life. It appeared to the learned counsel for the respondents a very perverse view to take of things. When you have little children, five, six or seven years of age, up to ten or twelve, and send them in a conveyance such as has been described, without anyone to look after them, I must say that I should be very much disposed, if I were on the jury myself, to say that it was not a reasonable or proper way of conveying them to school. However, that does not matter. The jury said so. They are the judges, and my opinion on the subject is of no importance. I am content to place on that ground the advice which I would respectfully offer to your Lordships—on the ground that, if the county council did through their representative agree to provide a vehicle for the appellant, it was their duty to provide a reasonably safe mode of conveyance, and, in the opinion of the jury, they did not do so. I do not think that it is necessary to enter on the larger question whether the county council would or would not be responsible for the negligence of the driver. I shall, therefore, respectfully advise your Lordships to allow this appeal.

THE EARL OF HALSBURY.—I am entirely of the same opinion. There is one thing that I wish to add to what the Lord Chancellor has said. Some question appears to have been suggested about the obligation toward the appellant. In the first place I wish to say that no such question appears to have been raised at the trial, or ever suggested by anybody, and the question whether the liability existed in respect of any one of the persons in this vehicle was not treated separately from the liability in respect of any of the others. Then with reference to the question itself, I think that it was very good sense on the part of the learned counsel not to raise such a question, because, in fact, you could not possibly in reason and good sense distinguish in the contract that was existing between the children and the county council, if there was such a contract, between one child and another. Conceive the mode in which it would have been received by the jury if the question had been fought in that way. If it were a child of five, the contract in respect to that child would be such and such; if the child next to it were six, it would be another contract; and so on with them all up to the one to whom the accident happened—namely, a child of twelve. The truth is that the whole question of the mode in which these children, speaking of them generally as children, were carried was treated as one, and that was the question which the jury were to decide—namely, Was that a reasonable mode in which to carry the children, in the plural, without distinction of whether they were six or seven or twelve years of age? I think that it was good sense on the part of the learned counsel not to raise that question, because this particular accident which happened might happen in fact to an adult. A person who knows what it is to step into or out of an omnibus, for instance, without any notice whether or not the horses are going to stop, or, if they do stop, whether they will suddenly go on again, will know what the difference may be as regards the power of helping oneself between a child of twelve and even an adult. Under these circumstances, I think that the learned counsel were quite justified in the course which they took. The result is that as the question has been treated before, so we must treat it now. The negligence of the county council was

established by the fact of their having sent this vehicle with these children under these circumstances, and, whether they were negligent in that, it is clear that there was evidence for the jury on which they were entitled to act. Under these circumstances, I am entirely satisfied with the verdict at which the jury arrived, and I think that this appeal ought to be allowed.

LORD ASHBOURNE concurred.

LORD ATKINSON.—I concur. I do not wish to add anything except this: During the course of the argument it was said that, if a statutory duty to do a particular thing is imposed on a public body, they cannot protect themselves by contracting with a contractor to do that thing if there is negligence in course of doing it, and it was sought to draw a distinction between that case and the case in which a public body are given statutory powers, and it is optional with them whether they put those statutory powers into force or not. It was suggested that, in this latter case, there is nothing to prevent them from protecting themselves from liability for accident by subcontracting, even though they have elected to exercise their statutory powers to do the very thing which they are empowered to do. I only wish to say that I do not at all desire to be taken as accepting that distinction, or as thinking that it is well-founded, and that I hold myself entirely free to reconsider it on a future occasion.

LORD SHAW concurred.

Appeal allowed.

Solicitors: *Church, Adams & Prior*, for *M. Arnold*, Watford; *J. N. Mason & Co.*, for *C. E. Longmore*, Hertford.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

SMITH *v.* STREATFEILD

[KING'S BENCH DIVISION (Bankes, J.), July 23, 1913]

[Reported [1913] 3 K.B. 764; 82 L.J.K.B. 1237; 109 L.T. 173; 29 T.L.R. 707]

Libel—Privilege—Qualified privilege—Malice—Two defendants—Malice found against one only—Effect on privilege of other defendants.

In an action for libel against the author and the printers of a pamphlet, the jury found that the author, who had set up the defence of privilege, was actuated by malice, but that the printers were not so actuated. It was admitted that, so far as the author was concerned, the occasion was privileged.

Held: the privilege extended to the printers, since it was a natural and proper course, in order to get the pamphlet published, to have it printed (*Baker* v. *Carrick* (1), [1894] 1 Q.B. 838, applied); but the malice of the author defeated the privilege both for him and the printers as they were joint tortfeasors; dictum of ROLFE, B., in *Clark* v. *Newsam* (2) (1 Exch. at p. 140) applied.

Notes. Followed: *Smith* v. *National Meter Co.*, [1945] 2 All E.R. 35. Explained and Distinguished: *Longden-Griffiths* v. *Smith*, [1950] 2 All E.R. 662. Referred: *London Association for Protection of Trade* v. *Greenlands* (1915), 85 L.J.K.B. 698; *Pratt* v. *British Medical Association*, [1918–19] All E.R. Rep. 104; *Crozier* v. *Wishart & Co. and Western Printing Services, Ltd.*, [1936] 1 All E.R. 1.

As to qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq.; and for cases see 32 DIGEST 112 et seq.

Cases referred to:

(1) *Baker* v. *Carrick*, [1894] 1 Q.B. 838; 63 L.J.Q.B. 399; 70 L.T. 366; 58 J.P. 669; 42 W.R. 338; 38 Sol. Jo. 286; 9 R. 283, C.A.; 32 Digest 126, *1580.*

(2) *Clark* v. *Newsam* (1847), 1 Exch. 131; 5 Ry. & Can. Cas. 69; 16 L.J.Ex. 296; 9 L.T.O.S. 199; 11 J.P. 840; 154 E.R. 55; 42 Digest 975, *62*.

Further consideration in a case tried with a judge and jury.

The facts are set out in the judgment.

Sir F. Low, K.C., and *Kerly* for the plaintiff.
McCall, K.C., and *Palmer* for the defendant, Canon Streatfeild.
McCardie for the defendants, Robert Spennell Press, Ltd.

Cur. adv. vult.

July 23, 1913. **BANKES, J.**, read the following judgment: In this case the plaintiff brought his action for libel, alleging a joint publication by the defendants of certain pamphlets to the rural deans in the diocese of Oxford. The defendant, Canon Streatfeild, was the author of the pamphlets and the defendants, the Robert Spennell Press, Ltd., were the printers. The printers admitted the publication complained of. Each defendant pleaded a justification, and, further, that the occasion was privileged, and that the publication was bona fide and without malice. The facts which were relied on as constituting the privilege were that the plaintiff was one of the diocesan surveyors for the diocese of Oxford, and that his re-election to the office rested with the rural deans; that the defendant Canon Streatfeild was bringing to the notice of the rural deans matters affecting the plaintiff in relation to a survey he had made of a rectory house and glebe in the diocese in which the defendant Canon Streatfeild was directly interested as rector; and that these were matters which it was material for the rural deans to know. As regards the defendant Canon Streatfeild, the privilege was admitted. At the end of the plaintiff's case, counsel on his behalf submitted that the above facts did not create any privilege as regards the defendants the printers; and counsel for the printers submitted that his clients were entitled to judgment on the ground that the privilege created by the facts above stated, and admitted as regards the defendant Canon Streatfeild, extended to protect the printers also, and that no evidence of malice on the part of the printers had been given by the plaintiff. I reserved both points, and stated my intention of putting questions to the jury to obtain their answers on all material points, including the question whether separate verdicts could be given against the defendants. I understood that this course was acquiesced in by all parties, and no objection was taken to the questions as subsequently formulated by me. These questions were five in number, and may be summarised as follows: First, whether the justifications were proved; secondly, whether the defendant Canon Streatfeild was actuated by malice; thirdly, whether the printers were actuated by malice; fourthly, what damages, if one verdict against both defendants; and, fifthly, what damages, if a separate verdict against each defendant. In reply to these questions, the jury found that the justifications were not proved, and that Canon Streatfeild was actuated by malice, but that the printers were not. If one verdict was given, they assessed the damages at £50. In reply to the last question, the jury first said that they found the whole sum against Canon Streatfeild and nothing against the printers; but when I pointed out to them that it was necessary, in order to cover all possible questions, that some sum should be given, and suggested 20s. as a nominal sum, they agreed to this, and gave that figure as their verdict against the printers if it was permissible to take two separate verdicts.

The matter came on before me on further consideration when counsel for Canon Streatfeild contended that, having regard to the answers of the jury to the fourth and fifth questions, no judgment could be entered against his client. I do not agree with this contention, as I consider that the questions were put, by the assent of all parties, in order to avoid a new trial, and that I am entitled to treat the matter as though I had ruled at the time (as I should have ruled had I been asked to do so) that one verdict only could be given. I consequently, for the present purpose, treat the fifth question as though it had not been put, and I give judgment for the

plaintiff against the defendant Canon Streatfeild. As regards the printers, I am of opinion that the privilege created by the facts above set out extends to them. It was, in my opinion, a natural and proper course, in order to get the pamphlet published, to have it printed, and I consider that the principle laid down in *Baker* v. *Carrick* (1) applies here.

It remains only to consider the proposition contended for by counsel for the printers that the printers are entitled to judgment, as the jury have negatived any malice on their part. Counsel's contention in substance amounted to this—namely, that his clients' privilege was what he called an incidental privilege—that is to say, that, though it arose out of the same facts as constituted the privilege of Canon Stretfeild, it was independent of it in the sense that his clients were entitled to the protection of the privilege even though Canon Streatfeild might have disentitled himself to any protection. It appears to me that counsel's argument fails, whether you regard the question from the point of view of the law applicable to privilege, or of the law applicable to the case of joint tortfeasors. To take the last first: the publication here complained of was a joint publication—that is to say, a single publication to each rural dean for which both defendants were jointly responsible. The publication was admitted by the printers. The finding of the jury establishes the fact that the defendant Canon Streatfeild was a tortfeasor as regards this publication. It necessarily follows, in my opinion, that the printers are joint tortfeasors with him. The ordinary rule of law is that each tortfeasor is liable for all the consequences of the joint tort. In *Clark* v. *Newsam* (2), ROLFE, B., states the rule thus (1 Exch. at p. 140):

> "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act."

In my opinion, it follows from the rule of law that, in the case of a joint publication of a libel, each tortfeasor is liable for the malice of the other. It may very well be that, in assessing damages, the jury may take into account the fact that one of the two persons jointly responsible for the publication of the libel may be morally blameless, and may consequently refuse to give anything in the nature of vindictive damages in a verdict which will affect him; but this does not affect his liability for the publication.

The same result, in my opinion, follows if the matter is looked at from the point of view of privilege. The principle on which the law of qualified privilege rests is, I think, this: that, where words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and, in an action for libel or slander founded on a publication on a privileged occasion, the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression, and conveys in a single word a correct idea of what has really happened—namely, that, although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason for this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion. Qualified privilege in one sense may be said to be the privilege of the individual, in that it arises out of the circumstances in which the individual is placed, but as a defence it is attached to the publication. Where, therefore, as here, the plaintiff is complaining of a joint publication, if the defence of privilege as to that publication fails because of the proof of express malice, it fails, in my opinion, altogether, and the plaintiff establishes his right to succeed in respect of that particular publication.

From whichever point of view, therefore, counsel for the printers' contention is approached, the result is, in my opinion, the same, and his clients cannot derive any benefit, so far as liability for the publication of the libel is concerned, from the fact that the jury have negatived any express malice on their part. In the result, therefore, I give judgment against both defendants for £50 damages.

Solicitors: *Kerly, Sons & Karuth; Marshall & Pridham; Whitelock & Storr.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

THE CAP BLANCO

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Samuel Evans, P.), April 21, May 9, 1913]

[Reported [1913] P. 130; 83 L.J.P. 23; 109 L.T. 672; 29 T.L.R. 557; 12 Asp. M.L.C. 399]

Admiralty—Jurisdiction—Loss of goods—"Goods carried into any port in England"—Goods shipped on bill of lading providing that any dispute thereunder to be decided in Hamburg according to German law—Effect of arbitration clause—Admiralty Court Act, 1861 (24 *Vict.*, *c.* 10), *s.* 6.

The plaintiffs, the owners and consignees of ten cases of gold coin, shipped them at Hamburg on a German vessel for delivery to the plaintiffs or their order at Montevideo or Buenos Aires. Under the bill of lading, the defendants, the shipowners, were given liberty to call at intermediate ports, and there was a clause providing that any disputes concerning the interpretation of the bill of lading were to be decided in Hamburg according to German law. The vessel called at Southampton on the voyage out and on arrival at Montevideo only nine of the cases were delivered. On her return voyage, the vessel called again at Southampton, where she was arrested at the suit of the plaintiffs in an action for damages for breach of duty and/or contract in respect of the missing case. The defendants objected to the jurisdiction of the English court, or, alternatively, asked that all further proceedings be stayed under s. 4 of the Arbitration Act, 1889.

Held: since the goods were "goods carried into any port in England" within the meaning of s. 6 of the Admiralty Court Act, 1861, the court had jurisdiction to arrest the vessel and entertain the action, but the proceedings must be stayed since the clause as to disputes in the bill of lading amounted to a submission within the meaning of s. 4 of the Arbitration Act, 1889.

[On appeal by the plaintiffs against that part of the judgment directing that the action be stayed, the Court of Appeal allowed the plaintiffs to withdraw the appeal on an undertaking by the defendants to waive a clause in the bill of lading providing that claims for compensation lapsed unless made at Hamburg within a certain period.]

Notes. The Admiralty Court Act, 1861, s. 6, has been repealed; see now the Administration of Justice Act, 1956, s. 1. The Arbitration Act, 1889, s. 4, has been repealed; see now the Arbitration Act, 1950, s. 4 (1).

Applied: *The Fehmarn*, [1957] 2 All E.R. 707. Referred to: *Racecourse Betting Control Board* v. *Secretary of State for Air*, [1944] 1 All E.R. 60.

As to Admiralty jurisdiction in rem and in personam, see 35 HALSBURY'S LAWS (3rd Edn.) 718, 719; and for cases see 1 DIGEST (Repl.) 72 et seq. As to stay of proceedings under an arbitration clause, see 2 HALSBURY'S LAWS (3rd Edn.) 21 et seq., and for cases see 2 DIGEST (Repl.) 477 et seq. For the Arbitration Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 93, and for the Administration of Justice Act, 1956, s. 1, see 36 HALSBURY'S STATUTES (2nd Edn.) 3.

Cases referred to:

(1) *Giovanni Dapueto* v. *James Wyllie & Co.*, *The Piéve Superiore* (1874), L.R. 5 P.C. 482; 43 L.J.Adm. 20; 30 L.T. 887; 22 W.R. 777; 2 Asp. M.L.C. 319; 1 Digest (Repl.) 172, *568*.

(2) *The St. Cloud* (1863), Brown & Lush. 4; 1 New Rep. 244; 8 L.T. 54; 1 Mar. L.C. 309; 1 Digest (Repl.) 172, *573*.

(3) *The Bahia* (1863), Brown & Lush. 61, 292; 1 Digest (Repl.) 174, *588*.

(4) *Law* v. *Garrett* (1878), 8 Ch.D. 26; 38 L.T. 3; 26 W.R. 426, C.A.; 2 Digest (Repl.) 479, *360*.

(5) *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Ltd.*, [1903] 1 K.B. 249; 72 L.J.K.B. 211; 88 L.T. 6; 51 W.R. 402; 19 T.L.R. 155; 47 Sol. Jo. 222, C.A.; 2 Digest (Repl.) 480, *365*.

(6) *Logan* v. *Bank of Scotland* (*No. 2*), [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187, C.A.; 11 Digest (Repl.) 542, *1508*.

(7) *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; 78 L.J.Ch. 117; 99 L.T. 932; 53 Sol. Jo. 151; 1 Digest (Repl.) 525, *1566*.

Summons to set aside a writ and warrant of arrest, or to obtain a stay of proceedings.

The facts are set out in the judgment.

By s. 6 of the Admiralty Court Act, 1861:

"The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: . . ."

By s. 4 of the Arbitration Act, 1889:

"If any party to a submission, or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Laing, K.C., and *Dunlop* for the defendants.

Mackinnon for the plaintiffs.

Cur. adv. vult.

May 9, 1913. **SIR SAMUEL EVANS, P.,** read the following judgment.—In this action the plaintiffs, as owners of certain cases containing German gold coin, sue the defendants for damages for breach of duty or of contract in respect of the non-delivery at Montevideo or Buenos Aires of one of such cases and its contents,

which were shipped on the *Cap Blanco* under a bill of lading dated Dec. 10, 1912. The vessel was arrested in the action on April 4, 1913, at Southampton, and was released on the undertaking of the defendants' solicitors to appear under protest and to put in bail. Appearance was entered under protest, and the undertaking to put in bail was given in due course. The defendants issued a summons asking that the service of the writ and warrant of arrest, and the undertaking to put in bail, should be set aside on the ground that this court has no jurisdiction to entertain the action, or to arrest the vessel; or, alternatively, that all further proceedings should be stayed under s. 4 of the Arbitration Act, 1889; or, alternatively, on the ground that the court in Hamburg is a more convenient tribunal for the trial of the action. The summons was adjourned into court for argument.

The material facts are as follows: The plaintiffs are the owners and consignees of the case of gold coin in question, which was shipped by them on the *Cap Blanco*, a German vessel, under a bill of lading, which was made in Hamburg between the plaintiffs and the defendants by their agents and is in the German language. A translation duly verified has been supplied to me. It shows that the defendants received from the plaintiffs in external good condition for shipment per the steamship *Cap Blanco*, or another steamer from Hamburg bound for Montevideo, option Buenos Aires, with liberty to call at any places for discharging and loading goods, cattle, or passengers, the goods stated in the margin, viz., German gold coin in cases which are to be marked and numbered as stated for delivery to the plaintiffs or order in Montevideo, option Buenos Aires, therein called the place of destination, under the following conditions (inter alia): (i) The company (i.e., the defendant company) has the right to tranship, land, and re-load the merchandise by one of their vessels, or any other vessel, or by any other means of transport, and all vessels have the right to touch once or several times at any places, in any sequence, whether in accordance with the itinerary or exceptional ones. The bill of lading contains other clauses dealing with exceptions and other matters. Clause 14 provides that

> "Any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law."

The case of gold in question was shipped in accordance with the bill of lading on the *Cap Blanco* at Hamburg. The vessel proceeded on her voyage and called at Southampton on Dec. 11, 1912, with the case on board. She arrived subsequently at Montevideo, when all the cases except the one in question were delivered. After the discharge of her cargo in South America, the *Cap Blanco* proceeded on her return voyage to Hamburg. On this return voyage, she called again at Southampton when she was arrested at the suit of the plaintiffs on April 4. The *Cap Blanco*, it appears, calls regularly in the ordinary course of business at Southampton on her passages from Hamburg to South America, and back.

The question whether or not this court has jurisdiction to arrest the vessel depends on the construction of s. 6 of the Admiralty Court Jurisdiction Act, 1861. That section reads as follows: [His Lordship read the section, and continued:] Section 35 of the same Act enacts that the jurisdiction provided by the Act may be exercised either by proceedings in rem or by proceedings in personam. The decision in this case turns on the question whether or not, in the circumstances above stated, the goods in question were "carried into" the port of Southampton within the meaning of s. 6. If they were so carried, this court had jurisdiction to arrest the *Cap Blanco*, and can entertain the action; otherwise there is no such jurisdiction, for apart from the provisions of the Act, the Admiralty Court had no power to entertain a suit in rem in the circumstances.

The sections referred to have been the subject of many judicial decisions in this court. I have taken the opportunity of looking into all of them. Most of them have been cited and dealt with in the decision of the Privy Council in *The Piéve Superiore* (1). The general object and scope of the statute was described by Dr. Lushington in *The St. Cloud* (2), and in *The Bahia* (3). The result of the authorities is that

s. 6 of the Act was intentionally framed in large and general terms, and ought to be construed with as great latitude as possible within the fair meaning of the words, on the ground that

> "the statute, being remedial of a grievance, by amplifying the jurisdiction of the English Courts of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow":

The Piéve Superiore (1) (L.R. 5 P.C. at p. 492). The cases were so fully dealt with in the Privy Council in the decision last referred to that it is quite unnecessary for me to discuss them further. In some of the cases the goods were only "carried into an English port" by reason of casual or fortuitious circumstances entirely extrinsic to the contract of carriage. Nevertheless, it was held that jurisdiction existed in this court. It is wholly unnecessary in order to found the jurisdiction under the statute that the goods should be carried into an English port for the purpose of delivery, or in pursuance of the contract. But, in the case now before the court, the gold coin was carried into Southampton—not for the purpose of delivery, it is true, but in full accordance with the contract. It might then have been transhipped and re-loaded into any other of the defendants' vessels, or, indeed, any other vessel, under the express terms of the contract itself. Southampton was a regular and contractual port of call of the defendants' vessel, and the vessel and the goods it carried had the advantage of the facilities and the protection afforded by that port. The port was used by the defendants in the ordinary course of their shipping business as a port of call on the outward and homeward voyage, and the vessel while there enjoyed the privilege and protection of English law in an English harbour. It does not need a construction of unusual or strained latitude in the circumstances to decide that the goods in question in the defendants' vessel were "carried into an English port" within the meaning of the section which confers jurisdiction on this court. I, therefore, decide that this court has jurisdiction to arrest the vessel and to entertain this action.

Some point was made that there was no breach of duty or of contract before the goods were carried into Southampton. It does not appear where the breach of duty took place; for aught I know, it may have been in Southampton itself. No case has decided that the breach of duty or of contract must take place, and the cause of action must have arisen, before the goods were carried into a port in England, and to say that that must be so would be to place a limitation on the jurisdiction which the authorities and the section do not justify, and to introduce into the section words which are not to be there found.

There remains to be considered cl. 14 of the bill of lading, which provides that any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law. It appears from the affidavit of their solicitor that the defendants contend that they are protected from liability for the claim in this action by the exceptions contained in the bill of lading, and this action involves, in my opinion, a dispute concerning the interpretation of the bill of lading, within the meaning of cl. 14. The authorities cited, viz.: *Law* v. *Garrett* (4), *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Ltd.* (5), *Logan* v. *Bank of Scotland (No. 2)* (6), and *Kirchner & Co.* v. *Gruban* (7), appear to me to establish the proposition that such a clause is to be treated as a submission to arbitration within the meaning of s. 4 of the Arbitration Act, 1889. The tribunal at Hamburg is not specified, but a fair businesslike reading of the contract means that such disputes are to be tried by the competent court in Hamburg, and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this court. In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties

clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court. Although, therefore, this court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do. The defendants will have the costs of the summons.

The plaintiffs lodged an appeal against that part of the judgment which directed that the action should be stayed. The appeal was to be heard by the Court of Appeal on May 30.

Compston, K.C., and *Mackinnon* for the plaintiffs.
Laing, K.C., and *Dunlop* for the defendants.

After counsel for the plaintiffs had opened, the appeal was, by leave, withdrawn, the plaintiffs agreeing to pay the costs of the appeal and the defendants undertaking not to rely on cl. 13 of the bill of lading, which provided that claims for compensation "must be made in Hamburg within two months after the notification at the port of destination, otherwise any claim to compensation lapses."

Solicitors: *William A. Crump & Son; Stokes & Stokes.*

[*Reported by* L. F. C. DARBY, ESQ., *Barrister-at-Law.*]

DAVIS *v.* MORTON

[KING'S BENCH DIVISION (Ridley, Pickford and Avory, JJ.), April 17, 1913]

[Reported [1913] 2 K.B. 479; 82 L.J.K.B. 665; 108 L.T. 677; 77 J.P. 223; 29 T.L.R. 466; 23 Cox, C.C. 359]

Res Judicata—Charge before magistrates—Withdrawal—Second charge preferred on same facts—Competency—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.*, *c.* 49), *s.* 17.

The respondent preferred an information against the appellant under the Betting Act, 1853, s. 1, charging that he used a house of which he was the occupier for the purpose of betting with persons resorting thereto. During the hearing of the information, it was discovered that the appellant had not, through inadvertence, been informed prior to the charge being gone into of his right to be tried by a jury pursuant to the Summary Jurisdiction Act, 1879, s. 17. The respondent's solicitor thereupon withdrew the summons, although the appellant's solicitor contended that he had no power to do so. A second information was preferred by the respondent against the appellant under the same section of the Act of 1853, and the evidence given on the hearing of that information was substantially the same as that which had been given on the hearing of the first information.

Held: the withdrawal of the first summons in the circumstances did not amount to a dismissal which could be pleaded in bar in the subsequent proceedings.

Pickavance v. *Pickavance* (1), [1901] P. 60, distinguished.

Notes. The Betting Act, 1853, has been repealed by the Betting and Gaming Act, 1960. The Summary Jurisdiction Act, 1889, s. 17, has been repealed. See now the Magistrates' Courts Act, 1952, s. 25.

Considered: *Owens* v. *Minoprio*, [1942] 1 All E.R. 30; *Stefani* v. *John*, [1947] 2 All E.R. 615; *Land* v. *Land*, [1949] 2 All E.R. 218. Referred to: *Hopkins* v. *Hopkins*, [1914] P. 282.

As to procedure in a magistrates' court, see 25 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 33 DIGEST 327 et seq. For the Magistrates' Courts Act, 1952, s. 25, see 32 HALSBURY'S STATUTES (2nd Edn.) 443.

Cases referred to:

(1) *Pickavance* v. *Pickavance*, [1901] P. 60; 70 L.J.P. 14; 84 L.T. 62, D.C.; 33 Digest 331, *438*.
(2) *R.* v. *Brakenridge* (1884), 48 J.P. 293, D.C.; 33 Digest 372, *807*.
(3) *R.* v. *Drury* (1849), 18 L.J.M.C. 189; 3 Cox, C.C. 544; 14 Digest (Repl.) 379, *3711*.
(4) *Wemyss* v. *Hopkins* (1875), L.R. 10 Q.B. 378; 44 L.J.M.C. 101; 33 L.T. 9; 39 J.P. 549; 23 W.R. 691; 15 Digest (Repl.) 383, *3747*.
(5) *R.* v. *Cockshott*, [1898] 1 Q.B. 582; sub nom. *R.* v. *Cockshott, etc., Southport Justices, Ex parte Rickerby*, 67 L.J.Q.B. 467; 78 L.T. 168; 62 J.P. 325; 14 T.L.R. 264; 42 Sol. Jo. 346; 19 Cox, C.C. 3, D.C.; 33 Digest (Repl.) 319, *345*.
(6) *R.* v. *Beesby*, [1909] 1 K.B. 849; sub nom. *R.* v. *Beesly, Ex parte Grimmett*, *R.* v. *Beesly, Ex parte Grey*, 78 L.J.K.B. 482; 100 L.T. 486; 73 J.P. 234; 22 Cox, C.C. 47; sub nom. *R.* v. *Beesby, etc., Justices and Dugdale, Birmingham Recorder*, 25 T.L.R. 337; 53 Sol. Jo. 289, C.C.A.; 33 Digest 319, *343*.
(7) *Foster* v. *Hull* (1869), 20 L.T. 482; 33 J.P. 629, D.C.; 33 Digest 347, *566*.
(8) *R.* v. *Marsham, Ex parte Pethick Lawrence*, post p. 639; [1912] 2 K.B. 362; 81 L.J.K.B. 957; 107 L.T. 89; 76 J.P. 284; 28 T.L.R. 391; 23 Cox, C.C. 77, D.C.; 14 Digest (Repl.) 392, *3817*.
(9) *Bond* v. *Plumb*, [1894] 1 Q.B. 169; 70 L.T. 405; 58 J.P. 168; 42 W.R. 222; 10 T.L.R. 137; 38 Sol. Jo. 99; 17 Cox, C.C. 749; 10 R. 44, D.C.; 25 Digest 443, *367*.
(10) *Jenkins* v. *Merthyr Tydvil U.D.C.* (1899), 80 L.T. 600, D.C.; 21 Digest 229, *611*.
(11) *Bollard* v. *Spring* (1887), 51 J.P. 501, D.C.; 21 Digest 228, *607*.
(12) *R.* (*McDonnell*) v. *Tyrone Justices*, [1912] 2 I.R. 44; 33 Digest 331, *440i*.

Case Stated by Huddersfield justices.

On Sept. 14, 1912, the respondent, John Morton, the chief constable for Huddersfield, preferred an information against the appellant, James Henry Davis, under the Betting Act, 1853, s. 1, charging that he, then being the occupier of a certain house, to wit, a beerhouse known as the Ring o' Bells, situate at No. 19, Northgate, Huddersfield, unlawfully did on Sept. 4, 5, 6, 7, 9, and 10, 1912, and on divers other days within six calendar months then last past, use the house for the purpose of betting with persons resorting thereto on certain events or contingencies of and relating to certain horse races. The information was heard on Sept. 18, 1912, but when the third of the witnesses for the respondent was being examined, it was discovered that the appellant had not, through inadvertence, been informed before the charge was proceeded with, as required by s. 17 of the Summary Jurisdiction Act, 1879, of his right to be tried by a jury, and thereupon the solicitor for the respondent withdrew the summons with the consent of the justices, although it was contended by the solicitor for the appellant that there was no power to withdraw it, as s. 14 of the Summary Jurisdiction Act, 1848, required that the justices should either convict the appellant or dismiss the information.

A further information was preferred on Oct. 9, 1912, by the respondent, under the Betting Act, 1853, s. 1, against the appellant, charging that, he being the occupier of a certain house, to wit, a beerhouse known as the Ring o' Bells situate at No. 19, Northgate, Huddersfield, unlawfully did on Sept. 4, 5, 6, 7, and 10, 1912, use the beerhouse for the purpose of certain moneys being received by the occupier

as or for the consideration for assurances to pay or give thereafter certain sums of money on the happening of certain events or contingencies of and relating to horse races, to wit, on the winning of certain horse races by horses called respectively Cylba, Fruition, Beau Bois, Mynora, and six others. Before the charge in this second information was proceeded with, the solicitor for the appellant took the objection that the withdrawal of the first summons amounted to a dismissal, and precluded the issue of a second summons. The justices, however, overruled the objection, proceeded to hear and determine the second information and fined the appellant £20, and ordered him to pay the sum of 11s. as costs.

On the hearing of the second information the following facts were proved in evidence, which were substantially the same as the facts in the first summons:— On Wednesday, Sept. 4, 1912, the appellant made forty-six bets on horse races at his house, the Ring o' Bells, such bets being made by means of slips of paper containing the names of horses, one of such slips containing the name of Cylba, which was to run that day at the Derby Summer Meeting. Sixpence was paid along with this slip. On Thursday, Sept. 5, 1912, the appellant at his house made forty-seven bets on horse races, twenty-seven of which were made on slips of paper which were handed to him along with money, on the receipt of which he entered the bets in a memorandum book. On Friday, Sept. 6, 1912, the appellant made fifty-eight bets on horse races at his house with men, women and children, some by slips of paper and money, and others by payment of money without slips of paper. On Saturday, Sept. 7, 1912, the appellant at his house made eighty-six bets on horse races, some by slips of paper and money, and others by money being put on the bagatelle table and the name of the horse being mentioned. On Tuesday, Sept. 10, 1912, bets on horse races were made by the appellant in his house, and slips of paper and money were handed to him. On that day, the police entered the appellant's house under a search warrant, and the memorandum book and pencil and a slip relating to the horse Romeo (being a bet made by one of the witnesses) were found on the appellant. A number of racing books and sporting papers were found in the bar parlour and music room of the house, and upstairs a cigar box was found containing a large number of slips. The witnesses for the prosecution were cross-examined by the appellant's solicitor, but no evidence was given by him or on his behalf.

It was contended on behalf of the appellant: (a) that the withdrawal of the first summons amounted to a discharge: *Pickavance* v. *Pickavance* (1); (b) that the appellant had been put in peril on the hearing of the first summons and could not be put in peril a second time: *R.* v. *Brakenridge* (2); (c) that as the evidence given on the hearing of the second summons was substantially the same as that given on the hearing of the first summons and was sufficient to have convicted the appellant on the first summons, he could not be convicted on the second charge: *R.* v. *Drury* (3), *Wemyss* v. *Hopkins* (4). It was contended on behalf of the respondent: (a) that the withdrawal of the first summons did not amount to a discharge, as the omission to inform the appellant of his right to be tried by a jury prevented the justices from having jurisdiction to deal with him: *R.* v. *Cockshott* (5), *R.* v. *Beesby* (6); (b) that the appellant was not put in peril on the hearing of the first summons, as the justices could not legally have either acquitted or convicted the appellant of the offence charged, and the proceedings would have been a nullity: *Foster* v. *Hull* (7), *R.* v. *Marsham* (8); (c) that, although the evidence on the hearing of the second summons was substantially the same as that given on the hearing of the first summons, the offence alleged in the second summons was not the same as that alleged in the first summons, and there were in the second offence ingredients which need not be present in the first: *Bond* v. *Plumb* (9); and, no decision having been given on the first summons, the matter was not res judicata: *Jenkins* v. *Merthyr Tydvil U.D.C.* (10), *Bollard* v. *Spring* (11).

The justices were of opinion that the several contentions of the respondent's solicitor were valid, and that the appellant could be convicted of the offence charged against him in the second summons. The appellant now appealed.

By the Betting Act, 1853, s. 1:

"No house . . . shall be . . . used for the purpose of the . . . occupier . . . or any person using the same . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such . . . person aforesaid as or for the consideration for any assurance . . . to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race . . ."

By s. 3, a person convicted of an offence against s. 1 is liable to a penalty not exceeding £100 or to imprisonment for any time not exceeding six months.

By the Summary Jurisdiction Act, 1879, s. 17:

"(1). A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, . . . may, on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by a jury . . . (2) A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury? with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury."

Lowenthal for the appellant.
Bodkin and *Mortimer* for the respondent.

RIDLEY, J.—We are all of an opinion that the decision arrived at by the justices is one which we must support. It appears that, in the first instance, the proceedings were instituted against the appellant on the ground that he had made use of his house for the purpose of betting. When the case had proceeded some little way, it was discovered that the appellant had not been informed of his right to be tried by a jury pursuant to s. 17 of the Summary Jurisdiction Act, 1879. As soon as this was discovered, the prosecution, with the consent of the justices, at once withdrew the summons, although the appellant's solicitor protested against this course being taken, and a second summons was issued, the case was heard, the same evidence was adduced, and the justices convicted the appellant. The points taken on the second hearing—that is, on the second summons—are fully set out in the Case Stated, and what we have to decide is whether the appellant could substantiate his contention that he had been previously acquitted.

R. v. *Marsham* (8) has been quoted as an authority which ought to guide us. In that case, the applicant was convicted of obstructing a police officer in the execution of his duty. When the applicant had been convicted, it was discovered that one of the witnesses for the prosecution had not been sworn. The attention of the magistrate before whom the summons was heard was directed to this fact, and the witness was immediately recalled. He was then duly sworn, gave his evidence, and the applicant, after having had a full opportunity of giving evidence and calling witnesses, was again convicted. Objection was taken in the Divisional Court that the conviction was bad on the ground that the applicant had been put in peril on the first occasion. In delivering judgment, LORD ALVERSTONE, C.J., said:

A "I am only dealing with the case where a magistrate who has decided to convict discovers during the same day that some evidence was not given on oath. In the present case the magistrate does not say that that evidence was not material; on the contrary he says in his affidavit that he acted on the constable's evidence and that it ought to be regularly before him. Accordingly he treated the first hearing before him on the same morning as a nullity, because it proceeded B on evidence which must have compelled this court to quash the conviction had an application for that purpose been made. He then proceeded de novo and on the second hearing again gave the applicant the opportunity of giving evidence. She cross-examined the witnesses for the prosecution again and availed herself of the opportunity of calling evidence. On the proper evidence taken before him upon the second hearing on the same day he convicted. . . . C In order to set aside the second conviction the applicant must show that the magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the magistrate, finding out that upon the first hearing he had had before him evidence which was not admissible and had therefore not heard and determined the D case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence."

It appears to me that the objection which has been taken in the present case is of precisely the same character as that which was taken in *R.* v. *Marsham* (8), and that the only distinction is that, in the present case, it is contended that the withdrawal of the summons is equivalent to a dismissal, whereas in the other E case it was the previous conviction which was relied on as being a bar to the second conviction. I am of opinion that the withdrawal of a summons is not equivalent to the dismissal of a summons. On behalf of the appellant *Pickavance* v. *Pickavance* (1) has been quoted as an authority for the contention put forward. But, on the other hand, our attention has been called to *R.* (*McDonnell*) v. *Tyrone Justices* F (12), an Irish decision, which shows that the decision in *Pickavance* v. *Pickavance* (1) must be read with certain limitations, and that, where there is a withdrawal of a summons owing to a technical informality, that decision does not apply. In my view, the objections which have been raised on the appellant's behalf fail, and this appeal must be dismissed.

G **PICKFORD, J.**—I agree. The summons in this case was withdrawn by the prosecution owing to certain defects which, if the case had proceeded and been decided against the appellant, would have made the conviction liable to be quashed —namely, that the appellant had not been informed before the proceedings began that he had a right to be tried by a jury. The first question is whether a withdrawal of a summons such as this is equivalent to a dismissal, and one which could be pleaded in bar of subsequent proceedings. In *Pickavance* v. *Pickavance* (1), the H court decided that, in the special circumstances of that case, the withdrawal of a summons might amount to an acquittal. But where the withdrawal of the summons has not been on the merits of the case, but on a preliminary point, it has been held in *Foster* v. *Hull* (7) that the withdrawal is not equivalent to a dismissal or acquittal. If the justices had proceeded to adjudicate on the first summons, they would have adjudicated on something on which they had no power to I adjudicate. In my opinion, the withdrawal of a summons under such circumstances does not amount to a dismissal which can be pleaded in bar. I also think that the decision of this court in *R.* v. *Marsham* (8) governs the present case, and that, consequently, the appeal must be dismissed.

AVORY, J.—I also am of opinion that this appeal should be dismissed. I do not think that the withdrawal of the summons under the special circumstances of the present case amounts to a dismissal or an acquittal. Even if it did amount to

a dismissal, seeing that the justices would have had no jurisdiction to hear and to determine the summons, their decision could not have been pleaded in bar to subsequent proceedings.

Appeal dismissed.

Solicitors: *Nicholls, Herbert & Co.*, for *Arthur Willey*, Leeds; *Smith, Rundell & Dods*, for *J. Henry Field*, Huddersfield.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re SANDERSON. SANDERSON *v.* SANDERSON

[CHANCERY DIVISION (Neville, J.), February 9, 1912]

[Reported 106 L.T. 26; 56 Sol. Jo. 291]

Power of Appointment—Exercise—Need to prove intention to exercise—Intention —All property dealt with without distinction between appointor's own and that over which he has power.

A testator cannot be held to have by his will exercised a special power of appointment unless it is shown that he had an intention to exercise the power, and when he deals with all his property in the mass without making any distinction between the property to which he is absolutely entitled from that over which he has only a power of appointment, he cannot be held to have had any intention to exercise his special powers of appointment, even though he has used the word "appoint."

Re Weston's Settlement (1), [1906] 2 Ch. 620, followed.

Notes. Referred to: *Re Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E.R. 566; *Re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1944] 2 All E.R. 462; *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co.* v. *Parker*, [1957] 2 All E.R. 252.

As to the exercise of powers of appointment by will, see 30 HALSBURY'S LAWS (3rd Edn.) 245 et seq.; and for cases see 37 DIGEST 412 et seq.

Case referred to:

(1) *Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620; 76 L.J.Ch. 54; 95 L.T. 581; 37 Digest 451, *540*.

Also referred to:

Re Swinburne, Swinburne v. *Pitt* (1884), 27 Ch.D. 696; 54 L.J.Ch. 229; 33 W.R. 394; 37 Digest 453, *550*.

Re Boyd, Nield v. *Boyd* (1890), 63 L.T. 92; 37 Digest 451, *538*.

Re Mayhew, Spencer v. *Cutbush*, [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 49 W.R. 330; 45 Sol. Jo. 326; 37 Digest 452, *542*.

Re Cotton, Wood v. *Cotton* (1888), 40 Ch.D. 41; 58 L.J.Ch. 174; 37 W.R. 232; 37 Digest 451, *539*.

Summons to determine whether the will of the testatrix operated as an exercise of special powers of appointment.

By her will, dated Jan. 21, 1861, Elizabeth Tunstall devised her moiety in certain dwelling-houses, buildings, land and hereditaments situate at Ellel in the county of Lancaster unto her niece, the testatrix, for her own absolute use during her life, with remainder to such uses for the benefit of all or any one or more of the children or other issue of the testatrix by her then present or any future husband, such other issue being born in her lifetime, as she should by her last will duly executed appoint, and in default of appointment to the use of the children if more than one equally or the child if one wholly of the testatrix in fee simple.

By her will, dated Oct. 27, 1874, Alice Chatburn devised her moiety in the same real property to the use of her niece, the testatrix, for her life and from and after her decease to the use of the husband of the testatrix and from and after the decease of the survivor of them to such uses for the benefit of all or any one or more of the children, or other issue of the testatrix and her husband, such other issue being born in her lifetime, as she should by her last will appoint, and in default of or subject to any such appointment to the use of the children if more than one equally or the child if only one wholly of the testatrix in fee simple. Elizabeth Tunstall died on Jan. 25, 1861, Alice Chatburn died on Sept. 26, 1878. By these two wills, the testatrix became the life tenant of the whole of the real property in question with a power of appointment as therein provided. By her last will, dated Dec. 17, 1900, the testatrix, after appointing certain trustees and making certain bequests, gave, devised, bequeathed and appointed all her real and personal estate not thereby otherwise disposed of (including all property over which she had a power of appointment) unto her trustees on trust that they should convert the same and thereout to pay her debts and should invest the residue of the moneys and should stand possessed of the residuary trust moneys and the investments for the time being representing the same in trust to pay the income to her husband during his life, and from and after his decease in trust for all her children in equal shares. The testatrix died on Jan. 4, 1905, leaving her husband and three children. Her husband died on Dec. 30, 1908.

The trustees took out this summons to determine the question whether or not the will of the testatrix operated as an exercise of the special powers of appointment given to her by the wills of Elizabeth Tunstall and Alice Chatburn.

Mossop for the trustees.

Topham for a son of the testatrix and the infant children of the daughter of the testatrix.

Bryan Farrar for the other children of the daughter of the testatrix.

NEVILLE, J.—A testator cannot be held to have by his will exercised a special power of appointment unless it be shown that he had an intention to exercise the power. Where a testator is found dealing with all his property in the mass, without making any distinction as to his various kinds of property, and not drawing a difference between the property of which he was absolutely entitled from that over which he had only a power of appointment, I do not think I can hold that there was any intention on the part of the testator to exercise his special powers of appointment. Certain cases have been cited to me where the use of the word "appoint" has been held to show an intention to exercise special powers of appointment. If these decisions stood alone, I should not feel justified in differing from them, especially as I am very much disinclined to draw fine distinctions in construing wills, as the only result of so doing is to embarrass testators. However, the will in this case is not like those in question in those cases, but appears to be very similar to that before BUCKLEY, J., in *Re Weston's Settlement* (1) and I do not think I can do otherwise than follow that decision. The reasons for that judgment are to a very great extent applicable to this case, and I approve of them in full. I have no doubt that in this case, considering the whole will, the testatrix had no intention of exercising her special powers of appointment.

Solicitors: *Martineau & Reid; Kekewich Smith & Kaye.*

[*Reported by* S. RAYMOND SEBASTIAN, ESQ., *Barrister-at-Law.*]

ORAM *v.* HUTT

[COURT OF APPEAL (Lord Parker of Waddington, Lord Sumner, and Warrington, J.), October 27, 28, November 5, 1913]

[Reported [1914] 1 Ch. 98; 83 L.J.Ch. 161; 110 L.T. 187; 78 J.P. 51; 30 T.L.R. 55]

Trade Union—Application of funds—Slander on officials—Action by them in their own names—Expenses paid by union—Legality—Maintenance.

A member of a registered trade union made public speeches in which he accused certain officials of the union of misconduct in its affairs, thereby injuriously affecting the union in that some of its members left or withheld their contributions. The union's executive committee passed a resolution that the officials should take legal proceedings against the member either in their own names or in that of the union and that the union should indemnify them against their expenses. The officials began actions for slander and libel against the member in their own names and obtained damages, their costs being paid out of union funds.

Held: no wrong had been done to the union, and so the union had no such common interest in the actions as to justify the payment of the officials' costs out of its funds; accordingly, the agreement to indemnify the officials was void on the ground of maintenance.

Alabaster v. *Harness* (1), [1895] 1 Q.B. 339, applied.

Decision of SWINFEN EADY, J., [1913] 1 Ch. 259, affirmed.

Notes. Considered: *Neville* v. *London Express Newspaper, Ltd.*, [1918–19] All E.R. Rep. 61. Applied: *Baker* v. *Jones*, [1954] 2 All E.R. 553. Distinguished: *Martell* v. *Consett Iron Co.*, [1955] 1 All E.R. 481; Referred: *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (1920), 36 T.L.R. 528.

As to maintenance of an action, see 1 HALSBURY'S LAWS (3rd Edn.) 39 et seq., and for cases see 1 DIGEST (Repl.) 83 et seq.

Cases referred to:

(1) *Alabaster* v. *Harness*, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 43 W.R. 196; 11 T.L.R. 96; 14 R. 54, C.A.; 1 Digest (Repl.) 96, *713*.

(2) *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906), 22 T.L.R. 274; 1 Digest (Repl.) 100, *755*.

(3) *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, *618*.

(4) *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, *613*.

(5) *Pechall* v. *Watson* (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 1 Digest (Repl.) 84, *640*.

(6) *Flight* v. *Leman* (1843), 4 Q.B. 883; 1 Dav. & Mer. 67; 12 L.J.Q.B. 353; 1 L.T.O.S. 287; 7 Jur. 557; 114 E.R. 1130; 1 Digest (Repl.) 81, *612*.

Also referred to in argument:

British Cash and Parcel Conveyors, Ltd. v. *Lamson Store Service Co., Ltd.*, [1908] 1 K.B. 1006; 77 L.J.K.B. 649; 98 L.T. 875, C.A.; 1 Digest (Repl.) 100, *758*.

Yorkshire Miners Association v. *Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431; H.L.; 43 Digest 106, *1122*.

Scott v. *National Society for Prevention of Cruelty to Children and Parr* (1909), 25 T.L.R. 789; 1 Digest (Repl.) 82, *619*.

Appeal from a decision of SWINFEN EADY, J.

The plaintiff was a member of the Warwickshire Miners' Association, and the defendants Hutt and Johnson were two of the members of the executive committee and the trustees of the association at the time when the cause of action arose. The Warwickshire Miners' Association was a trade union registered under the Trade Union Act, 1871, and the Trade Union Act 1876, for the purpose of raising funds for the assistance, protection, and support of its members. In the early part of 1907, a member named Pat McNicholas, who was desirous of having the accounts of the association audited by chartered accountants, professing to act in the interests of the association, made speeches at various public meetings accusing some of its officials, including the defendant Johnson, the general secretary, and Dewis, a lodge secretary, of misconduct in the affairs of the association, such as enriching themselves at its expense, and not accounting for moneys received. This produced a feeling of dissatisfaction among the members of the association, some of whom either left it or withheld their contributions, and was prejudicial to its interests. On May 16, 1907, the executive committee passed a resolution that

> "the Miners' Association, the general secretary, the executive committee, and any of the lodge officials, take legal proceedings against Pat McNicholas on behalf of the Miners' Association, or in their own names, and that the Miners' Association indemnify the general or lodge officials who take proceedings,"

which resolution was confirmed by the council of the association in whom the supreme government was vested, on June 24, 1907. Acting in accordance with this resolution, on May 16, 1907, the defendant Johnson commenced an action for slander, and on May 17, 1907, Dewis commenced an action for libel and slander. The solicitor of the association acted for the plaintiffs in both actions. On Feb. 24, 1908, the defendant Johnson obtained judgment against McNicholas for £1,000 damages and costs; and judgment for £25 without costs was then agreed on in favour of Dewis. The ultimate result of the litigation was that McNicholas lost his influence over the members of the association who had supported him, and left the neighbourhood; but nothing was received from him for damages or costs. The costs of the defendant Johnson and Dewis amounted to £949, which was paid as follows: £174 cash was paid by the treasurer of the association, out of income in his hands which had not been paid over to the trustees, to the solicitor in the course of the litigation, and £775 cash was paid by the treasurer out of the same fund to the defendant Johnson after the action had been determined; and the defendant Johnson gave the solicitor a cheque for that amount. The plaintiff claimed a declaration that these payments were ultra vires, and an order for repayment by the defendants, but eventually an order against the defendant Johnson only was claimed.

The action came on for trial before SWINFEN EADY, J., when his Lordship held that the trade union had not sufficient common interest in the subject-matter in issue in the action to justify the payment of the costs of the officials out of the trade union funds, granted declarations that the payments were ultra vires, and ordered the defendant Johnson to repay the £775. The defendant Johnson now appealed.

Frank Russell, K.C., and *J. W. Manning* for the defendant.

Sir Charles Macnaghten, K.C., and *Dighton Pollock* for the plaintiff.

Cur. adv. vult.

Nov. 5.—The following judgments were read.

LORD PARKER OF WADDINGTON.—In this case, I have come to the conclusion that the judgment of SWINFEN EADY, J., was right and ought to be affirmed for the following reasons. The moneys which the defendant Johnson was ordered to repay to the association were paid to him pursuant to the indemnity contained in the resolution of the executive committee of the association passed on May 16,

1907, and confirmed by the council of the association on June 24, 1907. This indemnity and the payments made under it are impeached as amounting to maintenance, and, therefore, illegal and ultra vires. It may well be that a corporation cannot commit the common law offence of maintenance. It may also well be that, in the present case, no civil action for damages could arise out of anything done by the association. I cannot doubt, however, that an agreement which, if entered into by an individual, would be void as an agreement to commit an illegal act would, if entered into by a corporation, be similarly void, and if this is so, payments made pursuant to any such agreement would be ultra vires unless they could be justified on other grounds.

The first question for decision, therefore, is whether the agreement by the association to indemnify any of its officers who took proceedings against McNicholas for libel was void on the ground of maintenance. In my opinion, SWINFEN EADY, J., was bound, and this court is bound, to hold this agreement void unless the case can be distinguished from *Alabaster* v. *Harness* (1). Several grounds of distinction were suggested in argument, but, on consideration, I think that there is little substance in them. A person who maintains the action of another can only justify by proving the existence of a common interest or bringing himself within certain recognised exceptions to the common law rule. A common interest means an interest recognised by law in the subject-matter of the action or some issue between the parties to the action. It was decided in the case in question that a libel action is a personal action which in point of law concerns only the parties to it, and the matters legally at issue are merely whether the plaintiff has been libelled, and, if so, to what damages he is entitled. The mere circumstance that, in the libel action, there must or may arise questions of fact in the determination of which a third party has an interest will not constitute a common interest sufficient to justify maintenance by such third party. In the libel action by Tibbits which Harness maintained there might arise, and did in fact arise, a question as to the efficiency of the electric belt in which Harness was interested. Indeed, the libel on Tibbits consisted in charging him with professional incompetence on the ground that he had reported favourably on a belt which was alleged to be worthless. From a business point of view, it was vital to Harness after the publication of that libel to prove that the belt had the merits appearing in Tibbits' report. That, however, was held insufficient to justify his maintaining the libel action. Similarly, in the present case it may have been vital for the association from a business point of view to controvert certain of the allegations made by McNicholas against their officers the truth of which would be in issue in the slander action by the defendant Johnson, or the libel and slander action by Dewis. Nevertheless, according to the case in question, this would not constitute a common interest justifying the association in maintaining such actions, the matters legally at issue being merely whether the plaintiffs in those actions had been slandered or libelled, and to what damages they were entitled. I do not, therefore, see how this case can be distinguished from *Alabaster* v. *Harness* (1), nor do I think that the association can be brought within any of the recognised exceptions.

The question remains whether the payments in question were justified on any other ground. As pointed out by LORD ALVERSTONE, C.J., in *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (2), a mere power to give legal aid to its members in protection of their interests could not justify an act which would be otherwise illegal. But even if the objection based on maintenance were out of the way in the present case, I am of opinion that the payments could not be justified. Such payments were certainly not justified by express words of the rules of the association. It may possibly be that, when a trade union has under its rules power to apply its funds in the attainment of specified objects, certain ancillary powers reasonably necessary for the attainment of those objects can be implied, but it would be stretching this principle too far to hold that a trade union was justified in defraying the costs of legal proceedings by its members

whenever an indirect benefit might be expected to result from, or had resulted from, the proceedings in question. I have come to the conclusion, therefore, that the appeal must be dismissed.

LORD SUMNER.—The association's payment and the defendant Johnson's receipt of the sum in question in this appeal can be justified only if the payment can be shown to have been within the association's implied powers. Clearly, no express power covers it. How far the association may spend its money on actions brought to defend itself or its officers we need not say. This limit at least must be placed on any implied powers, that they do not extend to cover acts which, in the association itself, would be actionable torts, and, if committed by natural persons, would be indictable misdemeanours. Hence the question is, "Did the association maintain the defendant Johnson in his action against McNicholas?" That the action of maintenance is now in small favour and that indictments for maintenance have been drawn by few among living men are nothing to the point. Maintenance has not ceased to be a part both of the law of torts and of the law of crimes. At the request and by the direction of the association, and on its indemnity as to costs, the defendant Johnson sued McNicholas for slandering him. There is no question here of the business of insurance or of mutual protection associations. I think it makes no difference to the validity of the payment whether the association paid the defendant Johnson money for the action in advance, or paid him sums as it proceeded, or promised to pay his bill of costs when it was over and did so, thus giving effect to an unlawful contract. The association prompted the defendant Johnson, who was doubtless nothing loth, to bring his own action to clear his own character. In this action it had no legal interest; to its fruits it had no legal right; the wrong that that action was brought to vindicate was no wrong done to the association. True, there was an action which the association itself might have brought; true, the slanders on the association and on the defendant Johnson were uttered by McNicholas in the same speech and in the same breath; true that, to some extent, they consisted of the same charge. Still the association and the defendant Johnson had no common interest in the latter's action. They suffered under similar wrongs caused by identical charges made against them severally on the same occasions. They possessed identical causes of action; they had a common aim—namely, the confutation of McNicholas and his reduction to silence. But a common cause is not a common interest. Victory for either would serve the other's turn. Doubtless it did not much matter which sued, if one judgment against McNicholas was obtained. Still their wrongs, their causes of action, their damages, and their costs were all separate. The association had no right to fight the defendant Johnson's battles.

Alabaster v. *Harness* (1), in my opinion, so far as the question of maintenance is concerned, covers the case. I have neither the right nor the wish to doubt or to disregard it. Two distinctions have been suggested. First, it is said that the motives both of the defendant Johnson and the association were honourable and their wrongs grievous, and that was true; while the motives of Harness were dubious, and he deserved all that was said of him—which may be true also. I think this is no distinction. Whether an act is an act of maintenance or not depends on its own character, not on the character of the maintenance. Next it is said that, while Tibbits was beaten in his action against Alabaster, in the defendant Johnson's action it was McNicholas who was the loser. I think this makes no difference either. Whether the tort of maintenance is one in which damage is of the essence of the action, as in an action for personal injuries, or is one in which the mere invasion of the plaintiff's legal right imports damage and is sufficient to give a cause of action, need not be decided now. In *Bradlaugh* v. *Newdegate* (3), LORD COLERIDGE, C.J., decided the case on the latter view, treating the plaintiff's success or failure in the maintained action as merely going to the quantum of his damages in the action for maintenance, and some text-writers so say: CLERK AND LINDSELL ON

TORTS (4th Edn.), p. 664: JENK'S DIGEST OF ENGLISH CIVIL LAW (1st Edn.) vol. 2, pt. 3, p. 497; HALSBURY'S LAWS OF ENGLAND (1st Edn.) vol. 1., title Action, p. 52, para. 81. In *Metropolitan Bank* v. *Pooley* (4), LORD SELBORNE'S language suggests the contrary view, and this is adopted definitely in POLLOCK ON TORTS (9th Edn.), p. 345. No case has been cited where the prosecutor's failure in the maintained action has been a defence to an indictment for the misdemeanour of maintenance, and it may be as much against public interest (which is the foundation of this head of wrongs) to stir up an action which lies indeed, but would never have been brought if the tort sufferer had been left to himself, or to maintain an action which does not lie at all. Be this as it may, in either case the maintainer for his part has done all he can to harass the party sued. If the maintained action fails, it is not because he has not done his best to commit maintenance and committed it, but because the party against whom it is brought has committed some tort or breach of contract. What the maintainer himself does is the same in either case. It is not a question of reasonable and probable cause for believing the maintained action to be a just one. This goes farther. It is an action for maintaining actual litigation in being: see *Pechell* v. *Watson* (5); and *Flight* v. *Leman* (6). Accordingly, in view of the questions here in issue, the association's conduct is tortious in its character, and, therefore, is beyond its implied powers. Whether or not McNicholas could have been sued successfully in view of his own indefensible slanders on the defendant Johnson is not material. It only remains to observe that the relations of the defendant Johnson and the association and the circumstances of the case excluded the application of any of the recognised exceptions to the rule as to maintenance, notably those relating to master and servant. I agree in the judgment of SWINFEN EADY, J., and think the appeal must be dismissed.

WARRINGTON, J.—To succeed in this appeal the defendant Johnson must satisfy us that the payment in question was one which it was in the power of the association to make, for it is not disputed that, unless it was so, the judgment appealed from is correct. Such an application of the funds of the association was not in terms authorised by the rules. But the defendant Johnson contends that it is impliedly authorised as incidental to the main objects of the association. It may be conceded that such a body may properly apply its funds in litigation instituted to assert a right of the association, or preventing the infliction of a wrong on the association, or recovering damages for a wrong already inflicted on it. But the question here is as to the application of its funds in payment of the costs of litigation started by another person for recovery of damages for a personal wrong inflicted on himself. Is such an application of its funds within the powers of the association? The learned judge has held that it is not, because the transaction amounted to maintenance on the part of the association. That it did amount to maintenance was concluded by the decision of the Court of Appeal in *Alabaster* v. *Harness* (1). In that case it was said that to expose or stop certain slanders on Tibbits might benefit Harness by removing a slur on the goods in which he dealt, and it was contended that this circumstance afforded a sufficient ground for holding that he had a common interest with Tibbits in his suit. The contention here is that the result of the defendant Johnson's action was expected to be and was in fact to stop the slanders of McNicholas and to re-establish the confidence of the miners in the association, and that this is a sufficient common interest with the defendant Johnson to justify the taking up of his action. In my judgment, the nature of the alleged interest is the same in both cases. It was held in *Alabaster* v. *Harness* (1) not to be sufficient to prevent the conduct of Harness from being "maintenance," and it must, in my opinion, be so held here. If the transaction amounted to maintenance on the part of the association, then the payment in question was made in pursuance of an illegal contract, and, in my opinion, it is

impossible to hold that to make such a payment can be within the implied powers of the association. I think, therefore, that the judgment of the learned judge was right, and this appeal fails.

Appeal dismissed.

Solicitors: *Bennett & Ferris*, for *W. H. Pownall*, Nuneaton; *Maude & Tunnicliffe*, for *Simpson, Bowring & Smith*, Derby.

[*Reported by* H. M. C. MACPHERSON, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF HALL. HALL *v.* KNIGHT AND BAXTER

[COURT OF APPEAL (Cozens-Hardy, M.R., Hamilton and Swinfen Eady, L.JJ.), October 14, 1913]

[Reported [1914] P. 1; 83 L.J.P. 1; 109 L.T. 587; 30 T.L.R. 1; 58 Sol. Jo. 30]

Will—Beneficiary's capacity to benefit—Beneficiary convicted of manslaughter of testator.

The rule that a person who feloniously kills another cannot claim any benefit under that other person's will is based on public policy and applies equally to manslaughter as it does to murder.

Cleaver v. *Mutual Reserve Fund Life Association* (1), [1892] 1 Q.B. 147, followed.

An order striking out a legatee who has been convicted of the manslaughter of the testator from an action for probate of the will can be properly made in an interlocutory proceeding.

Dyson v. *A.-G.* (2), [1911] 1 K.B. 410, distinguished.

Notes. Considered: *Beresford* v. *Royal Insurance Co.*, [1938] 2 All E.R. 602. Referred to: *In the Estate of G.— (deceased), M—* v. *L—*, [1946] 1 All E.R. 579; *Re Callaway, Callaway* v. *Treasury Solicitor*, [1956] 2 All E.R. 451.

As to capacity to benefit under a will, see 34 HALSBURY'S LAWS (2nd Edn.) 41 et seq.; and for cases see 44 DIGEST 219 et seq.

Cases referred to:

(1) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 44 Digest 226, *504*.

(2) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 80 L.J.K.B. 531; 103 L.T. 707; 27 T.L.R. 143; 55 Sol. Jo. 168, C.A.; 30 Digest (Repl.) 168, *193*.

(3) *Amicable Society* v. *Bolland* (1830), 4 Bli. N.S. 194; 2 Dow. & Cl. 1; 5 E.R. 70, H.L.; 29 Digest 369, *2968*.

(4) *In the Estate of Crippen*, ante p. 207; [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 27 T.L.R. 258; 55 Sol. Jo. 273; 23 Digest (Repl.) 170, *1909*.

Also referred to in argument:

Quinn v. *Leathem*, [1901] A.C. 495; 70 L.J.P. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 30 Digest (Repl.) 213, *553*.

Moore v. *Woolsey* (1854), 4 E. & B. 243; 3 C.L.R. 207; 24 L.J.Q.B. 40; 24 L.T.O.S. 155; 1 Jur. N.S. 468; 3 W.R. 66; 119 E.R. 93; 29 Digest 368, *2959*.

Prince of Wales, etc. Association Co. v. *Palmer* (1858), 25 Beav. 605; 53 E.R. 768; 29 Digest 370, *2974*.

Appeal from a decision of SIR SAMUEL EVANS, P.

The testator, Julian Bernard Hall, died on April 15, 1913. By a writ dated April 22, 1913, Percy Shene Bernard Hall propounded a will of the testator dated Aug. 14, 1912, and made Ada Knight defendant. On April 28, 1913, BARGRAVE DEANE, J., ordered that Jean Baxter should be added as a defendant. On May 27, 1913, Jean Baxter was convicted of the manslaughter of the testator, and sentenced to three years' penal servitude. On June 23, 1913, her appeal against conviction and sentence was dismissed by the Court of Criminal Appeal. Under the will propounded by the plaintiff, Jean Baxter had no interest. Under a will dated Nov. 2, 1912, she took the whole of the testator's property, but by a will dated Dec. 4, 1912, she only received half the estate. By a paper writing purporting to be a will and dated April 14, 1913, the interest of Jean Baxter was transferred to her daughter. On July 18, 1913, the plaintiff took out a summons before the registrar to dismiss Jean Baxter from the action on the ground that she, having feloniously killed the testator, could not take any interest in his estate under any testamentary document. The registrar refused to make the order, and the plaintiff appealed. The appeal was heard by the President (SIR SAMUEL EVANS) in chambers and was adjourned into court where the President ordered that Jean Baxter's name be struck out of the action and she now appealed.

Valetta (*D. Corrie* with him) for the defendant.
Barnard, K.C. (*Bayford* with him) for the plaintiff.

COZENS-HARDY, M.R.—This is an appeal from a decision of the President of the Probate Division raising a point which, but for authorities that I think are binding on us, might have required consideration on our part. Having listened, however, to the argument, I have no reasonable doubt that the decision of the President was perfectly correct. [HIS LORDSHIP stated the facts, and continued:] On what ground is the present appeal based? It has been argued by counsel for the defendant that you cannot find any statute depriving the defendant of her right to attend the proceedings and to assert her title. It is true that she is a felon, he says, but look at s. 15 of the Wills Act, 1837, and you will not find that she is in the class of persons who are disabled from taking under a will. That statute seems to me to have nothing whatever to do with this case. That only provides that certain persons cannot take under a will, although the person whose disability prevents them from taking may be interested to prove the existence of the will. That does not apply to this case. Nor does the Forfeiture Act, 1870, deal with this case.

This case, according to the authorities to which I am about to refer seems to me plainly to be one based on public policy. You do not look at public policy in the sense in which you look at words that are used in an Act of Parliament. It is something which is really part of the common law of the land, and you do not want a statute in order to enable you to deal with it. I think, if it were necessary, that the decision of the House of Lords in *Fauntleroy's Case* (*Amicable Society* v. *Bolland*) (3) really covers this point. But I do not think it necessary to go back to that, because, in my view, the decision of this court in *Cleaver* v. *Mutual Reserve Fund Life Association* (1) plainly and distinctly covers the present case. That was a case where murder was committed, and an action was brought on a policy by the executors of the murdered man, the benefit of the policy going to the murderess, the wife. In the circumstances of that case, the court held that the executors might recover, but they would not go into the question of how they would have to deal with the money when it was got in. All three members of the court—LORD ESHER, M.R., FRY and LOPES, L.JJ.—laid down the law in terms which, to my mind, plainly cover the present case, although it is true that that was a case of contract. LORD ESHER said ([1892] 1 Q.B. at p. 151):

A "No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity."

Later on he said (ibid. at p. 153):

"If, in consequence of the death of the insured having been caused by the crime of a person in whose favour the policy is expressed to be made, or to or upon whom the policy money is left by will or settled, such person is not entitled to insist on its being paid to him, but he nevertheless claims the money from the executors, they may then vouch the doctrine of public policy, and say that by reason of it such person has forfeited his or her right to the money."

FRY, L.J., was, if possible, more distinct (ibid. at p. 156):

"The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony."

LOPES, L.J., says exactly the same (ibid. at p. 160):

"I do not doubt that the principle of public policy would prevent the wife from recovering the amount of the policy money from them, and so reaping benefit from her crime; because no trust can be enforced which contravenes the law."

It is said that that was a case of murder and not manslaughter. I entirely fail to appreciate that distinction. It was a case of felony, and I find not a word to draw a distinction between murder and manslaughter in a case like this. The authority of *Cleaver's Case* (1) is sufficient for this court and is binding on us, even if we felt any difficulty in following it, which I am bound to say I do not. Then, again, in *In the Estate of Crippen* (4), before the learned President (SIR SAMUEL EVANS), he merely asserted the doctrine that is laid down in the other case. He said (ante p. 209):

"It is clear that the law is, that no person can obtain or enforce any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."

I think that it would be shocking if the defendant, who was the cause of the death of the testator, and who was convicted of felony in respect of that, could come before the court and claim an interest under any will made in her favour by the testator. That being so, it is plain that by a matter subsequent—namely, a conviction—that which was right in the first instance, making her a party to the action, is no longer right, and that it is quite proper to stay proceedings against her.

Then it is said that this is not a matter for interlocutory proceedings. I cannot follow that. If there is any possibility of a question whether the defendant had been guilty of the crime, that would be a matter which ought to have been tried in court, but when the fact is perfectly indisputable and beyond contest, I know nothing whatever which prevents the court in a case of this kind from dealing with what is a pure question of law on an application to stay proceedings. There is certainly nothing in *Dyson* v. *A.-G.* (2) which lends any colour to the suggestion that this decision of the President was one which he ought to have disposed of at the trial of the action. In my opinion, therefore, the appeal fails, and must be dismissed.

HAMILTON, L.J.—I agree. That the order for discharging the defendant was properly made at this stage of the proceedings I am quite satisfied, for the reasons given, and *Dyson* v. *A.-G.* (2) I think is irrelevant.

On the main question, I think *Cleaver's Case* (1) binds our judgment. In the considered judgment of all the members of the court, the principle on which they rest their decision on this part of the case is as equally applicable, by the terms they use, to murder as to manslaughter. True, it was a case of murder, but I do not think that, by using terms wide enough to cover manslaughter, the members of the court supposed themselves to be saying something obiter, or were in fact doing so. The fact is that the principle can only be expressed in that wide form. The principle is that a man shall not slay his benefactor and thereby take his bounty. And I cannot understand why a distinction should be drawn between the rule of public policy when the criminality consists in murder and the case where the criminality consists in manslaughter. Why should the legatee be excluded from taking the testator's bounty when he can be hanged, and not excluded when he can only be sent to penal servitude for life? The distinction seems to me to be either one of an undue reliance on legal classification, or else to encourage what, I am sure, would be very noxious—a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison. I think, therefore, that the principle as laid down in *Cleaver's Case* (1) applies equally and binds us, and that the appeal should be dismissed with costs.

SWINFEN EADY, L.J.—I agree. The defendant has been convicted of manslaughter, and, as I gather, has been sentenced to penal servitude. The death of the testator directly resulted from the crime of the defendant, and the question which arises in this appeal is: Can she benefit by that crime? In my opinion, the case is completely governed by *Cleaver* v. *Mutual Reserve Fund Life Association* (1). In that case, there was a policy effected for the benefit of a married woman. The result of the proceedings was that, although the insurance company had to pay to the executors the amount of the policy money, the trust in favour of the married woman was treated as non-existent, as if that clause had been struck out of the policy, and the money was held in trust for her husband's executors as if the trust in favour of the wife had never been inserted in the policy at all. In the present case, it seems to me that the estate of the testator must go in the same way as if there was no benefit given to the defendant at all, and that she cannot in any way benefit from the crime which she has committed. I see no reason for restricting the rule to cases of murder. It was pointed out during the course of the argument that, in *Fauntleroy's Case* (3) where the same principle was applied by the House of Lords, although Fauntleroy was executed, the crime of which he was guilty was not murder, but forgery. In my opinion, the reasons given by the Lord Chancellor in *Fauntleroy's Case* (3) and the reasons given by the Court of Appeal in *Cleaver's Case* (1) completely govern us. It is against public policy that a person committing a crime should directly benefit in the way that it is claimed that the defendant should benefit. I agree, therefore, that the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors: *John K. Torkington; Hasties.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. *v.* GOVERNOR OF BRIXTON PRISON. Ex parte STALLMANN

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Phillimore, JJ.), July 25, 1912]

[Reported [1912] 3 K.B. 424; 82 L.J.K.B. 8; 107 L.T. 553; 77 J.P. 5; 28 T.L.R. 572; 23 Cox, C.C. 192]

Extradition—Defence to application for order—Prisoner "already been tried and discharged"—Habeas corpus—"Person delivered or set at large on a habeas corpus not to be again committed for same offence"—"Delivered or set at large"—Previous application for extradition from another country—Discharge of prisoner then on ground of error in procedure—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 5—*Gaming Act*, 1845 (8 & 9 *Vict.*, *c.* 109), *s.* 17—*Extradition Treaty with Germany*, 1872, *art.* 4.

By s. 5 of the Habeas Corpus Act, 1679, "no person . . . which shall be delivered or set at large upon any habeas corpus, shall . . . be again imprisoned or committed for the same offence . . ." By art. 4 of the Extradition Treaty between Great Britain and Germany, made in 1872, no person was to be extradited who "has already been tried and discharged or punished" for the crime for which his extradition was demanded. By s. 17 of the Gaming Act, 1845, any person who by cheating at cards "wins from any other person . . . any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing . . . by a false pretence." The crime of obtaining money or goods by false pretences was one of the crimes specified in the treaty and in the Extradition Act, 1870.

The applicant, a German named S., was accused of having obtained from a German officer a bill of exchange for a large sum by fraud. The allegation was that the applicant, acting in concert with one H., induced the officer to play rouge et noir in Berlin, that they cheated during the play, and that the officer lost a large sum of money to H., who then took out of his pocket a piece of paper representing a bill of exchange for the amount, and handed it to the officer who accepted the bill and gave it back to H. On the request of the German government a warrant for the arrest of the applicant for obtaining money and goods by false pretences in Germany was issued by a magistrate in London in November, 1910. The applicant, who was then in India, was arrested under a warrant issued by a magistrate in India and brought before a magistrate who committed him for extradition to Germany, refusing a request made by him for an adjournment to enable him to produce evidence for the defence. Upon proceedings in the nature of habeas corpus the High Court in Calcutta ordered the discharge of the applicant on the ground that he was illegally detained by reason of the refusal of the magistrate to allow him a proper opportunity to make his defence. The applicant then came to England and was arrested in London under the original warrant. He was brought before a magistrate, who held that a prima facie case was proved and committed him for extradition. Upon an application for a writ of habeas corpus,

Held: (i) the discharge of the applicant by the Indian court not being because he could not be committed for the crime, nor because it was not an extraditable crime, or for any such reason, but because full opportunity to make his defence had not been given to him, did not bring him within s. 5 of the Habeas Corpus Act, 1695; nor could it be said that in those proceedings he had "been tried and discharged or punished" for the crime for which his extradition was demanded within art. 4 of the treaty of 1872; a prima facie case of obtaining the bill by false pretences had been made out against him; and, therefore, his application for habeas corpus would be dismissed.

Notes. Referred to: *R.* v. *Home Secretary, Ex parte Budd*, [1941] 2 All E.R. 749.

As to extradition, see 16 HALSBURY'S LAWS (3rd Edn.) 564 et seq., and for cases see 24 DIGEST (Repl.) 988 et seq. For Extradition Act, 1870, see 9 HALSBURY'S STATUTES (2nd Edn.) 874. As to habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 24, and 16 DIGEST 279.

Cases referred to:

(1) *A.-G. for Colony of Hong Kong* v. *Kwok-A-Sing* (1873), L.R. 5 P.C. 179; 42 L.J.P.C. 64; 29 L.T. 114; 37 J.P. 772; 21 W.R. 825; 12 Cox, C.C. 565, P.C.; 24 Digest (Repl.) 992, *32*.

(2) *Re Arton (No. 2)*, [1896] 1 Q.B. 509; 65 L.J.M.C. 50; 74 L.T. 249; 60 J.P. 132; 44 W.R. 351; 12 T.L.R. 189; 40 Sol. Jo. 258; 18 Cox, C.C. 177, D.C.; 24 Digest (Repl.) 991, *21*.

(3) *R.* v. *Danger* (1857), Dears. & B. 307; 26 L.J.M.C. 185; 29 L.T.O.S. 268; 21 J.P. 403; 3 Jur. N.S. 1011; 5 W.R. 738; 7 Cox, C.C. 303, C.C.R.; 15 Digest (Repl.) 1171, *11,829*.

(4) *R.* v. *Gordon* (1889), 23 Q.B.D. 354; 58 L.J.M.C. 117; 60 L.T. 872; 53 J.P. 807; 5 T.L.R. 466; 16 Cox, C.C. 622, C.C.R.; 15 Digest (Repl.) 1171, *11,830*.

(5) *R.* v. *Moss* (1856), Dears. & B. 104; 26 L.J.M.C. 9; 28 L.T.O.S. 109; 20 J.P. 757; 2 Jur. N.S. 1196; 5 W.R. 49; 7 Cox, C.C. 200, C.C.R.; 15 Digest (Repl.) 1195, *12,136*.

(6) *Re Parker, Canadian Prisoners' Case* (1839), 5 M. & W. 32; 2 Horn. & H. 45; 151 E.R. 15; sub nom. *Canadian Prisoners' Case*, 3 State Tr. N.S. 963; 7 Dowl. 208; 8 L.J.Ex. 81; 3 J.P. 64; 16 Digest (Repl.) 292, *629*.

(7) *Watson's Case* (1839), 9 Ad. & El. 731; 112 E.R. 1389; sub nom. *R.* v. *Wixon*, 8 L.J.Q.B. 129; sub nom. *R.* v. *Batcheldor*, 1 Per. & Dav. 516; 2 Will. Woll. & H. 19; sub nom. *Canadian Prisoners' Case*, 3 State Tr. N.S. 963; 16 Digest (Repl.) 291, *616*.

(8) *R.* v. *Sill* (1852), Dears. C.C. 10; 21 L.J.M.C. 214; 16 J.P. 407; 17 Jur. 22; sub nom. *R.* v. *Lills*, 19 L.T.O.S. 201; 16 Digest (Repl.) 453, *2617*.

Also referred to in argument:

R. v. *Governor of Brixton Prison, Ex parte Calberla*, [1907] 2 K.B. 861; 76 L.J.K.B. 1117; 98 L.T. 721; 21 Cox, C.C. 544, D.C.; 24 Digest (Repl.) 990, *15*.

R. v. *Spilsbury*, [1898] 2 Q.B. 615; 67 L.J.Q.B. 938; 79 L.T. 211; 62 J.P. 600; 14 T.L.R. 579; 42 Sol. Jo. 717; 19 Cox, C.C. 160, D.C.; 24 Digest (Repl.) 1012, *166*.

R. v. *Governor of Brixton Prison, Ex parte Percival*, [1907] 1 K.B. 696; 76 L.J.K.B. 619; 96 L.T. 545; 71 J.P. 148; 23 T.L.R. 238; 21 Cox, C.C. 387, D.C.; 24 Digest (Repl.) *1012*.

Ex parte Besset (1844), 6 Q.B. 481; 1 New Sess. Cas. 337; 14 L.J.M.C. 17; 8 J.P. 743; 9 Jur. 66; 115 E.R. 180; sub nom. *R.* v. *Bessé*, 4 L.T.O.S. 93; 16 Digest (Repl.) 280, *497*.

R. v. *Governor of Holloway Prison, Re Siletti* (1902), 71 L.J.K.B. 935; 87 L.T. 332; 67 J.P. 67; 51 W.R. 191; 18 T.L.R. 771; 46 Sol. Jo. 686; 20 Cox, C.C. 353, D.C.; 24 Digest (Repl.) 1007, *133*.

R. v. *Gordon* (1889), 23 Q.B.D. 354; 58 L.J.M.C. 117; 60 L.T. 872; 53 J.P. 807; 5 T.L.R. 466; 16 Cox, C.C. 622, C.C.R; 15 Digest (Repl.) 1171, *11,830*.

Rule Nisi calling on the governor of Brixton Prison to show cause why a writ of habeas corpus should not issue directing him to bring up one Rudolf Stallmann for the purpose of having him discharged from custody, on the grounds that the said Rudolf Stallmann was arrested for the same offence, that he was discharged

in habeas corpus in Calcutta—autrefois acquit; that art. 4 and art. 15 of the German Treaty, 1872, applied; that there was no prima facie case, and that the evidence of one Manteuffel and one Von Dippe was inadmissible.

The warrant of arrest under which the prisoner was detained in custody for the purpose of being extradited to Germany was issued on Nov. 12, 1910, by Mr. Curtis Bennett, metropolitan police magistrate, sitting at Bow Street Police Court, stating that the present applicant, Rudolf Stallmann (alias Von Konig, alias Von Korff Konig), late of Berlin, "is suspected and accused of the commission of the crime of obtaining money and goods by false pretences within the jurisdiction of the German government."

The facts as appearing in the statement by the investigating magistrate at Berlin, dated April 24, 1911, were shortly as follows. On June 2, 1910, a young German officer, Lieut. von Dippe, was going to Berlin, and on the way he met a man who had been previously introduced to him at a race meeting as Von Henrichs and was then passing under that name. They continued their journey to Berlin in company, and at the railway station they met a third man whom Henrichs introduced to Von Dippe as Von Konig [the applicant]. Until that time Von Konig was unknown to Von Dippe. Henrichs invited Von Dippe to go with him to an hotel, and all three went to the hotel and had luncheon together. Champagne was drunk, the other two drinking to Von Dippe. Von Dippe did not know how many bottles they drank, but he said it was "extraordinarily abundant." After the luncheon Von Dippe was invited to drink coffee in a room upstairs. They talked about the game of bridge and Von Konig wanted to show Von Dippe the game and got the waiter to bring up two packs of cards, and while Von Dippe was considering a game of bridge Henrichs and Konig engaged in the game of rouge et noir. When this had gone on for some time Stallmann asked Von Dippe to help him, and the game was carried on in this way. Henrichs held the bank—that is, he had the pack of cards in front of him and kept drawing a single card. Stallmann put an amount upon whether the card thrown down by Henrichs was a red card or a black one. Sums of various amounts were laid and the whole of the amount in the bank was stakes—that is, the amount which the keeper of the bank had noted as won for himself. Von Dippe helped Stallmann in this way, that he advised the laying of a certain amount on the whole bank. When Stallmann and Henrichs were playing alone, the amounts were small and the bank-holder lost when the amounts were small, but won when the amounts were large. The amounts became large when Von Dippe took part in the game. Play continued for some time, and then it was noted that an amount of 80,000 marks (about £4,000) was won for the bank, that is, for Heinrichs. Thereupon Stallmann jumped up and exclaimed that that was too high for him, and tore up the cards. Von Dippe stated in his deposition that he assumed that he was only to help Stallmann with his advice to win his bets, that it was only a matter of deciding a wager, and that the stakes were not actually being put on. During the play, however, it was mentioned that the amounts should be regarded as actually laid, and Stallmann told Von Dippe that, if he took part in the play he would also have to be responsible for a loss. After Stallmann had torn up the cards, they spoke about how the matter was to be settled. Henrichs drew some bill forms out of his pocket, and Stallmann accepted a bill for 80,000 marks, and requested Von Dippe to do the same. Thereupon Hendrichs handed a bill to Von Dippe who put his acceptance "Accepted eighty thousand thousand marks.—V. Dippe" upon the bill for 80,000 marks.

That there was cheating—the examining magistrate stated—was shown by the personality of Stallmann and Henrichs (called therein Bujos) who were known as international genteel swindlers and were passing as was their wont under false high sounding names, by the fact that the game was rouge et noir, a game almost exclusively used by card cheats, by the fact that it was to be inferred from the tearing up of the cards that they were marked cards, and that in the short time the play lasted Von Dippe and Stallman lost with a regularity which precluded

any chance when large sums of about 5,000 marks were staked, and only won in the case of smaller sums. It was stated that Von Dippe was a young man of twenty-one years of age, whose inexperience was taken advantage of by two expert cheats, and the fact of his writing the word "thousand" twice in the acceptance showed that his condition was influenced by the taking of alcohol. The fact that Stallmann gave Henrichs in collusion with him a bill for the same amount also served to mislead Von Dippe into the belief that it was a genuine bill obligation on the part of both, Stallmann's object all along—as the magistrate stated—being to swindle Von Dippe of a large sum by cheating at play. Stallmann further intended getting a bill, for this could be easily realised and could be passed on and by this means pressure brought to bear upon Von Dippe. The magistrate found that Stallmann acted in concert with Henrichs, and that, as Von Dippe in fact gave his bill acceptance he was injured by fraud to the extent of the 80,000 marks. In 1910 Stallmann applied to Von Dippe to settle the bill. Von Dippe communicated with his advocate in Berlin, and with the help of the police they succeeded in getting the bill from one Newton who declared he had given Stallmann 40,000 marks for it. On Oct. 15, 1910, criminal proceedings were taken against Stallmann before a magistrate in Berlin in respect of the offences of obtaining the bill for 80,000 marks from Von Dippe by fraud and forgery, and Von Dippe appeared and gave evidence on oath of the facts above stated.

On Oct. 25, 1910, a request was made by the police authorities in Berlin to the German Consulate-General in London setting out that a complaint had been lodged in Berlin that Stallmann and another person calling himself Von Henrichs were wanted in Berlin for the above fraud, and that, if arrested, their extradition would be demanded. On Nov. 12, 1910, Mr. Curtis Bennett at Bow Street issued the warrant referred to for the arrest of Stallmann with a view to his extradition to Germany. Between Oct. 25, 1910 (when the first request was made by the German authorities for the arrest of Stallmann), and March, 1912, it appeared that Stallmann was in India. On or about Nov. 12, 1910, a requisition was made by the German government to the Indian government for the extradition of Stallmann on the ground that he was suspected and accused of the crime of obtaining money and goods by false pretences within the jurisdiction of the German government. On April 23, 1911, an application was made under s. 4 (1) of the Indian Extradition Act, 1903, by a superintendent of police to the magistrate at Alipore in India for a warrant of arrest against Stallmann, alleging that a telegram had been received that Stallmann was wanted by the Berlin police for obtaining money from Von Dippe under false pretences, that he had left Beira by the steamer *Caspian* for Calcutta, and that the consul-general for Germany at Simla had received a request from his government for Stallmann's arrest, and that the government of India had directed that steps should be taken to comply with the request. On April 24—when the *Caspian* was in the Bay of Bengal on her way to Calcutta, the magistrate issued a warrant for Stallmann's arrest, and on April 26, 1911, Stallmann was arrested on board the *Caspian* as she was coming up the Hooghly to Calcutta. On April 27 he was brought before the magistrate at Alipore, who had issued the warrant, and he was admitted to bail. He was re-arrested on May 8, 1911, under a warrant issued under s. 3 (2) of the Indian Extradition Act, 1903, was brought before the district magistrate at Alipore, and released upon an increased bail. After various proceedings and a subsequent re-arrest the case against Stallmann proceeded before the district magistrate at Alipore, and on May 24, 1911, the magistrate purported to continue the inquiry under s. 3 (3) of the Act. On May 26, 1911, the magistrate concluded the inquiry and found a prima facie case against Stallmann. After this Stallmann was again arrested for the fourth time under a warrant issued under s. 3 (2) of the Act on a fresh charge of having obtained some 22,000 marks from one Kiepert in Germany, and was brought before the same magistrate, who again refused his application for an adjournment to call evidence and held that a prima facie case of cheating was made out. The government of India, acting upon

the reports of the magistrate at Alipore submitted under s. 3 (6) of the Act, issued a warrant, dated Aug. 1, 1911, for the custody and removal of Stallmann under s. 3 (8) of the Act, and under this warrant Stallmann was taken into custody and was to have been put on board a steamer sailing from Calcutta on the following morning to be extradited to Germany. Being in custody under the extradition warrant in Calcutta, he applied to the High Court for an order in the nature of a writ of habeas corpus to test the legality of such custody, and of the warrant which was said to justify it, upon the ground that the refusal of the magistrate to grant an adjournment to enable him to adduce evidence on his behalf amounted in law and in fact to a denial of his right to produce evidence under s. 3 (3) of the Indian Extradition Act, 1903, and s. 208 of the Code of Criminal Procedure 1898. The High Court in Calcutta in a considered judgment were of opinion that by reason of the refusal of the magistrate to grant the adjournment to enable Stallmann to produce evidence on his behalf, the inquiry by the magistrate was not according to law and the issue of the warrant upon such an inquiry was invalid. The court, therefore, held that the extradition warrant was invalid as regards Kiepert's case, because there was no evidence of an offence; and as regards Von Dippe's case, because, though there was evidence of an offence and a prima facie case against Stallman, the order had been made against him without any opportunity to make out his defence. The court held that he had been illegally detained under the warrant, and acting under the power given by cl. (b) of sub-s. (1) of s. 491 of the Code of Criminal Procedure, 1898, to give directions in the nature of habeas corpus and to determine whether the accused was in legal custody on Aug. 21, 1911, they ordered Stallmann to be discharged from custody. The order made by the court, omitting formal parts, was:

> "It is declared that the extradition warrant in the said petitions mentioned is invalid, and it is ordered that the said Rudolf Stallmann, alias Von Konig, be and is hereby set at liberty."

Stallmann, having thus been set at liberty in Calcutta, arrived in London in October, 1911, where he remained until the end of March, 1912, when he was arrested under the original warrant issued by Mr. Curtis Bennett on Nov. 12, 1910, for obtaining money and goods by false pretences within the jurisdiction of the German government. He was taken before Mr. Curtis Bennett and released on bail, and ultimately after some adjournment to admit of the arrival of documents and witnesses from Germany, the magistrate decided in regard to the charge of obtaining money by false pretences from Kiepert and of forgery that no prima facie case had been shown, and upon these two charges he discharged the accused, but on the charge of obtaining money and goods by false pretences from Von Dippe he held that a prima facie case had been made out, and he ordered Stallmann's commitment for extradiction. In these proceedings Stallman was examined on oath and gave his account of the transaction in Berlin, denying that he cheated Von Dippe at cards in June, 1910, either in collusion with anyone else or by himself. He then obtained the present rule for a writ of habeas corpus.

By the Habeas Corpus Act, 1679, s. 5:

> "And for the prevention of unjust vexation by reiterated commitments for the same offence; be it enacted . . . that no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly contrary to this Act re-commit or imprison, or knowingly procure or cause to be re-committed or imprisoned for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be know-

ingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of £500, any colourable pretence or variation in the warrant or warrants of commitment notwithstanding . . .''

By s. 17 of the Gaming Act, 1845:

''Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.''

The Extradition Treaty, 1872, between Great Britain and Germany, to which by Order in Council, dated June 25, 1872, the Extradition Acts were applied, provided:

''Article 2. The crimes for which the extradition is to be granted are the following: . . . (6) Obtaining money or goods by false pretences. . . . Article 4. The extradition shall not take place if the person claimed on the part of the government of the United Kingdom, or the person claimed on the part of any of the governments of the German Empire, has already been tried and discharged or punished, or is still under trial, in one of the States of the German Empire, or in the United Kingdom, respectively, for the crime for which his extradition is demanded. . . . Article 15. The stipulations of the present treaty shall be applicable to the colonies and foreign possessions of Her Britannic Majesty. The requisition for the surrender of a fugitive criminal who has taken refuge in any of such colonies or foreign possessions shall be made to the governor or chief authority of such colony or possession by the chief consular officer of the German Empire in such colony or possession. . . .''

The Attorney-General (*Sir Rufus Isaacs, K.C.*), *the Solicitor-General* (*Sir John Simon, K.C.*), *Bodkin* and *Rowlatt*, showed cause against the rule.

Danckwerts, K.C., and *George Elliott, K.C.*, *Curtis Bennett*, and *St. John Hutchinson* supported the rule.

LORD ALVERSTONE, C.J.—In this case the argument has ranged over very important points, and I should have been glad, if time had permitted, to have put my judgment in better shape; but that is quite impossible, having regard to the work that we have to do, and also to the importance of this matter.

Counsel obtained a rule on behalf of a man named Rudolf Stallmann, calling upon the governor of Brixton Prison to show cause why he should not be discharged from custody under the warrant under which he was committed to prison for the purpose of being extradited. The rule was obtained on the grounds that the applicant had been arrested before for the same offence and had been discharged on habeas corpus in Calcutta; that art. 4 and art. 15 of the German Treaty, 1872, applied; that there was no prima facie case against the applicant, and that the evidence of two men, Manteuffel and Von Dippe, was inadmissible. Without attempting to consider all the details, I will endeavour, as far as I can, briefly to deal with all the points in their order.

On Oct. 25, 1910, the first request was presented by the German authorities for proceedings to be taken against the applicant in this country. Between Oct. 25, 1910, and March, 1912, Stallman, otherwise Von Konig, was in India, and an application was made to get his extradition from India to Germany. I desire to say that I do not draw any distinction between habeas corpus proceedings in England and the proceedings in the form in which they were taken in India. I

think in all probability the law as to both might be properly applied by these proceedings, at any rate, so far as any point we have to consider is concerned, but in the view I take of the effect of those proceedings, and of the law, it is not material to consider at length whether there is or is not any distinction. It appears that under the procedure in India the applicant Stallmann was entitled to produce evidence for the defence in order that there might be a consideration of the facts upon which he could be surrendered, and it was said that the magistrate in India had not given him that opportunity. Upon that he took steps to set aside the proceedings, he raised several defences, and, among other defences, he raised the points whether or not there was any evidence against him and that he had not had an opportunity of giving certain evidence. The court decided against him upon the merits with regard to there being a prima facie case which he had to answer, but in Von Dippe's case it was said that, although there was evidence for the defence, the applicant was given no opportunity of presenting that evidence, and so the court held that the applicant was illegally detained, and directed that he should be released. Therefore, in proceedings analogous to proceedings in habeas corpus, the Indian court dismissed the application for the surrender of Stallmann. Upon proceedings being taken in this country on the original warrant in the early part of this year the same point was taken, and counsel for the applicant contended that Stallmann had been discharged from the proceedings in India and could not be re-arrested in respect of the same charge.

That argument was based on two main considerations. It was first based on the language of s. 5 of the Habeas Corpus Act, 1679. It is quite unnecessary, and quite impossible, to deal with all the questions that may arise as to what is covered by that section, but it seems to me that upon the language of the section it was never intended to suggest that the court had not the power to make an order which would lead to a person being subsequently committted. In my opinion, the section contemplated and intended to preserve the right of the court over persons who might be amenable to its jurisdiction, and intended to repress and stop imprisonment which at that time was very commonly without justification. When we consider that this is a section which imposes a penalty upon a person who contrary to the Act knowingly re-commits or imprisons any person who has been delivered or set at large as stated in the section, and which at the same time reserves the right of a person to go to the court by a legal process upon what must appear to the court to be good cause, it is impossible to suggest that because the section contemplates a release from an ordinary commitment as in this case on the ground that there was some error of procedure which permitted the man to be released from the jurisdiction of the court, that, therefore, it is a sufficient argument for his subsequent release.

It is said that the contrary is assumed in the language of Mellish, L.J., in *A.-G. for Colony of Hong Kong* v. *Kwok-A-Sing* (1). No point of this kind was before the court in that case, and, therefore, we should have to consider whether the learned judge had gone as far as was contended by the applicant, and whether or not the decision really did lay down such a broad proposition. The point there was this. Reference was made to the fact that there had been a previous commitment of Kwok-A-Sing for an alleged offence, that he had been in custody previously and had been discharged, and that he was charged again in respect of another offence, namely, piracy. He had been arrested again for piracy, and he was ultimately committed for trial for that second offence. At the end of the judgment, Mellish, L.J., said (L.R. 5 P.C. at pp. 201–2):

> "The principal object of [s. 6 of the Act of 1679] seems to have been to prevent persons, who have been brought up on a writ of habeas corpus, and discharged on giving bail and entering into their own recognisance, from being again arrested for the same offence, and obliged to sue out a second writ of habeas corpus. This appears from the provision by which the person discharged may

be again arrested by the order of the court, wherein he shall be bound by recognisance to appear, or other court having jurisdiction of the cause. The words 'other court having jurisdiction of the cause,' were probably added to meet the case of an indictment having been moved by certiorari from one court to another. They do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant, on which he is detained, shows no valid cause for his detention. They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first."

On the merits in that case with regard to the particular charge against the prisoner the first court decided that there was no evidence to sustain the charge, and, therefore, discharged the prisoner. Undoubtedly in that case it was not intended that there should be a second attempt to charge the prisoner with that same offence, and the words which MELLISH, L.J., uses,

"so that the return to the second writ of habeas corpus raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first,"

seem to me to show that he is there pointing to a decision upon the merits in respect of the matter upon which the man was sought to be arrested. He goes on:

"In the present case the second warrant by which Kwok-A-Sing was committed to take his trial at Hong Kong for piracy jure gentium, and was, in their opinion, a valid warrant. They think he ought not to have been discharged from his custody under that valid warrant because he had been previously discharged from an unlawful imprisonment."

Therefore, what we have to consider is the ground upon which the present applicant is now sought to be detained and whether the court here has power to deal with the applicant notwithstanding the fact that he has succeeded in showing that the procedure in India was such that he could no longer be detained there I am clearly of opinion that the objection taken that there had been a previous decision in India ordering his release is in the circumstances no answer to these proceedings. Therefore, in my view, the proceedings in India are not a bar to subsequent proceedings being taken in this country.

With regard to the question as to the treaty with Germany, the applicant has never been tried, and, therefore, it cannot be said that he can plead the treaty. His counsel raised a point, and has been very insistent upon it, with regard to art. 4 and art. 15 of the treaty, but it is only necessary for me to deal with art. 4. I am not able to agree with the construction that the applicant's counsel has put upon art. 4, either in the English or in the German version, and I cannot decide the question as to the accurate phraseology of the article because it is one with which I am not competent to deal. But we ought to apply a broad view to the English version of the article, and art. 4 says in terms that the extradition shall not take place if the person claimed

"has already been tried and discharged or punished, or is still under trial, in one of the States of the German Empire, or in the United Kingdom."

I do not think it can be suggested that this is a case in which the applicant has been "tried and discharged or punished." It seems to me that that means what is said by the treaty—namely, that there must be a trial and an acquittal, a discharge, or a punishment. Counsel for the applicant has told us that the German word "untersuchung" means that there had been a preliminary inquiry. That may be so, but I cannot find it. In my opinion, it would defeat the whole object of the treaty if an untried criminal in the strict sense of the word, could be allowed

to be acquitted or discharged merely because there had been some intermediate discharge without dealing with the case finally on the merits.

The points about the inadmissibility of evidence are not serious. If it had been necessary for us to rely on Von Dippe's evidence, we should have had to consider how far hearsay evidence, or evidence of character, would have been sufficient. We constantly have in extradition cases matters appearing in the depositions which are not evidence according to our law, and if it were necessary to rely upon those in order to make out a case then a question might arise, but the evidence to which the Attorney-General has called our attention satisfied me that the applicant played rouge et noir with Von Dippe. There may be other passages in the depositions with regard to that, but our attention has not been called to these passages.

I now come to the point upon which we have heard a very important argument, and that is the point with regard to there being no prima facie case. I accept and agree with the enunciation of Lord Russell, C.J., with regard to the conditions of extradition mentioned in *Re Arton (No. 2)* (2), and other cases. I agree that in order that the applicant should be extradited there must be evidence of the offence of obtaining money or goods by false pretences. I am by no means clear with regard to the point as to the piece of paper being obtained from Von Dippe. But that does not matter very much because the present applicant was taking an active part in the swindle, if it was a swindle, as to which I do not wish to express an opinion, and it is stated that by virtue of what the applicant and Henrichs did this piece of paper was got from the possession of Henrichs, handed to Von Dippe, and then given back to Henrichs. Counsel for the applicant has very strenuously contended that *R.* v. *Danger* (3) shows that the applicant could not have been indicted under s. 88 of the Larceny Act, 1861. For the moment I will assent to that; but I am not altogether satisfied with the decision in that case. I think that *R.* v. *Gordon* (4) shows that that case did not receive entire approval, although I agree with counsel that it is difficult for us to disregard it; but, in my opinion, for the reasons given by the Attorney-General, in the present proceedings and on this evidence, the applicant could be indicted for obtaining money or goods by false pretences. There was in *R.* v. *Danger* (3), no statute of the kind that we are dealing with here. At the time when this treaty was made in 1872, and the Extradition Act was passed in 1870, the Gaming Act, 1845, was on the statute-book. The words of s. 17 of that statute are these:

> "Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, . . . win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly."

Therefore, it is, to my mind, established that the applicant could have been indicted in 1872 for the offence now alleged against him.

I will now deal with the substance of this matter. I agree with counsel for the applicant that Stallmann did not win the piece of paper in the ordinary sense of the word, but I am looking at the substance of this offence, and the substance of this offence is that by cheating, if it is proved, the applicant obtained a right to claim 80,000 marks (£4,000) from Von Dippe, and, that being so, what happened and what is disclosed in the depositions is only the way in which the offence was finally carried into effect. In my opinion, the applicant would be indictable supposing that he had got the 80,000 marks out of Von Dippe's pocket and had taken it; or, supposing he had taken an I O U from him, or anything which helped him to get the money, he could be indicted for winning the 80,000 marks from Von Dippe. In these circumstances he could have been indicted in the year 1872, when this treaty with Germany was made, for obtaining that money by false pretences, and, that being

the real offence for which he was to be tried, in my judgment, it would be lamentable if we were obliged to hold that he was to be allowed to escape trial merely because it might be said that he did not win the piece of paper at the time. This is an indictment against him for obtaining money by false pretences within the sense and the meaning of the Gaming Act, 1845, the Extradition Act, 1870, and the Extradition Treaty with Germany, 1872, and, in my opinion, when a man could be indicted at the time the treaty was made on the words mentioned in the treaty, it is impossible to say that he should not be extradited for trial. If it had been necessary to have recourse to the language of s. 90 of the Larceny Act, 1861, in order to find an offence against the applicant, I should have agreed with counsel for the applicant, and I should have said that obtaining this piece of paper by false pretences was not an extraditable offence within the meaning of the treaty, and that in order to bring it in and make it an extraditable offence, an amendment of the treaty would have been required. Although this point requires to be carefully considered, my opinion is that the argument of counsel for the applicant fails, because at the time this treaty was made in 1872, a man who won money by cheating at cards could be indicted for obtaining money by false pretences. I note that the German warrant is for obtaining a valuable security by false pretences, and I think the German words are right. In my opinion, therefore, this point which is extremely ingenious, notwithstanding the great learning and research of the learned counsel who has argued it before us, fails, and this rule should be discharged.

DARLING, J.—I am of the same opinion, and I think it only necessary to say a few words upon the last point which my Lord has dealt with. I myself think that the decision of the court can be supported on one ground put forward by the Attorney-General, that really this piece of paper that was handed over is not in the least like the document handed over in *R.* v. *Danger* (3), but that it was handed over to Von Dippe in such circumstances that no action could have been maintained to recover it back again. It is just like the case of a man who, not having a cheque book with him, borrows a cheque from another man who happens to have an account at the same bank, and a cheque is handed over, and the piece of paper becomes the property of the person drawing the cheque. But there is another matter upon which an opinion may be expressed. I think s. 17 of the Gaming Act, 1845, is applicable to this case. It is plain from *R.* v. *Moss* (5) that the person indicted in that case was indicted in the words of the statute for winning "a sum of money"; and I think if the applicant were indicted for winning this piece of paper he could be properly indicted and might be convicted. POLLOCK, C.B., gave judgment in that case, and it seems to me that he did entertain an opinion which counsel for the applicant has said was so loose an opinion that no one could be supposed to entertain it. POLLOCK, C.B., said:

> "Whether the word 'winning' is used in this statute in the limited sense in which 'winning' is used in the mining districts, and means actually getting and obtaining the money, or in its more general sense of obtaining a title to a sum of money by becoming the winner of a stake [treating, to my mind, a stake as something imaginery] no ambiguity can arise if the offence is stated as it is in this indictment in the very words of the statute; and it would create greater difficulty in drawing indictments under this Act of Parliament if it were held necessary that it should be stated to whom the money which actually was won belonged."

I think this case was handed up to me not because of the passage I have read, but because it contains this passage which POLLOCK, C.B., stated in the course of the argument, where he said (Dears. & B. at p. 107):

> "This is not an indictment for obtaining money by false pretences, but is under a statute which says that if a person does certain things he shall be deemed to have obtained money by a false pretence."

A It seems to me that the judgment in that case shows that the statute would have been satisfied if the indictment had been drawn in the words of the statute and evidence had been given that the defendant cheated at cards and became entitled to a sum of money, it being admitted that he was entitled to that sum of money as a stake, but the stake not being forthcoming a signed document was obtained from him. I, therefore, think that this rule should be discharged.

B **PHILLIMORE, J.**—I am of the same opinion and I have nothing to add to what my Lord and my brother have said upon most of the case. There are only two matters on which I should like to say a few words. They are in fact the only two points of substance, and they are the points of substance and importance which have been raised on this rule.

C The first is under the Habeas Corpus Act, 1679, s. 5, I think the true interpretation of the words of that section was given by MELLISH, L.J., in *A.-G. for Colony of Hong Kong* v. *Kwok-A-Sing* (1). It is the true interpretation which requires some reference to history in order to obtain it. The section was directed against reiterated commitments, as it says, for the same offence. People were committed; they were enlarged upon bail or their recognisances to appear. Frequently

D it was a very long process in those days for the court to be persuaded to go so far as that, and in the meantime there was the danger that a fresh warrant would be issued against them and they would be compelled to sue out a second writ of habeas corpus, the defendants remaining in custody meanwhile, and having had to bear the charges of the writ, and it was intended by that section to say that as long as those people had done nothing to forfeit their recognisances or cause

E was not shown why their bail should be estreated they should not be re-committed upon the same charge, while power was given to the court before which the recognisance to appear arose to determine that there were circumstances, if they thought fit, judicially, upon which the man must be committed to prison notwithstanding that at one time he was released on bail. That power was given also to any other court to which the jurisdiction of the cause was transferred either, as

F MELLISH, L.J., suggested, by certiorari or otherwise. I doubt if the section really was intended to go any further, but MELLISH, L.J., suggests, and it may be so, that it would come within the mischief of the statute if, with a colourable variation, the man was re-arrested substantially for the same frauds, and he guards his sentence in this manner (L.R. 5 P.C. at p. 202):

> "They think, however, it can only apply when the second arrest is substantially
G for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first."

But if the second arrest is for the same cause, while the discharge in the first case was because the warrant was bad, or the return to the warrant was bad, then it would be lawful to re-arrest for the same offence with a proper warrant and one

H making a different return. I think that if we looked at the case of the Canadian prisoners (*Re Parker* (6), *R.* v. *Batcheldor*, *Watson's Case* (7)) it would throw some light upon that matter. That being the case, the fact that the applicant in this case was discharged, not because he could not be committed for this crime, not because it was not an extraditable crime, or for any such reason, but because full opportunity to make his defence had not been given to him before the magis-

I trate, cannot be a reason why he should not be re-arrested and have the case fully investigated before his committal for extradition.

The other matter arises upon *R.* v. *Danger* (3), and I must say that I appreciate and admire the learning and ability which discovered and applied *R.* v. *Danger* (3) to the present case. It is a case that requires a good deal of consideration. It must be remembered that in that case the whole of the facts were reserved for the Court for Crown Cases Reserved. The learned recorder set out the evidence and said:

"At the close of the case for the prosecution, it was objected by the prisoner's counsel that there was no evidence that the prisoner had obtained from Richard Latham a valuable security within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 53 [Larceny Act, 1827: repealed by Criminal Statutes Repeal Act, 1861], so as to sustain either count of the indictment, on the ground that the evidence showed that the prisoner had obtained from Richard Latham either an acceptance only or an instrument which was not an available security, or of any value to Richard Latham. I refused, on this objection, to direct an acquittal, but left the case to the jury, who found the prisoner guilty; but I reserved the question for the opinion of the Court for Crown Cases Reserved, whether there was evidence that the prisoner obtained from Richard Latham a valuable security so as to sustain either count of the indictment."

Then reasons for that are given:

"After the verdict it was objected, in arrest of judgment, that each count of the indictment was bad for not alleging that the valuable security obtained by John Danger was the property of Richard Latham, and *R.* v. *Sill* (8) was cited. I also reserved that question, and I have to request the opinion of the Court for Crown Cases Reserved upon the above matters."

That being so, the court, drawing inferences of fact and law from the evidence before them, and having this salient and remarkable fact that the indictment had not ventured to allege that this piece of paper obtained by the prisoner ever had been the prosecutor's property, came to the conclusion that it never was the prosecutor's property, and, that being so, the section of the Act of Parliament did not apply. It is enough here to say that there is evidence upon which the foreign tribunal may find that this bill of exchange was at one time the prosecutor's property—we need not go further than that—and the distinction between the piece of paper in this case and the piece of paper in *R.* v. *Danger* (3), is great, or rather I should say that the distinctions are several. In that case the real mischief lay in the previous agreement to give money for an alleged delivery of leather. The piece of paper was obtained, made good, completed, and passed in order to carry out that agreement into which the prosecutor was tricked. It was, when it passed from the hands of the prisoner to the prosecutor, already a piece of paper of considerable value. It had a bill stamp upon it, and it had upon it the drawer's name as the drawer. In those circumstances it might well be held by the court—that is all I need say—drawing inferences of fact, that there had been no gift by the prosecutor, and that the piece of paper never was the prosecutor's; and, if that be so, it was never obtained from him. I agree that the court also took the point that it was not a valuable security until it left the prosecutor's hands. Upon that I should like to express a pious opinion that they went too far, but the other matter is quite enough to support the judgment in the case. In this present case the facts are quite different. The piece of paper here was a mere form, only valuable from the fact that it had, making it a bill of exchange, printed or lithographed, or written matter upon it. There is no reason why the German court should not find that the other man, Henrichs, gave it to the prosecutor. If so, it was then his property, and he was induced to part with it by the false representations of the prisoner; and the Gaming Act, 1845, which has been quoted, has said that winning any money or valuable thing by cheating in playing at cards amounts to obtaining money by false pretences. I do not think it is necessary to go further into the case, but I would add, because I do not quite know that my Lord distinctly said so in his judgment, though he said so in the course of the argument, that upon the merits I imagine we have none of us any doubt that there is, apart from the technical ground, ample prima facie evidence to justify the prisoner's committal for extradition.

Rule discharged.

Solicitors: *C. F. Appleton; Director of Public Prosecutions.*

[*Reported by* W. W. Orr, Esq. *Barrister-at-Law.*]

A

FAIRCLOUGH *v.* SWAN BREWERY CO. LTD.

[Privy Council (Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Mersey), April 24, 25, May 17, 1912]

[Reported [1912] A.C. 565; 81 L.J.P.C. 207; 106 L.T. 931; 28 T.L.R. 450]

B *Mortgage—Redemption—Clog on equity—Mortgage of leasehold property—Postponement of redemption until six weeks from expiry of lease—Right of mortgagor to redeem at any time.*

By a mortgage deed, dated Dec. 27, 1907, by which the mortgagor mortgaged a leasehold interest, it was provided that the mortgage debt should be repaid C by monthly instalments, the last of which would become payable six weeks before the expiration of the lease, and that the mortgagor should not be at liberty to pay off the debt except by those instalments without the written consent of the mortgagee.

Held: the last provision made the mortgage irredeemable for all practical purposes, and since equity would not permit any device or contrivance, being D part of the mortgage transaction or contemporaneous with it, to prevent or impede redemption, it was void, and the mortgagor was entitled to redeem at any time.

Notes. Considered: *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1938] 4 All E.R. 618.

As to restrictions on right to redeem mortgages, see 27 Halsbury's Laws (3rd E Edn.) 235–239; and for cases see 35 Digest 352–356.

Case referred to:

(1) *Gossip* v. *Wright* (1863), 2 New Rep. 152; 32 L.J.Ch. 648; 8 L.T. 627; 9 Jur. N.S. 592; 11 W.R. 632; on appeal (1869), 21 L.T. 271; 17 W.R. 1137, H.L.; 35 Digest 246, *63*.

F Also referred to:

Teevan v. *Smith* (1882), 20 Ch.D. 724; 51 L.J.Ch. 621; 47 L.T. 208; 30 W.R. 716, C.A.; 35 Digest 301, *509*.

James v. *Kerr* (1889), 40 Ch.D. 449; 58 L.J.Ch. 355; 60 L.T. 212; 53 J.P. 628; 37 W.R. 279; 5 T.L.R. 174; 35 Digest 314, *595*.

Noakes & Co., Ltd. v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. G 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, *19*.

Bradley v. *Carritt*, [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 51 W.R. 636; 19 T.L.R. 466; 47 Sol. Jo. 534, H.L.; 35 Digest 354, *971*.

Samuel v. *Jarrah Timber and Wood Paving Corpn.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 52 W.R. 673; 30 T.L.R. 536; 11 Mans. 276, H.L.; 35 Digest 353, *957*.

H *Browne* v. *Ryan*, [1901] 2 I.R. 653; 35 Digest 352, *946 iii*.

Biggs v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504, C.A.; 35 Digest 356, *993*.

Morgan v. *Jeffreys*, [1910] 1 Ch. 620; 79 L.J.Ch. 360; 74 J.P. 154; 26 T.L.R. 324; 35 Digest 301, *510*.

Talbot v. *Braddil* (1686), 1 Vern. 394; 23 E.R. 539, L.C.; 35 Digest 271, *277*.

I *Cowdry* v. *Day* (1859), 1 Giff. 316; 29 L.J.Ch. 39; 1 L.T. 88; 5 Jur. N.S. 1199; 8 W.R. 55; 65 E.R. 936; 35 Digest 356, *990*.

Bovill v. *Endle*, [1896] 1 Ch. 648; 65 L.J.Ch. 542; 44 W.R. 523; 35 Digest 362, *1045*.

Brown v. *Cole* (1845), 14 Sim. 427; 14 L.J.Ch. 167; 5 L.T.O.S. 2; 9 Jur. 290; 60 E.R. 424; 35 Digest 360, *1027*.

Salt v. *Marquess of Northampton*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 40 W.R. 529; 8 T.L.R. 104; 36 Sol. Jo. 150, H.L.; 35 Digest 352, *954*.

Santley v. *Wilde*, [1899] 2 Ch. 474; 68 L.J.Ch. 681; 81 L.T. 393; 48 W.R. 90; 15 T.L.R. 528, C.A.; 35 Digest 239, *1*. A

De Beers Consolidated Mines, Ltd. v. *British South Africa Co.*, [1912] A.C. 52; 81 L.J.Ch. 137; 105 L.T. 638; 28 T.L.R. 114; 56 Sol. Jo. 175, H.L.; 10 Digest (Repl.) 805, *5225*.

Appeal from a decision of the full court of the Supreme Court of Western Australia (PARKER, C.J., BURNSIDE and BOOTH, JJ.) allowing in part an appeal from the judgment of MCMILLAN, J. B

Danckwerts, *K.C.*, and *P. F. Wheeler* for the appellant.

Sir R. Finlay, *K.C.*, and *E. Beaumont* for the respondent company.

C

May 17, 1912. **LORD MACNAGHTEN.**—James Fairclough, a publican, the appellant in this case, became the registered proprietor of a lease of the Federal Hotel, Katanning, for the residue of a term of twenty years from June 12, 1905. By an instrument of mortgage dated Dec. 27, 1907, the appellant, therein called "the mortgagor," in consideration of the sum of £500 lent to him by the respondent company, and in consideration of all moneys which might thereafter become owing D by the mortgagor to the company for goods supplied, or for money lent or advanced, or on any other account whatever, did thereby for himself, his heirs, executors, administrators, and transferees, covenant with the company as follows:

> "That the mortgagor will pay to the company the said principal sum of £500, by 209 successive monthly instalments as follows, that is to say, 208 instalments of £2 8s. each, and one final instalment of 16s., the first of such monthly instalments of £2 8s. to be paid on the 1st day of January next, and a subsequent instalment to be paid on the first day of every succeeding month thereafter until the whole of the said principal sum of £500 shall be paid off, provided always that the mortgagor shall not be at liberty to pay off the said principal sum, except by the instalments, and at the times aforesaid, without the express consent in writing of the company on each occasion first had and obtained." E F

Then followed a covenant for payment of interest on the amount from time to time remaining unpaid, at the rate of £7 per cent. per annum, on the first day of every calendar month, and other covenants, including a covenant stipulating in effect that during the continuance of the security the Federal Hotel should be a tied house in G favour of the company. For better securing the payment in manner aforesaid of the said principal sum and interest, and all other moneys intended to be thereby secured, the mortgagor thereby mortgaged all his estate and interest in the Federal Hotel to the company. It will be observed that the lease is made to expire on June 12, 1925, and that the instrument of mortgage provides that without the consent in writing of the company the mortgage debt of £500 is not to be wholly H paid off until May 1, 1925, that is just six weeks before the actual expiration of the lease.

In December, 1909, the company were prevented by accidental circumstances from supplying the appellant with beer in accordance with a covenant on their part contained in the mortgage deed. The appellant thereupon assumed to treat the tie as at an end, and obtained beer from other quarters. The company brought I an action for damages and for an injunction. The appellant, who apparently had already offered to redeem, counter-claimed for redemption. MCMILLAN, J., gave judgment for the company in the action, and assessed the damages at £8. On the counter-claim he gave judgment for the appellant, holding that by law he was entitled to redeem. On appeal to the full court an order was made in the action in favour of the company with a reference as to damages. The counter-claim was dismissed with costs. Hence the present appeal.

A The arguments of counsel ranged over a very wide field. But the real point is a narrow one. It depends on a doctrine of equity, which is not open to question. KINDERSLEY, V.-C., said in *Gossip* v. *Wright* (1) (32 L.J.Ch. at p. 653):

> "There is no doubt that the broad rule is this: that the court will not allow the right of redemption in any way to be hampered or crippled in that which B the parties intended to be a security either by any contemporaneous instrument with the deed in question, or by anything which this court would regard as a simultaneous arrangement or part of the same transaction."

The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned judges in the full court. But it is now firmly established by the House of Lords that the old C rule still prevails and that equity will not permit any device or contrivance, being part of the mortgage transaction or contemporaneous with it, to prevent or impede redemption. Counsel on behalf of the respondent company admitted, as he was bound to admit, that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is D nugatory. The incumbrance on the lease the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring when redemption can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this E mortgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself. Their Lordships are therefore of opinion that the order of the full court should be discharged with costs, and the decision of MCMILLAN, J., restored. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Trinder, Capron & Co.; W. H. & A. G. Herbert.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

MASON *v.* PROVIDENT CLOTHING AND SUPPLY CO., LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Shaw and Lord Moulton), June 27, 30, July 28, 1913]

[Reported [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739]

B

Contract—Illegality—Public policy—Restraint of trade—Covenants by trade canvasser—Not to work in similar business or help person employed therein within twenty-five miles of branch of employers' business for three years—Agreement terminable by two weeks' notice—One hundred and fifteen branches of employers' business in Great Britain—Severability of covenant—Severance only where part of contract enforceable clearly severable and excess of trivial importance and merely technical.

C

By cl. 8 of an agreement in writing dated Mar. 25, 1908, and made between the appellant, as employee, and the respondents, as employers, the appellant, who was employed as a canvasser, undertook that he would not "within three years after the termination of his engagement and services with the company be in the employ of, or be engaged in any manner whatsoever, whether on his own account, or as partner with, or agent, or manager, or assistant, for, any person or persons, firm or firms, company or companies, carrying on or engaged in the same or a similar business to that of [the respondents]," and that he would not assist, directly or indirectly, any person employed in such a business or assisting to carry on the same "within twenty-five miles of London . . . or . . . any place where [the appellant] shall have been employed by [the respondents]." The agreement was terminable by two weeks' notice on either side. The respondents had, apart from fifteen branches in London, some 100 branches in Great Britain covering the greater part of the country.

D

E

Held: the capacity of the appellant must be due mainly to his natural gifts as a canvasser and only in a secondary degree to special training by the respondents, and that fact and the character of the respondents' business did not entitle them to exclude the appellant from exercising his talents as a canvasser within the time and area specified in the agreement; the covenant in cl. 8 of the agreement was consequently wider than anything that could reasonably be required for the protection of the respondents in their business; and, therefore, it was void in law and unenforceable.

F

G

Per Curiam: In the course of his employment the appellant might acquire lists of actual and possible customers of the respondents in the district in which he had canvassed, and under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers or in the limited locality of his former labour.

Per Lord Moulton: Clause 8 was not severable from the rest of the contract, but, in any case, severance ought only to be done where the part of the contract enforceable was clearly severable, and, even so, only where the excess was of trivial importance and merely technical, and not a part of the main purport and substance of the clause. It would be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of that void covenant the maximum of what he might have validly required.

H

I

Decision of the Court of Appeal, [1913] 1 K.B. 65, reversed.

Notes. Considered: *Nevanas* v. *Walker and Foreman*, [1914] 1 Ch. 413. Applied: *Eastes* v. *Russ*, [1914] 1 Ch. 468; *Millers* v. *Steedman* (1915), 84 L.J.K.B. 2057. Followed: *Herbert Morris, Ltd.* v. *Saxelby*, [1916–17] All E.R. Rep. 305. Applied: *Horwood* v. *Millar's Timber and Trading Co., Ltd.*, [1916–17] All E.R. Rep. 847;

Whitmore v. *King*, [1918–19] All E.R. Rep. 1063; *Hepworth Manufacturing Co., Ltd.* v. *Ryott*, [1918–19] All E.R. Rep. 1019. Distinguished: *Dewes* v. *Fitch*, [1920] 2 Ch. 159. Applied: *Attwood* v. *Lamont*, [1920] All E.R. Rep. 55. Considered: *British Reinforced Concrete Engineering Co.* v. *Schelff*, [1921] All E.R. Rep. 202; *Putsman* v. *Taylor*, [1927] All E.R. Rep. 356; *Express Dairy Co., Ltd.* v. *Jackson*, [1929] All E.R. Rep. 327. Applied: *M. & S. Drapers* v. *Reynolds*, [1956] 3 All E.R. 814. Referred to: *Goldsoll* v. *Goldman*, [1914–15] All E.R. Rep. 257; *Konski* v. *Peet* (1915), 112 L.T. 1107; *Great Western and Metropolitan Dairies* v. *Gibbs* (1918), 34 T.L.R. 344; *McEllistrim* v. *Ballymacelligott Co-operative, Agricultural and Dairy Society*, [1919] A.C. 548; *Ropeways* v. *Hoyle* (1919), 120 L.T. 538; *Spence* v. *Mercantile Bank of India* (1921), 37 T.L.R. 390; *Gilford Motor Co.* v. *Horne*, [1933] All E.R. Rep. 109; *Pellow* v. *Ivey* (1933), 49 T.L.R. 422; *Empire Meat Co.* v. *Patrick*, [1939] 2 All E.R. 85; *Connors Bros., Ltd.* v. *Connors*, [1940] 4 All E.R. 179; *Routh* v. *Jones*, [1947] 1 All E.R. 179; *Electric Transmission, Ltd.* v. *Dannenberg* (1949), 66 R.P.C. 183; *Vandervell Products, Ltd.* v. *McCleod*, [1957] R.P.C. 185.

As to severability of promises in a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 147, 148, and as to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq. For cases see 12 DIGEST (Repl.) 325, 326, and 43 DIGEST 19 et seq.

Cases referred to:

(1) *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch.D. 112; 58 L.J.Ch. 229; 60 L.T. 341; 53 J.P. 356; 37 W.R. 183; 5 T.L.R. 81, C.A.; 7 Digest (Repl.) 257, *960*.

(2) *General Accident Assurance Corpn.* v. *Noel*, [1902] 1 K.B. 377; 71 L.J.K.B. 236; 86 L.T. 555; 50 W.R. 381; 18 T.L.R. 164; 1 Digest (Repl.) 525, *1568*.

(3) *Sir W. C. Leng & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 43 Digest 25, *164*.

(4) *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, *158*.

(5) *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(6) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; 1 Nev. & P.K.B. 796; 2 Mar. & W. 464; 6 L.J.Ex. 266; 1 J.P. 215; 112 E.R. 167, Ex.Ch.; 43 Digest 37, *326*.

(7) *Ward* v. *Byrne* (1839), 5 M. & W. 548; 9 L.J.Ex. 14; 3 J.P. 724; 3 Jur. 1175; 151 E.R. 232; 43 Digest 26, *183*.

(8) *Tallis* v. *Tallis* (1853), 1 E. & B. 391; 22 L.J.Q.B. 185; 21 L.T.O.S. 43; 17 Jur. 1149; 1 W.R. 114; 118 E.R. 482; 43 Digest 30, *240*.

Also referred to in argument:

Dowden and Pook, Ltd. v. *Pook*, [1904] 1 K.B. 45; 73 L.J.K.B. 38; 89 L.T. 688; 52 W.R. 97; 20 T.L.R. 39; 48 Sol. Jo. 50, C.A.; 43 Digest 31, *247*.

Dubouski & Sons v. *Goldstein*, [1896] 1 Q.B. 478; 65 L.J.Q.B. 397; 74 L.T. 180; 44 W.R. 436; 12 T.L.R. 259; 40 Sol. Jo. 334, C.A.; 43 Digest 43, *438*.

Mallan v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

Mumford v. *Gething* (1859), 7 C.B.N.S. 305; 29 L.J.C.P. 105; 1 L.T. 64; 6 Jur. N.S. 428; 8 W.R. 187; 141 E.R. 834; 43 Digest 44, *448*.

Horner v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181*.

Whitwood Chemical Co. v. *Hardman*, [1891] 2 Ch. 416; 60 L.J.Ch. 428; 64 L.T. 716; 39 W.R. 433; 7 T.L.R. 325, C.A.; 43 Digest 55, *564*.

Appeal in formâ pauperis from a decision of the Court of Appeal reversing a decision of a Divisional Court reversing a decision of Clerkenwell County Court

granting an injunction to restrain the appellant from entering the service of a firm in contravention of a covenant entered into by him with the respondents. A

By an agreement in writing dated Mar. 25, 1908, between the respondents, the Provident Clothing and Supply Co., Ltd., whose registered offices were in Bradford, and who, as stated in the agreement,

"carry on the business of a general clothing and supply company on the check and credit system at London in the county of Middlesex (among other places)" B

of the one part, and William Milne Mason, of Islington, London, of the other part, it was provided as follows (cl. 8):

"And in consideration of the premises the said William Milne Mason hereby agrees that he shall not within three years after the termination of his engagement and services with the company be in the employ of, or be engaged in any C manner whatsoever, whether on his own account, or as partner with, or agent, or manager, or assistant, for, any person or persons, firm or firms, company or companies, carrying on or engaged in the same or a similar business to that of "The Provident Clothing and Supply Co., Ltd.," carried on as aforesaid, or be engaged by, or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any D person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping (either directly or indirectly) in the carrying on of the same or a similar business, or assist or help anyone in the formation of such a business, society, or club as aforesaid within twenty-five miles of London aforesaid, where the company carry on business, or within twenty-five miles of any place where the said E William Milne Mason shall have been employed by the company at any time during the continuance of this agreement. And if the said William Milne Mason shall be engaged as aforesaid he shall forfeit to the company the sum of £25 by way of liquidated damages, and not as a penalty."

The agreement was terminable by two weeks' notice on either side.

The company carried on business in most of the large towns in England and F Wales, and also in Scotland and Ireland. They entered into agreements with shopkeepers—drapers, clothiers, bootmakers, jewellers, and others—under which the shopkeepers agreed to supply the members of the company with such goods as they required and which could be purchased at those shops upon production by the member of a check issued by the company. A large number of canvassers and collectors were employed by the company, and their business was to canvass people G to become members of the company and take up a share of 10s. or more. When a person was accepted as a member, the company gave him a check to the full amount of the share he proposed to take up. That check entitled the member to purchase goods to the amount of the check from any of the shopkeepers with whom the company had entered into an agreement, and the company paid the shopkeepers for all goods supplied to their members, less an agreed discount. The H members repaid the amount of their checks to the company by weekly instalments.

The appellant continued in the company's service from March, 1908, until May 16, 1911 (when he was dismissed), and was employed by them as a canvasser for members at Islington, London. After leaving the company's service he entered the service of the People's Supply Co., of Upper Street, Islington, and the respondent company commenced an action in the Clerkenwell County Court claiming an I injunction restraining him from breaking cl. 8 of the agreement. The respondent company had fifteen districts in London and about 1,000 canvassers, and the People's Supply Co. carried on a similar business to that of the respondents. The county court judge granted an injunction against the appellant, who appealed to the Divisional Court, the material grounds of his appeal being that the terms of cl. 8 were too vague and ambiguous to be capable of being enforced by injunction, and that the clause was wider in its terms than was reasonably necessary for the

protection of the company's interests. The Divisional Court (PICKFORD, and AVORY, JJ.) allowed the appeal, holding that, as regards the area within which the appellant was not to be employed, the clause was too vague to be enforced by injunction. They also held, following a previous decision (unreported) of the Divisional Court (DARLING, and BUCKNILL, JJ.) on the same agreement, that the clause was not unreasonably wide. On appeal the Court of Appeal held that the clause was reasonably limited in point of time and space, and was not too vague and indeterminable to be enforced, and restored the order of the county court judge with a modification of the form of the injunction. The appellant appealed to the House of Lords.

Rawlinson, K.C., and *J. B. Matthews* for the appellant.

Danckwerts, K.C., *Waugh*, K.C., and *Newell* for the respondents.

Their Lordships took time for consideration.

July 28, 1913. The following opinions were read.

VISCOUNT HALDANE, L.C., stated the facts and continued: It is on cl. 8 of the agreement of Mar. 25, 1908, that the appellant was sued. If the clause was a valid one I think that the respondents were entitled to an injunction, for the words disclose what purports to be an agreement, and the mere fact that there is a special remedy provided by way of liquidated damages or penalty does not take away the prima facie right to enforce the agreement by injunction. Such cases as *National Provincial Bank of England* v. *Marshall* (1) and *General Accident Assurance Co.* v. *Noel* (2) illustrate the principle of construction in this class of agreement. But other points were taken for the appellant before the county court judge. It was said that the agreement was bad because it went further than was necessary for the protection of the respondents' business, and was, therefore, in undue restraint of trade. It was further said that the clause was bad for vagueness, and particularly because London was a place of description which was too indefinite, and, moreover, was described in the early part of the agreement as London in the county of Middlesex, a place that was non-existent. I do not think it necessary to discuss the question whether this description of London in the county of Middlesex invalidated the agreement. It may well be that the maxim falso demonstratio non nocet applies to such a case. Nor do I propose to examine the argument as to general vagueness. It is true that the Divisional Court, which consisted of PICKFORD, J., and AVORY, J., decided against the respondents on this point. They did not enter into the wider question whether the clause was altogether invalid as being in undue restraint of trade, because they thought that they were bound by a previous decision on the point of another Divisional Court. But this wider question goes to the root of the whole claim, and I desire to direct my observations to it.

The Court of Appeal, differing from the Divisional Court, appear to have thought not only that the clause was sufficiently intelligible to form the subject of an injunction, but that its validity was established by the finding of the county court judge that the appellant, as a paid servant, had been so trained by his employers, the respondents, that he had become, in the language of BUCKLEY, L.J., "a particular sort of expert" who would, if he engaged in a similar business, be interfering with his employers' business. This is not the case of an agreement made to protect the sale of a goodwill, or to guard against the disclosure of special trade secrets. The capacity of the servant must obviously, from the character of the business as I have described it, be due mainly to natural gifts as a canvasser, and only in a secondary degree to special training. If so, it is necessary to consider carefully the extent of the restraint imposed. Such agreements are frequently insisted on, but they are invalid if they go beyond what is necessary for the protection of the rights of the employer. Whether there are such rights must depend on the character of the business. Now, the character of the respondents' business does not appear to me to be such as to entitle them to say that they had any right which justified

them in excluding the appellant from exercising his talents, such as they were, altogether or within a wide area. Had they been content with asking him to bind himself not to canvas within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits. He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they could have restrained him from doing this. But the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid. The county court judge has taken evidence which shows what the character of the work done for the respondents by the appellant was, and it is with reference to this work that the validity of the agreement must be tested. Now cl. 8 is in very wide terms. I will assume in the respondents' favour, what I do not think it necessary to decide, that the twenty-five mile limit applies to every branch of this clause, so that there is no unrestricted area to which it applies. But even so, the appellant would have bound himself for three years not to be employed in the same or a similar business within twenty-five miles of London or of any place where he had been in the employment of the respondents during the currency of the agreement, an agreement, be it observed, which might not have lasted more than a fortnight. He further bound himself to abstain within the same limits of time and space from assisting, even without remuneration, anyone who was helping in connection with any such business. Such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the courts as being for the court itself, and to be decided in accordance with a definite legal test. Evidence cannot be given on the question of validity or reasonableness, although evidence can be given as to the nature of the business and of the employment and, I think, also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is reasonable, but because what is usual is to some extent a guide in the consideration of the requirements of the particular business. On this point I agree with what was said by FLETCHER MOULTON, L.J., in his judgment in *Sir W. C. Leng & Co.* v. *Andrews* (3) ([1909] 1 Ch. at p. 770), which seems to me quite consistent with what was laid down by LINDLEY, M.R., in *Haynes* v. *Doman* (4) ([1899] 2 Ch. at p. 24).

The test is now settled. The law is summed up in LORD MACNAGHTEN'S judgment in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (5). After pointing out, as LORD WATSON had already done, that the standard of public policy must be the standard of the day, and that what was laid down as to public policy a long time ago may be of little use in settling what the actual standard is, he says ([1894] A.C. at p. 565):

> "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. This is sufficient justification and, indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in

A reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

The respondents have to show that the restriction they have sought to impose goes no further than was reasonable for the protection of their business. But even assuming the construction most favourable to them, that which makes the words B introducing the twenty-five miles limit apply to every branch of the restrictive language, I think that they fail to show this. I have examined the evidence as to the character of the business and the document which sets out particularly the duties of these canvassers. I can find nothing to lead me to think that the canvasser could become possessed of any special knowledge of the kind recognised as a trade secret. I doubt whether there were any secrets in this business. The C success of the canvasser depended, as I have already said, mainly on his natural aptitude. No doubt he might acquire, in the course of his employment, lists of actual or possible customers in the district in which he had canvassed. I think that under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers. But that is not the clause which the respondents in this case did frame. They have chosen to try to bind the appellant to an D extent which might be necessary for their protection if they had been carrying on a business of a different kind.

The reported cases afford instances of varying descriptions in which restriction over a wide area is necessary for the protection of the employer. But in the case of a business which is local, and which is carried on simply by canvassing, it is hardly possible for an employer to justify an area with a twenty-five mile radius, E and I do not think that it has been justified here. It is, no doubt, as a general rule, wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the court to scrutinise agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the courts have to check, and the F judges have to see that LORD MACNAGHTEN'S test is carefully observed. As I do not think that cl. 8 complies with that test I am of opinion that it was void altogether. The order of the Court of Appeal should be reversed, and that of the Divisional Court restored.

LORD DUNEDIN.—I have had the advantage of seeing the opinion which has G just been delivered by my noble and learned friend on the Woolsack. I concur therein and I have nothing to add.

LORD SHAW.—I agree. The case is not complex, but it has a far-reaching importance, and on this latter account I deal with it in a little detail. The appellant, on Mar. 25, 1908, entered into an agreement with the respondents which is called "An agreement for partial services as canvasser and collector." He was employed H in this capacity, his remuneration being a commission upon the sums collected from customers. He engaged that he would not during the continuance of his employment serve any other person or firm engaged in a similar business nor assist the servants of such a firm, nor help in the carrying on or formation of such a rival business, society, or club. This part of the agreement is cl. 4. There are also other obligations—for accounting for moneys received, for keeping books, and the like— I and, on the termination of his service, handing over these, with any balance due, to his employers. The engagement was terminable on a fortnight's warning. It is cl. 8 of this agreement which raises the question before your Lordships' House. A not unimportant clause of the agreement also is cl. 9 which provides that the respondents shall be at liberty to assign it, and their rights and powers under it, to any successors or assigns, direct or indirect, of their company. Such successors and assigns would, therefore, it was argued, be also entitled to enforce these comprehensive restrictions against the appellant. On May 16, 1911, the respondents

dismissed the appellant. He was entitled to two weeks' notice, and this was given. Later in the year he entered the service of "The People's Supply Co." The evidence is very meagre, but it appears that the appellant's round of canvassing was among customers within a very limited area, and that his canvassing for his new employers was two miles away. It further appears that the respondents have—apart from London, which will be presently referred to—one hundred different branches in Great Britain, covering the greater part of the country. Twenty-five miles from every place would leave very little of the map. If, accordingly, under the agreement the appellant, or any other servant under a similar contract, had at any period of his service been employed in other quarters of the country, for however short a time, these places, as well as London, and an area of twenty-five miles round each and all of them, would have come under the operation of the restrictive covenant and have been ground over which it was not permitted to him to take service in any capacity whatsoever with a company in the same line of business.

I am not very greatly concerned with discovering whether the sweep of this restrictive clause is, either on the facts as to the employment or on a construction of certain clauses in the agreement, confined to within twenty-five miles of London, or extended substantially to the United Kingdom. Nor, for the purposes of the opinion which I am about to deliver, do I take account of the difficulties of saying what would be the exact delimitation of a twenty-five miles circuit of London, or of the places in which the appellant had acted as canvasser. It is no doubt true that an injunction granted in the terms of the judgment of the Court of Appeal restrains employment "within twenty-five miles of London." And it appears to me that the appellant would be in an extraordinarily precarious position if he did any one of the things against which he is enjoined, taking upon himself the risk that London should be taken to be the city of London, or even particular portions of the county of London. So vague is the injunction that I should share the difficulty and hesitation of PICKFORD, J., in putting any person under it. But I desire to decide the question before this House on another ground.

I will take it that the "London" of this contract is a known and defined area, and that, therefore, twenty-five miles around it is also known and defined. Within that area there are at least six millions of inhabitants, there is a large variety of businesses, and there are rivals in trade conducting business on the check and credit system. So extensive is the area that in London alone the respondents have fifteen different districts and employ about 1,000 canvassers. If the judgment of the Court of Appeal stands, the appellant will accordingly be restrained from being in the employment of, or engaged in any manner whatsoever by, or helping directly or indirectly any person who shall be employed with any person, firm, or company carrying on a business similar to that of the respondents. He may not, of course, also, help in the starting of a rival business within the area. The restriction lasts for three years, and, as will be seen, is not confined to the appellant canvassing the customers of the old firm or in his old district, but he cannot, throughout any part of this great and densely populated area, take any engagement as a canvasser with their trade rivals, nor can he be employed by them in any other capacity whatsoever. He may not be a manager, a book-keeper, a clerk, a messenger, a typist, a caretaker. The restriction, even granted the limit in time and in area as already stated, is of a comprehensive and most extensive character. The question is whether this restriction is enforceable in a court of law.

Conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect. It is necessary in

such cases to look, in the first place, at the nature of the contract itself. As to that, the diversities may be wide and the view of the law may be different as to the upholding or the scope of a covenant in restraint of personal or industrial freedom. If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to show that such a contract—in so far as it restrains the vendor from becoming a rival of a business whose goodwill he has sold and which he has bargained he shall not oppose—there may be elements showing that such a contract is enforceable, and, indeed, that a declinature by the law to enforce them would amount to a denial of justice. In such cases it may clearly appear that the express view of the bargain may have been the elimination from the sphere of rivalry of a powerful personality which by the very terms of the contract had been paid for disappearing into retirement, carrying his sheaves with him. In such cases a restraint is enforced by the law. But to use LORD MACNAGHTEN's language in *Nordenfelt's Case* (5) ([1894] A.C., at p. 566),

> "There is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."

And, in my opinion, there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work.

In both cases which have been cited there are appeals to public interest. Yet the public interest in the one case may be on the side of freedom of contract, while on the other it is on the side of freedom of trade. The right to dispose for adequate consideration of a business which a person has built up and which has become solid, attractive, and valuable, by the exercise of his energy or ability, might become worthless unless accompanied by a substantial restraint of opposition on the part of the seller, and for the law to decline the validity of such a restraint would be to impose a great obstacle to the enjoyment of the fruits of labour, and so to destroy that incentive to industrial or commercial energy that the public interest might be grievously injured by such a restraint on freedom of contract. But, upon the other side, the public interest may strongly coincide with freedom of trade. That liberty might gravely be endangered or contravened by a restriction or impairment of the liberty of the subject to enter the ranks of business or of labour and work for and earn his living. The law can achieve a reconciliation and adjustment of these two elementary liberties—the right to bargain and the right to work. And it has in fact achieved this in such a manner that the public interest has been in both cases conserved.

For the rule evolved after much discussion may now be considered settled. The language of TINDALL, C.J., in *Hitchcock* v. *Coker* (6) can now no longer be questioned as being the law, that (6 Ad. & El. at p. 454)

> "where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void."

This was adopted by PARKE, B., in *Ward* v. *Byrne* (7), and is expressly founded upon by LORD MACNAGHTEN in his analysis of the case law in *Nordenfelt's Case* (5). I cannot refrain from again quoting Lord Macnaghten's words ([1894] A.C. at p. 565):

> "The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade

of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

I have referred, to the apparent antagonism between the right to bargain and the right to work. The extreme of the one destroys the other. But the public interest reconciles these two, and removes all antagonism by the application of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint. In such a case it may be

"plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrified."

This is the language of LORD CAMPBELL in *Tallis* v. *Tallis* (8) (1 E. & B. at p. 412). For myself, I should not use the expression of an alternative, but I should prefer to say that when it is plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion then from that moment it is established that the public interest would be sacrificed.

I desire expressly to adopt for myself a further proposition bearing upon this subject, and enunciated by FARWELL, L.J., in *Sir W. C. Leng & Co., Ltd.* v. *Andrews* (3). The case that was there being dealt with, as at present, was a case of restraint upon a servant seeking fresh employment. Referring to the passage cited from LORD MACNAGHTEN, he says ([1909] 1 Ch. at p. 773):

"That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instructions."

Upon this last point there was much argument at your Lordships' Bar as to whether this case did not fall within the principle of *Haynes* v. *Doman* (4). But *Haynes* v. *Doman* (4) was a case, and was expressly so treated, of the divulging of trade secrets and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases are, in my opinion, widely distinguished from the other cases of an employee who, by faithful and industrious exercise of his powers, becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide as the psychological distinction between subjective and objective knowledge. But it is also as real. For, in the former case, the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would, or might be likely to, induce the transfer of

this to others, with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract between master and servant, this distinction should be borne in mind.

Judged by these principles, the case on its facts becomes very simple. In the first place, has it been shown that this restraint sought to be put upon the appellant was reasonable for the protection of the respondents? His period of service under the contract might have been only a fortnight, and the restraint placed upon his liberty to earn his accustomed livelihood—in all its comprehensiveness, as above mentioned, and for the same period of years—would have been the same. In respect of that fortnight's employment, his bargain would have been to debar himself from all manner of service in the same class of trade, and for three years, among a population of nearly six million souls. A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and would look upon as a reasonable protection of the employer. But to extend it from that to the wide range which I have set forth appears to me to be a thing under the guise of a contract which is not protection for the employer, but a means of coercing and punishing the workman and putting him under a tyrannous and, therefore, a legally indefensible restraint. No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause. It is to be noted that the respondents have tendered no evidence whatsoever that the clause was necessary for their protection. Their secretary was examined, and on that head all that he said was: "This is a breach of his agreement."

Finally an attempt was made to bring the case by analogy within the principle of the trade secret cases. It appears, however, plainly, from the rules for canvassers, which are printed, that what is required is simply a fair share of intelligence and industry, with the accompaniment of a persuasive manner. If all these have been improved during the appellant's service with the respondents, they may assist his success in life, but they do not afford any material for restraint by a court of law upon his liberty in pursuing his ordinary calling. In my opinion, further, courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms. There is no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate and clearly defined divisions. It stands as a whole, and, in my opinion, it is not enforceable by law.

LORD MOULTON.—I concur. The law as to covenants in restraint of trade was so carefully and authoritatively formulated in this House in *Nordenfelt's Case* (5) that I do not think it necessary to discuss the numerous authorities cited in the course of the argument in order to ascertain what is the critical question which the court ought to put to itself in such a case as this. It is as follows: Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?

The first task of the court, therefore, is to ascertain with due particularity the nature of the master's business and of the servant's employment therein. The facts are not in dispute. The business of the respondents consists in inducing persons to become so-called "members," i.e., to subscribe for checks of various face values, say, for instance, of a value of £1. These checks are paid for gradually by instalments at certain due dates, but they are delivered to the member when a certain proportion of their face value has been paid by him, say, for instance, when 3s. has been paid on a £1 check. So soon as the check is received it is available for purchasing goods to its full face value, the company being answerable

to the vendor for the price of the goods purchased, and itself collecting the instalments payable by the member. A list of firms willing to sell goods on these terms is set out in a printed list given to the members, and is, therefore, a matter as to which there is no secrecy, and the profits of the company are derived from the discounts given to them by the vendors of the goods. The nature of the employment of the appellant in this business was solely to obtain members and collect their instalments. A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was, therefore, that of a local canvasser and debt collector, and nothing more. Such being the nature of the employment, it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand. If the servant is employed by a rival firm in some district which neither includes that in which he formerly worked for the respondents, nor is immediately adjoining thereto, there is no personal knowledge which he has acquired in his former master's service which can be used to that master's prejudice. The respondents would be in no different position from that in which they would be if the appellant had acquired his experience in the service of some other company carrying on a like business.

These, then, being the limits of the protection which the master might reasonably insist on, I turn to the covenant in order to see whether it exceeds these limits. That covenant is admittedly difficult to construe, and, moreover, it is, in my opinion, vague by reason of the extraordinary generality of the language employed. But, at all events, it prohibits the appellant from entering into a similar employment within twenty-five miles "of London in the county of Middlesex" for a period of three years after leaving the respondents' service. Such an area must include something like six million persons—that is to say, that on a moderate estimate it is an area a thousand times as great as the district assigned to him when in the respondents' service. Considering the strictly local character of the employment, I have no hesitation in saying that I should be prepared to hold that such an area is very far greater than could be reasonably required for the protection of his former employers. But this is but a small portion of the restrictions imposed by the covenant. It is very arguable that it prohibits him entering into the employ of anyone carrying on a similar business without any limitations of area. But assuming in favour of the respondents that we ought to give it the more limited construction which was evidently put upon it at the trial, and to which the evidence was directed, it restrains him for three years from entering into the employ of any firm which carries on a similar business within twenty-five miles "of London in the county of Middlesex," wherever it be that his employment is located. To my mind, the employment of the appellant is in respect of its local character analogous to a milk-walk, where the servant is employed in distributing his master's goods in a certain defined district and not otherwise, and the portion of the covenant with which I am now dealing would amount in the case of a man so employed to prohibiting him from entering into the service of any milk-distributing company that had a place of business within twenty-five miles of his former milk-walk no matter where it was that they proposed to employ him.

But even now we have not exhausted the extravagances of this restrictive covenant. Under it the appellant must not for a like period

"be engaged by or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping either directly or indirectly in the carrying on of the same or a similar business."

It is difficult to construe with any certainty words which are so intentionally wide and general. I doubt whether a covenant that is so intentionally unreasonable merits even the benefit of the general rule of construction that a court should, if possible, construe language so as to give a reasonable meaning to the document. But, however we construe it, the covenant is out of all measure wider than anything that can reasonably be required for the protection of the respondents in their business, and, therefore, the covenant is void in law and will not be enforced by the courts.

It was suggested in the argument that even if the covenant was, as a whole, too wide, the court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and, even so, only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would, in my opinion, be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, they would in the end obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business. I am of opinion, therefore, that the appeal should be allowed.

Solicitors: *Langhams; Jacques & Co.*, for *J. H. Richardson, Son & Fox*, Bradford.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

SMITH *v.* MARTIN AND KINGSTON-UPON-HULL CORPORATION

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), April 27, 28, May 19, 1911]

[Reported [1911] 2 K.B. 775; 80 L.J.K.B. 1256; 105 L.T. 281; 27 T.L.R. 468; 55 Sol. Jo. 535; 75 J.P. 433; 9 L.G.R. 780]

Master and Servant—Liability of master for negligence of servant—Teacher—Injury to schoolgirl—Liability of education authority.

The plaintiff, a girl of fourteen years of age, a pupil at a public elementary school, was sent by her teacher to poke the fire and draw out the damper in one of the school rooms. In the course of obeying this order her pinafore caught fire, and she was burnt and injured.

Held: (i) on the facts the teacher had acted negligently in telling the child to see to the fire; (ii) the relationship of the education authority and the teacher was one of master and servant, and the teacher had acted within the scope of her employment; and therefore the maxim qui facit per alium facit per se applied and the education authority were liable to the plaintiff for the teacher's negligence.

Notes. The Elementary Education Act, 1870, and the Education Act, 1902, have been repealed. See now Education Acts, 1944–1959, which contain the current law on education.

Considered: *Fisher* v. *Oldham Corpn.*, [1930] All E.R. Rep. 96. Referred to: *Gold* v. *Essex County Council*, [1942] 2 All E.R. 237; *Cassidy* v. *Minister of Health*, [1951] 2 K.B. 343.

As to liability of a master to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq., and for cases see 34 DIGEST 125 et seq.

Cases referred to:

(1) *Ching* v. *Surrey County Council*, [1910] 1 K.B. 736; 79 L.J.K.B. 481; 102 L.T. 414; 74 J.P. 187; 26 T.L.R. 355; 54 Sol. Jo. 360; 8 L.G.R. 369, C.A.; 19 Digest 556, *17*.

(2) *Shrimpton* v. *Hertfordshire County Council*, ante p. 359; (1911), 104 L.T. 145; 75 J.P. 201; 27 T.L.R. 251; 55 Sol. Jo. 270; 9 L.G.R. 397, H.L.; 34 Digest 146, *1150*.

(3) *Evans* v. *Liverpool Corpn.*, [1906] 1 K.B. 160; 74 L.J.K.B. 742; 69 J.P. 263; 21 T.L.R. 558; 3 L.G.R. 868; 34 Digest 40, *160*.

(4) *Hillyer* v. *St. Bartholomew's Hospital Governors*, [1909] 2 K.B. 820; 78 L.J.K.B. 958; 25 T.L.R. 762; 53 Sol. Jo. 714; sub nom. *Hillyer* v. *London Corpn. (St. Bartholomew's Hospital Governors)*, 101 L.T. 368; 73 J.P. 501; 34 Digest 26, *52*.

(5) *Lloyd* v. *Grace, Smith & Co.*, ante p. 51; [1911] 2 K.B. 489; 80 L.J.K.B. 959; 104 L.T. 789; 27 T.L.R. 409; 55 Sol. Jo. 461, C.A.; reversed [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991*.

Also referred to in argument:

Morris v. *Caernarvon County Council*, [1910] 1 K.B. 840; 79 L.J.K.B. 670; 102 L.T. 524; 74 J.P. 201; 26 T.L.R. 391; 54 Sol. Jo. 443; 8 L.G.R. 485, C.A.; 19 Digest 556, *18*.

Hall v. *Lees*, [1904] 2 K.B. 602; 73 L.J.K.B. 819; 91 L.T. 20; 53 W.R. 17; 20 T.L.R. 678; 48 Sol. Jo. 638, C.A.; 34 Digest 26, *51*.

British Mutual Banking Co., Ltd. v. *Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590, C.A.; 34 Digest 137, *1059*.

Appeal by the plaintiff from the judgment of LAWRANCE, J., in favour of the Kingston-upon-Hull Corporation, and application by the defendant Martin for judgment or a new trial, in respect of the same judgment in an action brought by Miss Amy Smith (by her next friend) a pupil at the Mersey Street Elementary School, Hull, against Miss Emily A. Martin, a teacher in the school, and the Kingston-upon-Hull Corporation as the local education authority.

The plaintiff on April 7, 1910, was a pupil at the Mersey Street school, Hull, a public elementary school, being a provided school, under the control of the defendant corporation as an education authority. On the same day the plaintiff was under the care and instruction of Emily Martin, a teacher in the school. The statement of claim alleged that while the plaintiff was so in the school the defendant Martin negligently and improperly and in violation of her duties for safeguarding the plaintiff, sent the plaintiff to poke the fire and draw out the damper in one of the school rooms, thus exposing the plaintiff to risk and danger of fire. While carrying out this duty the plaintiff's pinafore caught fire, and she was burnt and injured. She accordingly brought an action for damages against the teacher and the education authority. The corporation pleaded that they were guilty of no negligence, and that the statement of claim disclosed no cause of action against them. The defendant Martin alleged that she was engaged in teaching domestic economy to the plaintiff at the school. She admitted that she asked the defendant to pull out the damper and poke the fire, but denied that she owed any duty to the plaintiff. She further alleged that the request involved no risk to the child, particularly as the plaintiff, as part of her education at the school, had been instructed in the management of stoves and was perfectly competent to carry out the request. She also alleged contributory negligence. The evidence was that the defendant Martin, who was not well, desired some hot refreshment, and sent the child to poke a fire which was used for cooking the teacher's dinner. It was also stated that the child was in the sixth standard of the school and had been through two courses of cookery lessons, and was going through a third course, and had also been through two courses of laundry instruction. The jury found that it was negligent on the part of the teacher to send the plaintiff to attend to the fire, and they found a verdict in favour of the plaintiff for £300.

On further consideration LAWRANCE, J., held that the teacher was liable, but that as what was done by her was not an act for the purpose of carrying on the school, but was entirely personal to the teacher, the corporation were not responsible, and he ordered judgment to be entered for the defendant corporation and for the plaintiff against Miss Martin. The plaintiff appealed from the judgment in favour of the corporation, and the defendant, Miss Martin, gave cross notice of appeal, asking for judgment or a new trial. The teacher's appeal was taken first, and the court refused to upset the finding of negligence in the court below. The plaintiff's appeal against the Kingston-upon-Hull Corporation as the local education authority was then proceeded with.

Tindal Atkinson, K.C., and *Owen* for the plaintiff.

Scott Fox, K.C., and *Compston* for the defendant corporation.

Cur. adv. vult.

May 19, 1911. The following judgments were read:

VAUGHAN WILLIAMS, L.J.—I think that this appeal should be allowed. I have read the judgments of FLETCHER MOULTON, L.J., and FARWELL, L.J., and agree in the results of them, and in their reasoning. I only wish to add that in the case of *Ching* v. *Surrey County Council* (1) which was, as this is, a case of a provided school, the argument was put forward and overruled that the managers were an independent statutory body which is not, as a whole, appointed by the county council, and cannot be considered as their master or servant, and that such bodies who in point of fact deal with the matters connected with the management of schools do so as independent statutory bodies, by virtue of the provisions

of the statute, and not as the delegates or agents of the county council, so that the principle qui facit per alium facit per se upon which a principal or master is made responsible for the act or omission of his agent or servant, is not applicable. A similar, although not identical, argument, was put before us—and is really disposed of by this case—as well as by *Shrimpton* v. *Hertfordshire County Council* (2) in the House of Lords. I think that the decision of LAWRANCE, J., was wrong, and that this appeal should be allowed.

FLETCHER MOULTON, L.J.—In this appeal counsel for the defendants, the Kingston-upon-Hull Corporation, prayed in aid the argument which was addressed to us on behalf of the teacher, to the effect that there was no negligence in the teacher in asking the child to poke the fire and draw the damper. This he was entitled to do. As we had already decided that question he abstained from repeating his argument on that point, and I do not propose to give any further judgment upon it, except that I wish to refer explicitly to the decision of the House of Lords in *Shrimpton* v. *Hertfordshire County Council* (2), as it appears to me on further consideration that their decision has a direct bearing on the present case. In *Shrimpton's Case* (2) the House of Lords held that a jury was entitled to hold it to be negligence to allow a country girl of twelve years of age to ride to school in an ordinary brake without a conductor to help her in and out, even though she had been accustomed to ride in that way and in that brake for some months. Accepting this, as I must, as indicating the standard of care with regard to children of this age that the tribunal of final appeal holds it reasonable for a jury to adopt, I think it impossible to say that a jury was perverse in holding it to be negligent to send a child of the same age wearing a print pinafore to poke the fire and draw out the damper in a grate of this construction with which she was not familiar. The main contention on behalf of the education authority and that to which the judge of first instance gave effect was that it was not liable for the act of the teacher, first, because the relation of the education authority to the teacher was not that of master and servant; and, secondly, that even if the teacher must be held to be under a contract of service with the education authority this particular act was so completely outside the scope of the teacher's employment that the employer was not liable in respect of it. With regard to the first point, I confess that I am quite unable to follow the argument in favour of the education authority. The school was a provided school under the control of the defendant corporation as education authority. They had with regard to it all the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870, and 1902, and thus had the entire control of the school. It is true that they exercised this control and management through an education committee, but that would not alter their responsibility. It was contended that we ought to hold that the employment of a teacher is in pari materiâ with the employment of a physician, and that this case therefore came under the class of cases where it has been held that a person whose duty it is to provide medical attendance has discharged that duty when he has appointed a competent medical man and that he is not responsible for the negligence of a doctor so appointed. The analogy in my opinion is a false one. The position of a medical man is in such matters a very special one and bears no resemblance to that of a teacher of an elementary school. The layman is presumably incapable of judging of the right treatment to be adopted by the medical man, and accordingly he is not required to interfere with it or even warranted in doing so. But the education authority can and ought to take cognisance of the way in which the teaching is given, and although it is rightly guided to a great extent by the advice of the teacher, it can direct the teacher what to do and what not to do, and it is clear that he must obey. Speaking for myself, I can see nothing in the position of an elementary teacher appointed by an education authority to carry out its statutory duties of providing education for the children under its care which distinguishes the teacher in respect of his being under

a contract of service from any other official, and the ordinary consequences as regards liability for the acts of a servant must attach in such a case.

There remains the further question—Was the direction given by the teacher to the plaintiff so completely outside the scope of the employment that the education authority is not liable for the consequences? It was strongly contended on behalf of the education authority that such an order as this was not within her duty as teacher, and that her employer was no more liable in respect of it than if she had asked the child to run an errand for her in the street and the child had been injured in so doing. We must recognise that the position of a teacher is peculiar in this respect, that immediate obedience is expected on the part of the children, as otherwise it would be impossible to maintain that discipline which is so indispensable to effective teaching. It would not be reasonable to hold that children ought to be able to draw the line between what is within the intended ambit of the teacher's authority and that which is just outside of it, and to limit the liability of the education authority to orders given by the teacher which are such as she was intended to give. In my opinion the teacher was put in a position in which it was intended that her commands should be obeyed by the children, and the education authority is responsible for orders given by her in that position such as the one we have to consider. It does not seem to me to have been an order which in its nature differed essentially from such an order as to shut the door of the school room or to open the window. It is true that it related directly to a matter personal to the teacher, but she may well have thought that it was in the interests of her teaching that the act should be done and that it was better that she should send one of the scholars to do it than that she should leave the class unattended to while she did it herself. A wide discretion in small matters such as this is, in my opinion, inseparable from the quasi parental position of a teacher towards her class in such a school, and without discussing what are the exact limits of such an authority as is thus given to her I am of opinion that in the present case the act was one for which the education authority is liable, and that this appeal should be allowed.

FARWELL, L.J.—We have already held that we cannot interfere with the finding of the jury that the teacher was negligent in sending the child under the circumstances of the case to pull out the damper, and the question now remains whether the Kingston-upon-Hull Corporation, being the education authority of the school, are also liable. The corporation deny liability on two grounds, either of which if sound would suffice to exonerate them. First, they deny that the teacher is their servant, and allege that their only duty is to appoint fit and proper persons as teachers and that it is not suggested that the teacher was not a fit and proper person; and, secondly, they contend that the act was not done by the teacher in the course of her employment and for her master's benefit. First, the school in question is a provided school, and the case is therefore free from any complication by the interposition of managers. By the Education Act, 1902 [repealed] the corporation have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900 [repealed], and these include the duty of providing sufficient accommodation in public elementary schools: (Act of 1870, s. 5). Every such school "shall be conducted under the control and management" of the corporation, subject to regulations therein mentioned: (s. 14). Every such school shall be maintained and kept efficient by the corporation: (s. 18). The teachers are appointed by the corporation and hold office during their pleasure at such salaries as the corporation think fit, and are removable at their pleasure: (s. 35). The corporation pay all salaries: (Act of 1902, s. 2). It is true that the Board of Education issues regulations which bind the corporation, but no regulation material for any purpose that we have to consider has been called to our attention, nor am I aware of any such regulation. Under these circumstances, all the incidents usually relied on to show the existence of the

relationship of master and servant exist in this case; the teacher was engaged by the corporation and paid by them, she was under their control and could be dismissed by them. The two cases relied on by the corporation—*Evans* v. *Liverpool Corpn.* (3) and *Hillyer* v. *St. Bartholomew's Hospital Governors* (4)—are entirely different. The person alleged to be the servant in the first case was the consulting physician, and in the second ([1909] 2 K.B. at p. 825) the surgeon and anæsthetist,

> "professional men employed by the defendants to exercise their profession to the best of their abilities according to their own discretion, but in exercising it they are in no way under the orders or bound to obey the directions of the defendants."

In *Hillyer's Case* (4) the nurses and carriers were treated as being servants for whose acts the hospital would be liable, but the plaintiffs failed to prove any case against them. I am, therefore, of opinion that the first contention of the corporation fails. Secondly, it is then contended that it was no part of the business of the teacher to send the child on any errand of her own, but that her business is confined to teaching. This is to draw a distinction between education and teaching which, if adopted as sound, would have a most prejudicial effect on these schools. In my opinion, the Education Acts are intended to provide for education in its truest and widest sense; such education includes the inculcation of habits of order and obedience and courtesy; such habits are taught by giving orders, and if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority, even although they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like. It would be extravagant to say that a teacher has no business to ask a child to perform small acts of courtesy to herself or others—such as to fetch her pocket-handkerchief from upstairs, to poke the fire in the teachers' room, or to open the door for a visitor, or the like. It is said that these are for the teacher's own benefit, but I do not agree; not only is it good for the child to be taught to be unselfish and obliging, but the opportunity of running upstairs may often avoid punishment; the wise teacher who sees a volatile child becoming fidgety may well make the excuse of an errand for herself an outlet for the child's exuberance of spirits, very much to the benefit of the child. Teachers must use their commonsense, and it would be disastrous to hold that they can do nothing but teach. Then, it is suggested that the acts in this case cannot be for the master's benefit. I have recently delivered a judgment on this point in *Lloyd* v. *Grace Smith & Co.* (5), and I will not repeat it; it is enough to say now that "benefit" does not mean pecuniary benefit only; an act done within the scope of the employment is by legal intendment for the benefit of the master, unless and until the master proves the contrary. Here, in addition to the considerations that I have already stated, and which are, in my opinion, quite sufficient, the corporation supply a common room in which the teachers sit, fitted with fireplace and oven so that they can cook and eat their dinners there if convenient; but they supply no one to look after the fires or the room; it is therefore necessary for the teachers to do it themselves. In the present case, the teacher might have gone herself, but if she had she would have left her class unattended. It cannot be said that she chose an alternative beyond the scope of her employment in sending the child. Such sending was within such employment, but she did it in a negligent manner; the corporation are therefore liable for her negligence. I am, therefore, of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors: *Windybank, Samuell & Lawrence*, agents for *Benno Pearlman*, Hull; *Martin, Baker & Nairne*, agents for *A. M. Jackson & Co.*, Hull; *Sharpe, Pritchard & Co.*, for *H. A. Learoyd*, Hull.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

KERRISON v. GLYN, MILLS, CURRIE & CO.

[House of Lords (The Earl of Halsbury, Lord Atkinson, Lord Shaw and Lord Mersey), October 31, December 4, 1911]

[Reported 81 L.J.K.B. 465; 105 L.T. 721; 28 T.L.R. 106; 56 Sol. Jo. 139; 17 Com. Cas. 41]

Bank—Mistake of fact—Payment to bank by third person on account of customer—Money retained by bank—Liability of bank to repay to payer.

Where money is paid to a banker by a third person on account of one of his customers under a mistake of fact the banker is not entitled to retain the money, but must repay it to the payer, unless he has paid it over to his customer or has altered his position in relation to his customer to his own detriment on the faith of the payment. In such a case he can leave the payer to enforce his remedy against the customer.

The appellant, who lived in England, had a standing arrangement with a firm of bankers in New York in virtue of which they were to honour the drafts of a company carrying on business in Mexico, in which the appellant was interested, up to £500, the appellant agreeing to put them in funds by paying that amount from time to time to their account at the respondents' bank in London. On Oct. 21, 1907, the New York firm wrote to the appellant informing him that the Mexican company had been credited with £500, and requesting him to pay that amount to their account with the respondents. On receipt of this letter on Oct. 30 the appellant paid £500 to the respondents to the credit of the New York firm. On Oct. 30 the New York firm became bankrupt, and the appellant on becoming aware of this fact on Oct. 31 applied to the respondents for the repayment of the £500.

Held: the money had been paid under a mistake of fact; the respondents were in no better position than the New York firm would have been had the money been paid direct to them; and, therefore, they were not entitled to retain it.

Notes. Applied: *British American Continental Bank, Ltd.* v. *British Bank for Foreign Trade, Ltd.*, [1925] All E.R. Rep. 486. Referred to: *Admiralty Comrs.* v. *National Provincial and Union Bank of England*, [1922] All E.R. Rep. 260; *Steam Saw Mills Co.* v. *Baring, Archangel Saw Mills Co.* v. *Baring*, [1922] 1 Ch. 244; *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579.

As to a banker's lien, see 2 Halsbury's Laws (3rd Edn.) 210–213, and for cases see 3 Digest (Repl.) 321 et seq.

Cases referred to:

(1) *Foley* v. *Hill* (1848), 2 H.L. Cas. 28; 9 E.R. 1002, H.L.; 3 Digest (Repl.) 177, *289.*

(2) *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263; 23 T.L.R. 696; 51 Sol. Jo. 672, H.L.; 3 Digest (Repl.) 192, *367.*

Appeal by the plaintiff in the action from a decision of the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Farwell, L.JJ.), reported 102 L.T. 674, reversing a decision of Hamilton, J. (reported 101 L.T. 675), in favour of the appellant in an action brought by him against the respondents to recover £500 under circumstances which are set out fully in the judgment of Lord Atkinson.

Sir R. Finlay, K.C., and *Rowlatt* for the appellant.

Bailhache, K.C., and *Alan Macpherson* for the respondents.

The House took time for consideration.

Dec. 4, 1911. The following opinions were read.

LORD ATKINSON.—The action out of which this appeal has risen was brought by the appellant to recover a sum of £500 lodged by him in the bank of the respondents on Oct. 31, 1907, to the credit of the account therein of a certain firm of bankers carrying on business in New York, called Kessler & Co., under a mistake of fact. The alleged mistake of fact was that Kessler & Co. had, before the lodgment, but without the knowledge of either the plaintiff or the defendants, committed an act of bankruptcy. The case was heard before HAMILTON, J., sitting in the Commercial Court without a jury, upon the documents given in evidence, supplemented by two affidavits made by deponents in New York.

The facts are really not in dispute, but much controversy has been raised as to the proper inference to be drawn from them touching the precise nature of the arrangement entered into between Kerrison, the plaintiff, and this New York banking company, in accordance with which the sum which it is sought to recover was lodged with the defendants on the occasion mentioned. Upon this point, a vital one in the case, HAMILTON, J., and the Court of Appeal came to different and conflicting conclusions. One of the questions for decision in this appeal is: Which of those conclusions is right? It is, therefore, necessary to examine in detail the evidence upon which the conclusions respectively purport to be based.

The plaintiff was owner, jointly with others, of a certain silver mining property at Zacathecas in Mexico, of which he acted as managing partner in this country, one J. S. Pattinson being the local manager. The undertaking was known as the "Bote Mining Co.," and for the purposes of its business a current account was kept with Kessler & Co. in its name. The defendants are the agents of Kessler & Co. in this country. The plaintiff's father, one Roger Kerrison, of Ipswich, was in 1903, when the correspondence opens, and for some years afterwards, as his son, who succeded him, is now, the managing partner in this country of the mining company. The letter earliest in date given in evidence in the case is that of May 1, 1903, from Kessler & Co. to Roger Kerrison, to which the latter replied by a letter of the 5th of the same month. These two letters, which opened the negotiations between the parties, ran as follows:

"Per steamship *Campania*.—Mr. Roger Kerrison, Ipswich, May, 1903.—Dear Sir,—The National Park Bank of this city has paid as for account of the Bote Mining Co. "of Zacathecas, Mexico, Roger Kerrison, Managing Owner," the sum of $7,300. As we have no instructions from the mining company or yourself in regard to the disposal of this money, we await advice either from you or from them.—Yours very truly, KESSLER & Co."

"Gurneys Alexanders Bank, Ipswich, May 5, 1903.—Dear Sirs,—I now beg leave to confirm cable message sent to you on the 30th ult. from my banking firm's London house to open a credit of seven thousand three hundred dollars ($7,300) in favour of the Bote Mining Co., Zacathecas, Mexico, as instructed by my manager there, Mr. J. S. Pattinson, and, on receiving further particulars from him, will write you further on this subject, and am, dear Sirs, yours faithfully, ROGER KERRISON."

In this letter of May 5 Roger Kerrison uses the words "open a credit of $7,300," but it is clear that he did not mean by those words that Kessler & Co. should advance or pay any money of their own, properly so called, to the mining company but should simply pay drafts or cheques of the mining company up to the amount of $7,300 then in their hands. There was no loan of any kind, in the proper sense of the term, to be made by Kessler & Co. to the mining company of any sum of money whatever. The sum of $7,300 was, as they state, paid to them by the National Park Bank for account of the mining company. On May 22, 1903, Roger Kerrison again wrote to Kessler & Co. a letter in which a sum of £500 is for the first time mentioned. It runs as follows:

"Dear Sirs,—Referring to your letter of May 1 acknowledging my cable message of previous day, I have now heard from the manager of my mining company at

A Zacathecas, Mexico, Mr. J. S. Pattinson, and he informs me that he desires to open an account with you, so as to enable him to get the best possible terms when paying for certain stores, &c., required for the mines, and I should, therefore, feel obliged if you would honour his drafts up to the amount wired you, $7,300, and, as he also asks in a supplementary letter received this morning that I should allow him a standing credit with you for the equivalent of £500—say B $2,500—I should be glad if you would allow him this further accommodation on my responsibility and account when and as required; and for your guidance I inclose you herewith specimen of Mr. Pattinson's signature.—Thanking you in anticipation, I am, dear Sirs, yours faithfully, Roger Kerrison. P.S. I should be glad of some suggestion from you as to how you would prefer to be recouped for any sum or sums which Mr. Pattinson may draw upon you against the C above-mentioned standing credit of £500.—Pp. R. K., C. B. Trollope.—Messrs. Kessler & Co., Bankers, 54, Wall Street, New York."

Indorsed on this letter in pencil is the following:

"On original credit $7,000 no charge because money is deposited with us. On £500 $\frac{1}{8}$ per cent., and amount to be deposited with Glyn when requested by us."

D To this letter Kessler & Co. sent a reply dated June 3, 1903, the portions of which dealing with the matter in controversy ran as follows:

"Per steamship *Deutschland*.—Roger Kerrison, Esq., Ipswich, June 3, 1903. —Dear Sir,—Your favour of the 22nd ult. is received, and we note that you ask us to open a credit in favour of Mr. J. S. Pattinson, which we presume is for account of the Bote Mining Co. for £500. This we will do, and, as soon as we E have paid his draft or drafts, we will advise you of the amount, with a request that you pay the equivalent to Messrs. Glyn, Mills, Currie & Co. for credit of our account. For transactions of this nature our commission is one-eighth of one per cent. It is not quite clear to our mind whether you intend that when this credit is exhausted Mr. Pattinson should have another credit of £500, what is usually called a revolving credit, the advance at any one time not to exceed F £500. Kindly advise us on this point. For the amount you have already given us of $£7,300 for his credit, as it has been lying here for some little time before his drafts were presented, we will make no charge for commission."

On June 15, 1903, one C. B. Trollope wrote on behalf of Roger Kerrison to Kessler & Co. a letter, of which the material parts ran as follows:

G "Dear Sirs,—I am requested by Mr. Kerrison to thank you for your letter of the 3rd inst., and in reply to inform you that a revolving credit of £500.—say $2,500—in favour of Mr. Pattinson as manager of the Bote Mining Co. is exactly what Mr. Kerrison meant by a standing or renewable credit, as we call them here, and he would be much obliged if you would open such a credit for him upon the terms you mention—that is, one-eighth of one per cent.—and, on H receiving advice from you of the amount of the drafts paid, Mr. Kerrison would at once credit your account at Messrs. Glyn & Co. with the sterling equivalent. Mr. Kerrison also begs leave to thank you for your consideration in honouring Mr. Pattinson's drafts free of charge against the credit of $7,300 cabled to you on April 30 last."

I Stopping here, it is, in my view, too plain for argument that the arrangement embodied in this correspondence only amounted to this, that Kessler & Co. were to pay the drafts or cheques of Pattinson, acting on behalf of the mining company, in the first instance out of their own money; that until such advances had been made Kerrison was not bound to lodge with the defendants any sum of money whatever to the credit of Kessler & Co., and that the amount which he at any time might be bound to lodge with them was the amount which Kessler & Co. had advised him that they had, by honouring Pattinson's cheques or drafts, advanced to the mining company, and no more. The words "to be recouped" occurring in the

postscript to the letter of May 22, coupled with the words "and as soon as we have paid his draft or drafts we will advise you of the amount with a request that you will pay the equivalent," are, it would appear to me, conclusive as to the nature of the arrangement embodied in the correspondence up to this date, June 15, 1903.

It does not appear to me that there is any substantial difference of view between HAMILTON, J., and the Court of Appeal on this point. Where they do differ from him is as to the effect of the course of business, quite inconsistent with the above-mentioned arrangement, followed invariably from its conclusion down to Oct. 31, 1907. HAMILTON, J., held that the arrangement embodied in the correspondence was not varied by this course of business, that it remained valid and binding, that the legal rights of the parties to it, and the true relation of each to the other, were to be determined by its terms, and that the departure in practice from its provisions was only made voluntarily by Roger Kerrison for his own convenience by way of anticipation. The Court of Appeal, on the other hand, held, as I understand their judgments, that the nature of the arrangement actually made was to be inferred from all the correspondence coupled with the course of business actually followed, and that it amounted in effect to this, that Kessler & Co. were not to advance any of their own moneys, properly so called, to the mining company, but that before they cashed any of Pattinson's cheques or drafts as against this credit for £500, Kerrison was bound to lodge the full sum of £500 with Glyn, Mills & Co., their bankers, to the credit of their account; so that the moment that Kessler & Co. credited the mining company with £500 in their own books, and advised Kerrison of that fact, though not a single cheque had then been drawn by Pattinson against the credit, Kerrison became bound to pay them £500. No conceivable arrangement could be more inconsistent with the contents of the correspondence ending on June 15, 1903. But it followed as a necessary consequence of this conclusion, as, indeed, the Court of Appeal appear to have held, that when the plaintiff on Oct. 31, 1907, lodged with the defendants the sum of £500 to be placed to the credit of Kessler & Co., he was simply in the position of a debtor who had paid to his creditor the debt which he owed in ignorance of the fact of the creditor's bankruptcy, and that this ignorance did not amount to such a mistake of fact as would entitle the debtor to have the money refunded to him. On the assumption that the plaintiff was, by lodging this sum of money, merely paying a debt which he owed, the Court of Appeal were, I think, clearly right in this latter conclusion.

The course of business followed is described in the affidavit of Mr. McLean, the former manager of Kessler & Co., as follows:

> "When from time to time the Bote Mining Co. had exhausted its credit, Kessler & Co. would give additional credit to the company in the equivalent of £500 less ⅛ per cent. commission, by crediting the account of the company in their books. Upon making this credit in their books they would on the same day write to Mr. Kerrison notifying him thereof, and requesting him to pay £500 to Glyn, Mills & Co. for their account, and on the same day they would also notify Glyn, Mills & Co. that Mr. Kerrison would deposit £500 with them for the account of Kessler & Co., and on the same day Kessler & Co. would write to the Bote Mining Co. advising them that the sum of £500 at current exchange less ⅛ per cent. commission had been placed to their credit, specifying the rate of exchange and the amount in dollars. When the Bote Mining Co. required for some special payment an amount larger that £500, that was arranged for by cable, or by correspondence with Mr. Kerrison. The Bote Mining Co. from time to time made deposits of cheques or drafts which Kessler & Co. collected and passed to their credit. The only commission or charge made by Kessler & Co., except petty disbursements, was the commission of ⅛ per cent. deducted from the amounts remitted by Mr. Kerrison, such deductions being made at the same time that the credit was given to the Bote Mining Co.

A It was adopted apparently immediately after June 15, 1903, when Roger Kerrison was in no way bound to adopt it, or to depart from the original arrangement made between Kessler & Co. and himself, for on June 18, 1903, they wrote him a letter to which Mr. Trollope replied on the 29th of that month. These letters ran as follows:

B "Roger Kerrison, Esq., Ipswich, June 18, 1903.—Dear Sir,—Confirming ours of June 3, we this morning have a letter from the Bote Mining Co. asking us to pay to the National Metal Co. $5,789.64, which we have done. As this overdraws the previous credit of $7,300, we make use of the further credit which you opened with us for £500, and would thank you to pay that amount on receipt of this letter to Messrs. Glyn, Mills, Currie & Co., London, for the credit of our account. Inclosed is copy of our reply to Mr. Pattinson's letter, in order that you may be posted on how we are handling his account, which we trust will be satisfactory to you.—Yours very truly, KESSLER & CO."

C "Gurneys Alexanders Bank, Ipswich, June 29, 1903.—Dear Sirs,—In the absence of Mr. Kerrison I beg leave to acknowledge the receipt of your letter of the 18th inst. with copy of your letter to Mr. Pattinson, and, in accordance with your instructions, have paid to Messrs. Glyn, Mills & Co. for your account the sum of £500 sterling, and am, dear Sirs, yours faithfully, C. B. TROLLOP."

D The dates of these two letters in themselves suggest an explanation of this immediate departure in business from the strict letter of the arrangement made. In the interval between June 18 and 30 it was necessary to finance the mining company, and it may well be that Kerrison, knowing this, in order to avoid delay, and to save himself the trouble of making repeated lodgments on the receipt of repeated advices, anticipated a liability of which he had not been actually advised, but had every reason to think either had actually accrued, or most probably would soon accrue, and lodged the full sum of £500 at once to meet the present or future claims.

E The occurrences of the latter part of October, 1907, leading up to the lodgment on the 31st of that month of the sum now sued for, support that conclusion. On Oct. 21 the account of the mining company with Kessler & Co. was drawn down to $100.45. On that day Kessler & Co. wrote to the plaintiff a letter, the important part of which ran as follows:

F "Will you please pay for our credit to Messrs. Glyn, Mills, Currie & Co. £500 for account of the Bote Mining Co., which we credit to their account here at $4.85 less one-eighth—viz., $2,421.97.

G But that letter did not reach the plaintiff till Oct. 30, nine days later, and in this interval the Bote Mining Co. had drawn four drafts on Kessler & Co. to the amount in the aggregate of $1,091.65. It happened that these drafts were not presented before Oct. 30, and they were not paid. Something of the same kind seems to have occurred in August in the same year—that is to say, in the interval between the posting of the letter of advice and its arrival at its destination, drafts of the

H mining company had been cashed by Kessler & Co., involving an obligation on Kerrison to pay. It would appear to me that it was a most natural thing for Kerrison to lodge the entire sum of £500 with Kessler & Co.'s bankers to discharge any liability which might have accrued in the interval above mentioned, and by anticipation to provide for that which might thereafter accrue.

I I do not think that it is a just or fair inference from the adoption of this course of business that the plaintiff's father, Roger Kerrison, or the plaintiff himself, ever abandoned their rights under the arrangement embodied in the correspondence terminating on June 15, 1903, or that this agreement was in any sense varied. Accordingly, I am of opinion that the conclusion at which HAMILTON, J., arrived on this issue of fact was right, and, with all respect for the members of the Court of Appeal, that their conclusion on that issue was erroneous. Kerrison, at the time when he paid the money, had not been advised that Kessler & Co. had made any advances of their own money to the Bote Mining Co. in respect of which he was

bound to recoup them. He lodged the money in the belief that Kessler & Co. were a living commercial entity able to carry on their business as theretofore, that they were in a position to honour, and would honour, the drafts of the Bote Mining Co. up to the sum which he, in anticipation, sent to recoup them for their repeated advances. Kessler & Co. had in fact ceased to be in that position. If not commercially dead, they were, at least, in a state of suspended animation, utterly incapable of carrying on business, making advances, or doing the very things which he lodged this money to their credit to enable them to do. I cannot doubt that on general principles he would be entitled to recover money paid in ignorance of these vital matters, as money paid in mistake of fact. It is urged, however, that, although he gave notice to the defendants on Oct. 31 of Kessler & Co.'s act of bankruptcy, asked them to stop payment of his cheque, and to refund him his money, he is precluded from recovering it from them in this suit because, as they were Kessler & Co.'s bankers, though not his, the relation between a banker and his own customer is that of creditor and debtor. It was admitted, as I understood, that if money be sent direct from one person to another in payment in advance for some service to be rendered by that other, in the belief that he is alive, when in fact he is dead, it could be recovered by the sender from the person, whether agent or legal personal representative of the deceased, into whose hands it came. The fact that the deceased was largely indebted to such agent, and that the latter would as between himself and the legal personal representative of the deceased be entitled to set off pro tanto the money received as against the debt due to him, could not possibly prejudice the rights of the person transmitting the money. He would obviously have the same rights against an agent to whom the deceased owed money as he would have against an agent of the deceased to whom nothing was owing; and this would be so even though the deceased had authorised the agent to apply the money when received to the discharge pro tanto of the sum due to him.

Here, undoubtedly, the defendants were the agents designated by Kessler & Co. to receive the money from Kerrison. Kerrison is not shown to have known anything as to how the account between the defendants and Kessler & Co. stood. It may well be that money lodged by a customer with his banker is, as between themselves, considered to be a loan to the banker, who may thenceforth deal with the money as his own, but the lodgment of this £500 was not a loan from Kerrison to the defendants. That is clear. It was the mode selected by Kessler & Co. themselves by which each of these different sums of £500 should from time to time be paid to them. If it had been transmitted direct by post, neither Kessler & Co. nor their assignees in bankruptcy could, I think, on HAMILTON, J.'s, decision as to the nature of the arrangement entered into, have retained it. It would be against good morals to permit them to do so. The defendants cannot, I think, have a better right to hold the money than Kessler & Co. would have had. The cases cited deal with the respective rights of banker and customer inter se, and with those rights alone. They do not touch the question whether a banker to whom money is paid to the credit of his customer's account at that customer's request, in mistake of fact, is in a better position than his customer would be, and is entitled to hold it, though his customer, had it been paid to him direct, would under the circumstances have been bound to refund it. That was the principle contended for by the respondents before your Lordships. No authority was cited in support of it. It seems to me to be contrary to reason and justice, and, in the absence of binding authority upon the point, I refuse to accept it as the law. I am, therefore, of opinion, on the whole case, that the decision of the Court of Appeal was wrong and should be reversed, and the decision of HAMILTON, J., restored, and that this appeal should be allowed with costs.

THE EARL OF HALSBURY.—I am entirely of the same opinion, and I only wish to say that I do not understand myself to be differing on any question of law either from HAMILTON, J., or from the Court of Appeal, because I think that it

was simply due to a misapprehension of the facts with which they were dealing that the Court of Appeal differed from Hamilton, J. At all events, I am of opinion that the course of dealing and the facts as found by Hamilton, J., were correct, and I think that the Court of Appeal went wrong, if they went wrong at all, simply upon the question of fact.

LORD SHAW.—I am of opinion that the narrative of the facts of this case as stated by Hamilton, J., and the conclusions in law reached by that learned judge are correct, and I agree with the full opinion of Lord Atkinson, which I have had the pleasure of reading.

On Oct. 31 the appellant, Mr. Kerrison, paid £500 to Messrs. Glyn, Mills, Currie & Co., the London correspondents and bankers of the firm of Kessler & Co., New York. The object of the payment was to cover accommodation or advances to be made by Messrs. Kessler to a Mexican firm called the Bote Mining Co. On that date, Oct. 31, Messrs. Kessler & Co. stood completely disabled from making such advances or giving such accommodation, and could not honestly have taken the money for the purpose, for the reason that on the previous day they had filed a deed of assignment in favour of their creditors and had closed their doors. The money was paid, however, in London under the mistake in fact, which was material, and was indeed the only reason for payment, that Kessler & Co. could perform their obligations. In my opinion, it is of no materiality whether this payment under mistake to Messrs. Kessler was made either directly or indirectly, either to them personally, or to any agency of theirs in New York or in London.

The case is only of importance on account of an able attempt by the respondents' counsel to distinguish the position of a banker from the position of any other recipient of money acting as factor or agent, and to attach the authority of this House to such a distinction as applicable to a case like the present. It was for this purpose that the dictum of Lord Cottenham, L.C., in *Foley* v. *Hill* (1) was so strongly founded on. That dictum is not capable of the application suggested. In the first place it was pronounced, and, indeed, the case turned, on a point of procedure, or rather in regard to the respective jurisdictions of a court of law and a court of equity. This was expressly referred to by the Lord Chancellor when he described the argument:

> "Although it is not disputed that the transactions between the parties gave the legal right, it is said a court of equity, nevertheless, has concurrent jurisdiction."

In the second place, when the general language founded upon, to the effect that "money when paid into a bank ceases altogether to be the money of the principal," and so forth, was used, it was plain that that language was employed solely in regard to the relation between a banker and his own customer. And in the third place, it was not meant to be applied, and did not apply, to, or cover the case of, money paid, whether by a customer or not, under a mistake of fact. I agree with the opinion that money so paid can be successfully re-demanded, and I do not think that it would be correct, either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained. This rule applies generally, even although the recipient, whether banker or agent, was, as here, ignorant at the time of receipt of the disability of the principal to do the thing for which, and for which alone, the money was deposited, or was himself under a mistaken impression on that subject.

LORD MERSEY.—It is not necessary to recapitulate the facts of this case. They are sufficiently set out in the opinion of Lord Atkinson. Nor is it necessary for me to say more as to the conclusions to be drawn from the facts. The case is in reality very simple. Mr. Kerrison paid £500 into the defendants' bank in order that Kessler & Co. might be provided with funds to meet the drafts of the mining company when presented for payment in New York. He paid the money in the mistaken belief that Kessler & Co. were in a position to apply his money to the

purpose for which it was intended. Kessler & Co. were not in fact in a position to do this. They had, at the date of the payment, assigned all their property to trustees for the benefit of their creditors; they had put up their shutters and were no longer in a position to do business of any kind. If Kerrison had known these facts, undoubtedly he would not have paid the money; and if the money had been tendered by him directly to Kessler & Co. instead of to their bankers, it would have been wrong for them to have taken it. I am quite unable to understand how it can be said that Kerrison was merely paying a debt which he owed to Kessler & Co. He owed nothing to them, and it is contrary to all notions of business to say that Kessler & Co., by the mere entry in their own books of account of a sum of money to the credit of the mining company, could make Kerrison their debtor. The facts bring the case directly within the terms of the judgment of LORD LOREBURN, L.C., in *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.* (2), where he says (97 L.T. at p. 264):

> "It is indisputable that if money is paid under a mistake of fact, and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received."

An attempt was made to take this case out of this plain and simple rule of law by saying that the defendants, being Kessler & Co.'s bankers, had, by the receipt of the money, become debtors of Kessler & Co., and could not, therefore, be called upon to repay the plaintiff. This is, in my opinion, a fallacy. No doubt when a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer's debtor for the amount so received. But this does not entitle the banker to retain money which in common honesty ought not to be kept. If, indeed, the banker has paid over the money to his customer, or has altered his position in relation to his customer to his own detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer. But the circumstances here are that Messrs. Glyn, Mills & Co. had in no way altered their position when they were asked to refund the money. They held money which they ought not to retain because it had been paid to them under a mistake of fact, and, in the words of the Lord Chancellor, it does not matter in what character it was received by them. I think that the judgment of HAMILTON, J., was right, and ought to be restored.

Appeal allowed.

Solicitors: *Gribble, Oddie, Sinclair, Rowlatt & Johnson; Murray, Hutchins, Stirling & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

COWERN *v.* NIELD

[King's Bench Division (Phillimore and Bray, JJ.), April 19, May 7, 8, 1912]

[Reported [1912] 2 K.B. 419; 81 L.J.K.B. 865; 106 L.T. 984; 28 T.L.R. 423; 56 Sol. Jo. 552]

Infant—Contract—Trading contract—Liability for breach—Money obtained ex delicto—Recovery from infant in action for money had and received.

A trading contract entered into by an infant who is carrying on business does not come within the class of personal contracts which, if entered into for the benefit of the infant, can be enforced against him. If it appears, however, that an infant has obtained money ex delicto an action for money had and received will lie against him.

Notes. Considered: *Stocks* v. *Wilson*, [1913] 2 K.B. 235. Referred to: *Roberts* v. *Gray*, post p. 870; *R. Leslie, Ltd.* v. *Shiell*, [1914–15] All E.R. Rep. 511; *Mercantile Union Guarantee Corpn., Ltd.* v. *Ball*, [1937] 3 All E.R. 1.

As to infants entering into contracts, committing torts and crimes, see 21 Halsbury's Laws (3rd Edn.) 138 et seq., and for cases concerning trading contracts entered into by infants, see 28 Digest (Repl.) 517, 518.

Cases referred to:

(1) *Earl of Buckingham* v. *Drury* (1762), 2 Eden, 60; 28 E.R. 818, H.L.; 28 Digest (Repl.) 521, *381.*

(2) *Bristow* v. *Eastman* (1794), 1 Esp. 172; Peake, 291, N.P.; 28 Digest (Repl.) 526, *419.*

(3) *Re Seager, Seeley* v. *Briggs* (1889), 60 L.T. 665; 28 Digest (Repl.) 524, *404.*

(4) *Thornton* v. *Illingsworth* (1824), 2 B. & C. 824; 4 Dow. & Ry. K.B. 545; 2 L.J.O.S.K.B. 175; 107 E.R. 589; 32 Digest 356, *387.*

Also referred to in argument:

Re Jones, Ex parte Jones (1881), 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193; 29 W.R. 747, C.A.; 28 Digest (Repl.) 522, *387.*

Thurstan v. *Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1; 71 L.J.Ch. 83; 86 L.T. 35; 50 W.R. 179; 18 T.L.R. 135; 46 Sol. Jo. 102, C.A.; on appeal sub nom. *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A.C. 6; 72 L.J.Ch. 134; 87 L.T. 529; 67 J.P. 129; 51 W.R. 273; 19 T.L.R. 54, H.L.; 32 Digest 287, *649.*

Chapple v. *Cooper* (1844), 13 M. & W. 252; 13 L.J.Ex. 286; 3 L.T.O.S. 340; 153 E.R. 105; 28 Digest (Repl.) 514, *300.*

Maddon d. Baker v. *White* (1787), 2 Term. Rep. 159; 100 E.R. 86; 28 Digest (Repl.) 548, *641.*

Zouch d. Abbot and Hallet v. *Parsons* (1765), 3 Burr. 1794; 1 Wm. Bl. 575; 97 E.R. 1103; 28 Digest (Repl.) 486, *28.*

Clarke v. *Cobley* (1789), 2 Cox, Eq. Cas. 173; 30 E.R. 80; 28 Digest (Repl.) 525, *413.*

Bruce v. *Warwick* (1815), 6 Taunt. 118; 128 E.R. 978, Ex.Ch.; 28 Digest (Repl.) 502, *185.*

Cory v. *Gertcken* (1816), 2 Madd. 40; 56 E.R. 250; 28 Digest (Repl.) 523, *392.*

Corpe v. *Overton* (1835), 10 Bing. 252; 3 Moo. & S. 738; 3 L.J.C.P. 24; 131 E.R. 901; 28 Digest (Repl.) 508, *216.*

Esron v. *Nicholas* (1733), 1 De G. & Sm. 118; 63 E.R. 996; sub nom. *Evroy* v. *Nicholas*, 2 Eq. Cas. Abr. 488, L.C.; 28 Digest (Repl.) 548, *640.*

Ketsey's Case (1613), Cro. Jac. 320; 79 E.R. 274; sub nom. *Keteley's Case*, 1 Brownl. 120; sub nom. *Kirton* v. *Eliott*, 2 Bulst. 69; 28 Digest (Repl.) 542, *576.*

Clements v. *London and North Western Rail. Co.*, [1894] 2 Q.B. 482; 63 L.J.Q.B. 837; 70 L.T. 896; 58 J.P. 818; 42 W.R. 663; 10 T.L.R. 539; 38 Sol. Jo. 562; 9 R. 641, C.A.; 28 Digest (Repl.) 500, *175*. A

Appeal from a decision of His Honour JUDGE HOWARD SMITH, sitting at the Wolverhampton County Court.

The plaintiff entered into a contract with the defendant, an infant, who carried on business as a hay and straw merchant, for the supply of clover and hay. The defendant delivered the clover, which was rejected by the plaintiff as bad, and failed to deliver the hay. Before the rejection of the clover the plaintiff had sent the defendant a cheque for £35 19s. in payment of the clover and hay, and as the defendant declined to return the cheque the plaintiff brought an action against him claiming to recover the amount of the cheque as damages for breach of contract, and in the alternative as money paid upon a consideration which had failed. At the trial in the county court the judge found against the defendant on the merits of the case. There was some doubt whether the plea of infancy had been strictly proved, but, assuming this to be the case, he held that, as the defendant was an infant and was trading and the contract was for his benefit, the plaintiff was entitled to recover. He, therefore, gave judgment in his favour for £35 19s. B C D

Hogg for the defendant.
Merlin for the plaintiff.

PHILLIMORE, J.—In this case an action was brought in the county court for money had and received. The case made by the plaintiff was that he had been induced, as the result of some correspondence with the defendant, to order some rotten clover of which he was entitled to refuse to take delivery, and did so refuse, and also some hay which was never delivered by the defendant. He gave the defendant a cheque for the price of the goods, and by his action he sought to recover the amount of the cheque. The defendant fought the case on the merits and also gave notice of a plea of infancy. He lost the case upon the merits, and then the learned judge had to give his decision on the plea of infancy. There was some question as to whether that plea was strictly proved, but there was no real or substantial doubt that the defendant was an infant. Assuming this to be the case, the learned judge held that as the defendant was trading and the contract was for his benefit, the plaintiff was entitled to recover. E F

In a general sense contracts which can be brought within certain categories and are also for the benefit of the infant can be supported. A trading contract does not come within any of these categories. That is quite clear from the authorities which have been cited. The only contracts of an infant which can be enforced are those which relate to the infant's person, as contracts by which he provides himself with clothes, food, or lodging, or suitable tuition or contracts of marriage, apprenticeship, or service. Counsel for the plaintiff has suggested that *Earl of Buckingham* v. *Drury* (1) shows that there is a further class of a contract arising out of marriage by which an infant wife can bind herself. I doubt whether that case was a case of contract at all. The question there was whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her in bar of her dower, was thereby bound and barred of dower within the statute 27 Hen. 8, c. 10. The Lord Chancellor, LORD HENLEY, held in favour of the infant, but the House of Lords reversed that decision and held that the widow, who had married as an infant was precluded from claiming her dower and her share of her husband's personal estate under the Statute of Distributions by reason of the jointure contained in her marriage settlement to which she was in fact a party. Both LORD HARDWICKE and LORD MANSFIELD, however, disclaimed deciding the point on a question of contract. The Act of 18 & 19 Vict., c. 43, passed to enable infants, "with the approbation of the Court of Chancery to make binding settlements of their real and personal estate on marriage" recites that G H I

A "whereas great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property"

and proceeds to enable them with the assistance of the Court of Chancery, to make such settlements. That recital is conclusive as to the state of the law on that subject.

B What is left? An infant is liable ex delicto, but not ex contractu. If an infant has acquired personal property which he has no right to acquire, an action of trover or detinue will lie against him, and in *Bristow* v. *Eastman* (2) LORD KENYON thus expresses himself

"that infancy was no defence to the action [i.e., for money had and received], that infants were liable to actions ex delicto, though not ex contractu, and C though the present action was in its form an action of the latter description, yet it was of the former in point of substance."

That shows that an action for money had and received can be maintained against an infant if the substance of the action is that the infant has obtained the money ex delicto. That view received the further authority of KAY, J., in *Re Seager*, *Seely* v. *Briggs* (3).

D Such a cause of action may still be open to the plaintiff in the present case. If he can satisfy the judge that the infant, supposing infancy is strictly proved, obtained this cheque by fraud, then an action for money had and received can be supported, but if not, then it cannot. None of the cases cited adds anything to what I have already said—i.e., that an infant can validly contract and bind himself E in regard to certain personal contracts for personal purposes, and that there are certain other contracts which are avoidable at the election of the infant, but which he can approbate and having approbated them he can enforce them or be sued upon them. That, however, does not let in the suggestion made by the respondent in this case that ratification would be a good reply to the plea of infancy. *Thornton* v. *Illingworth* (4) shows that that is not so, when the ratification has been made F after writ issued. Therefore, I am of opinion that this appeal must be allowed and that the case must go back for a new trial in order that the plaintiff may have an opportunity of showing, if he can, that this money was had and received to the plaintiff's use because the defendant got it from the plaintiff by fraud. The defendant will have his costs of this appeal, and the cost of the first trial will follow the event of the second trial.

G **BRAY, J.**—I am of the same opinion. The learned county court judge found that this contract was for the infant's benefit, and having found that fact he ruled, as a matter of law, that the action was maintainable against the infant. In my opinion he was wrong in so holding. It is true that there are certain contracts which, if it is proved that they are for the benefit of the infant, can be enforced against the infant. The present case, however, is concerned with a trade debt H and nothing more. The defendant was set up in business and was dealing in hay and clover, and plaintiff agreed to buy some hay and clover from him, and paid him in advance. Now, whatever the exceptions to the rule that an infant cannot make a binding contract may be, I am satisfied that there is no exception applicable to an ordinary trading contract. It was suggested to us that a man had got to learn a trade, and the question was asked why he should not begin to learn it when I he was an infant. If that were so, every infant might trade, and would be responsible for every contract made for his benefit. There is no case in the books in which an infant has been held liable upon such a contract.

It was said that the present action was one for money had and received, and that there were cases which showed that a plaintiff has been held entitled to recover against an infant for money had and received in an action founded on contract. In *Bristow* v. *Eastman* (2) and *Re Seager*, *Seely* v. *Briggs* (3), to which we were referred, it appears that the judges decided that although in form the action of

money had and received is an action of contract, yet the court might look at the substance of the matter, and if in substance the action was brought ex delicto and not ex contractu, the infant might be liable. In this case we think that the plaintiff ought to have an opportunity of proving, if he can, that this really was in substance a matter arising ex delicto, and for this reason there must be a new trial.

New trial ordered.

Solicitors: *Thorne, Robinson & Co.*, for *Thorne & Haslam*, Wolverhampton; *Waterhouse & Co.*, for *Sherratt & Nelson*, Kidsgrove.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

R. *v.* CHANDLER

[COURT OF CRIMINAL APPEAL (Lord Alverstone, C.J., Channell and Avory, JJ.), November 18, 1912]

[Reported [1913] 1 K.B. 125; 82 L.J.K.B. 106; 108 L.T. 352; 77 J.P. 80; 29 T.L.R. 83; 57 Sol. Jo. 160; 23 Cox, C.C. 330; 8 Cr. App. Rep. 82]

Criminal Law—Shopbreaking—Knowledge of owner of premises that offence to be committed.

The appellant suggested to a servant of the prosecutrix a plan by which the appellant could commit a robbery at the shop of the prosecutrix. The servant, pretending to agree with the suggestion, lent the keys of the shop to the appellant. The appellant then made duplicate keys and with one of them, on a day arranged with the servant, unlocked a padlock attached to the outer door and entered the shop, where he was arrested. The prosecutrix had been told by her servant of the appellant's plan, and knew that he intended to enter the shop on the day arranged. The appellant was convicted of breaking and entering the shop with intent to steal therein.

Held: the conviction was right, although the prosecutrix knew that her servant had enabled the appellant to break and enter the shop.

R. v. *Johnson* (1) (1841), Car. & M. 218, distinguished.

Notes. As to burglary and housebreaking, see 10 HALSBURY'S LAWS (3rd Edn.) 801 et seq., and for cases see 15 DIGEST (Repl.) 1127 et seq.

Case referred to:

(1) *R.* v. *Johnson* (1841), Car. & M. 218; 15 Digest (Repl.) 1130, *11,308*.

Also referred to in argument:

R. v. *Lawrence* (1850), 14 J.P. 561; 4 Cox, C.C. 438; 15 Digest (Repl.) 1056, *10,400*.

Appeal from a conviction at the Birmingham Quarter Sessions of breaking and entering a shop.

The appellant had become acquainted with one, Lorie, the manager of the prosecutrix, Henrietta Aaron, a pawnbroker, and suggested a plan by which he (the appellant) might rob the shop. Lorie pretended to agree, but in reality informed the prosecutrix and the police authorities, and subsequently acted under the instructions of the police. Lorie then, pretending to assist the appellant, lent him the keys of the shop. The appellant took impressions of the keys and made duplicates, returning the original keys to Lorie. It was arranged that the robbery should be committed on July 31, and Lorie so informed the prosecutrix and the police. On the afternoon

of that day, no one being on the premises, the appellant unlocked a padlock on the outer door with a duplicate key and entered the shop. While there he was arrested by police officers, who were on the watch close by. He was tried and convicted for breaking and entering the shop with intent to steal therein.

Hugo Young, K.C. (*H. H. Joy* with him) for the appellant.

J. G. Hurst for the prosecution.

The judgment of the court was delivered by

AVORY, J.—The question is whether *R.* v. *Johnson* (1) is an authority which applies to this case. The evidence in the case shows that the appellant used a key with which he unlocked a padlock on a door, and broke and entered the premises of the prosecutrix, and it is not denied that he broke and entered with intent to steal. The appellant, therefore, in the first place did everything necessary to complete the offence of shopbreaking. But it has been contended that, because the appellant had been supplied by the servant of the prosecutrix with the means of obtaining the key with which he unlocked the padlock, the entry of the appellant was with the assent of the prosecutrix, and that therefore the offence charged has not been proved. In our opinion, although the prosecutrix knew quite well what was going to be done, she did not assent to the breaking and entering by the appellant for the purpose of stealing. The keys were supplied to the appellant merely in order that he might be detected; that did not make the servant an accomplice or make the breaking and entering lawful. The distinction between the case of *R.* v. *Johnson* (1) and the present case is that there the prisoner entered through an open door and therefore there was no breaking, but here the appellant broke open the door with a key before entering, and did so with intent to steal. That distinction is sufficient ground for saying that *R.* v. *Johnson* (1) is not an authority on the facts of this case, and, if that case does not apply, the appellant was rightly convicted. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Philip Baker & Co.*, Birmingham; *J. E. Hill*, Birmingham.

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

A

R. *v.* BYLES AND OTHERS. Ex parte HOLLIDGE

[King's Bench Division (Lord Alverstone, C.J., Channell and Avory, JJ.), October 30, 31, 1912]

[Reported 108 L.T. 270; 77 J.P. 40; 23 Cox, C.C. 314]

B

Certiorari—Magistrates—Interest in subject-matter of dispute—Objection not taken during hearing.

When a case is heard before a court of summary jurisdiction, the defendant or his solicitor must take objection to the presence on the Bench of any justice who is alleged to have an interest in the subject-matter of the case, if he is aware of the existence of such interest, before the merits of the case are gone into. If the defendant, or his solicitor, fails to take such objection and the defendant is afterwards convicted, he cannot then come to the Divisional Court and obtain a writ of certiorari to quash the conviction on the ground that one of the justices had an interest in the matter.

C

Notes. As to disqualification for acting as justice, see 25 Halsbury's Laws (3rd Edn.) 131–136, and for cases see 33 Digest 288 et seq. The Public Health (Buildings in Streets) Act, 1888, is repealed by the Highways Act, 1959.

D

Cases referred to:

(1) *R.* v. *Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R.* v. *Harrison*, 24 W.R. 392; 33 Digest 294, *100*.

(2) *R.* v. *Lancashire Justices* (1906), 75 L.J.K.B. 198; 94 L.T. 481; 70 J.P. 337, D.C.; 33 Digest 299, *138*.

E

Also referred to in argument:

R. v. *Middlesex Justices* (1854), 2 W.R. 459; 18 J.P. Jo. 390, D.C.; 33 Digest 300, *146*.

R. v. *Richmond, Surrey, Justices* (1860), 2 L.T. 373; 24 J.P. 422; 8 Cox, C.C. 314; 33 Digest 300, *147*.

F

R. v. *Kent Justices* (1880), 44 J.P. 298; 33 Digest 301, *154*.

R. v. *Budden, etc., Kent Justices* (1896), 60 J.P. 166, D.C.; 33 Digest 299, *140*.

R. v. *Henley*, [1892] 1 Q.B. 504; 61 L.J.M.C. 135; 66 L.T. 675; 56 J.P. 391; 40 W.R. 383; 36 Sol. Jo. 233; 17 Cox, C.C. 518, D.C.; 33 Digest 297, *121*.

G

Rule Nisi directed to Walter Barnard Byles, and eight other justices of the county of Middlesex, sitting at Uxbridge, to show cause why a writ of certiorari should not issue to remove into the High Court a conviction obtained against the applicant, Walter Hollidge, on July 8, 1912, for that he had on June 1, 1912, in the parish of Ruislip and within the urban district of Northwood, unlawfully commenced to erect a building in the West End Road, Ruislip, without having obtained the written consent of the Ruislip-Northwood Urban District Council, the urban authority for the said district, contrary to s. 3 of the Public Health (Building in Streets) Act, 1888. The ground upon which the rule was made was that one of the justices, a Mr. Elgood, was the chairman of the Ruislip-Northwood Urban District Council; that it was he who had been instrumental in instituting the prosecution in the case; that he was, as it was alleged, interested in the conviction of Hollidge; and that he sat on the Bench as one of the justices who directed the conviction. The case was the seventh to be heard at the petty sessions at Uxbridge on July 8, 1912. Mr. Elgood, the chairman of the district council, had taken part in all the preceding cases, but when that of Hollidge came on he retired to the end of the row of the justices, took no part in the hearing of the same, and did not accompany the other justices to their private room when they retired to consider their decision, which resulted in the conviction of Hollidge by a majority of four to three, a fine of 40s. being imposed together with ten guineas costs. Mr.

H

I

Elgood himself denied that he communicated in any way with any of his brother magistrates, or that he took any part in the hearing, either directly or indirectly. The applicant and his solicitor, on the other hand, stated that Mr. Elgood smiled during the giving of the evidence, and they also pointed out that he was responsible for the institution of the prosecution.

D. Cotes-Preedy for the justices.

Macmorran, K.C., and *Joshua Scholefield* for the urban district council.

Courthope-Munroe (*Graham Mould* with him) for the applicant.

LORD ALVERSTONE, C.J.—I am clearly of opinion that this rule must be discharged. I have frequently had to refer to a matter of this kind, and I have over and over again approved of the general principle laid down by Blackburn, J., in *R.* v. *Meyer* (1), that a justice ought not to sit upon the Bench if a case is being heard in which he is an interested party even though he takes no part whatever either in the hearing or in the decision. And in *R.* v. *Lancashire Justices* (2) I expressed my opinion that it was of great importance that persons who are interested should not even appear to form a part of the court, nor place themselves in such a position during the hearing of the case as might tend to the belief that they could exert any influence over the decision of the court. Upon the affidavits now before us I am not satisfied that anyone could have imagined that Mr. Elgood did form any part of the petty sessional court at Uxbridge during the hearing of the case in which Mr. Hollidge was concerned. Still there might be a difference of opinion, especially as Mr. Elgood had taken part in the hearing of the previous cases. But I do not arrive at my decision in the present instance upon that part of the case. What I am perfectly clear about is this, that both Mr. Hollidge and his solicitor knew of the presence of Mr. Elgood upon the Bench, and made no protest against it. They kept this point in reserve. When an application like the present is made, it is necessary for the applicant to satisfy the court that he had no knowledge of the point at the time when it might have been raised. This is clearly not so in the present instance, and for that reason the rule must be discharged.

CHANNELL, J.—I agree. There is no doubt whatever as to the principle which is involved; the difficulty lies in its application. On the facts before us Mr. Elgood did not appear to take any part in the proceedings, nor did he appear to be a member of the court. But if he had appeared to be a member of the court, the mere fact that he took no part in the hearing of the case would not be sufficient to put matters right.

AVORY, J.—The principle involved in the present case has been stated by a great authority to be "that it is as important, if not more important, that justice should seem to be done, as that it should be done." That being so, I prefer to base my judgment upon the second point which has been raised before us rather than upon the first. I am satisfied that both the applicant and his solicitor knew of the position occupied by Mr. Elgood, and were well aware of the fact that an objection might have been raised in the first instance, if there was the slightest suspicion of an appearance on his part that he was taking any part in the hearing. No objection was taken, and therefore the point was distinctly waived, possibly with a view of raising it later on when questioning the proceedings in the petty sessional court. I agree that the rule must be discharged.

Rule discharged.

Solicitors: *Woodbridge & Sons; Charles Rogers, Sons & Abott; Henry Pumfrey & Son.*

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

A

HOWLEY PARK COAL AND CANNEL CO. *v.* LONDON AND NORTH WESTERN RAIL. CO.

[House of Lords (Viscount Haldane, L.C., the Earl of Halsbury, Lord Atkinson and Lord Shaw), October 29, 31, November 1, 1912]

B

[Reported [1913] A.C. 11; 82 L.J.Ch. 76; 107 L.T. 625; 29 T.L.R. 35; 57 Sol. Jo. 42]

Railway—Lateral support—Adjacent mine—Support from land outside the forty yards limit—Railways Clauses Consolidation Act, 1845 (*8 & 9 Vict., c.* 20), *ss.* 77–85.

A railway company purchased land from a vendor subject to the provisions of the Railways Clauses Consolidation Act, 1845. C

Held: the railway company acquired a right of support from minerals lying under lands belonging to the vendor at a distance from the railway of more than the forty yards mentioned in ss. 77–85 of the Act, as a natural right of property not arising out of grant.

D

Notes. Referred to: *St. John Peerage Claim*, [1915] A.C. 282; *London and North Eastern Rail. Co.* v. *Hardwick Colliery Co.*, [1935] Ch. 203; *London and North Eastern Rail. Co.* v. *B. A. Collieries, Ltd.*, [1945] 1 All E.R. 51; *Ilkeston Collieries, Ltd.* v. *Grand Union Canal Co.* (1946), 175 L.T. 12; *Newcastle-under-Lyme Corpn.* v. *Wolstanton, Ltd.*, [1947] 1 All E.R. 218.

As to right of support affecting mines, see 26 Halsbury's Laws (3rd Edn.) 339 et seq., and for support in the case of railways, see ibid. pp. 353 et seq., and for cases see 11 Digest (Repl.) 164 et seq. For the Railways Clauses Consolidation Act, 1845, ss. 77–85, as enacted or as amended by the Mines (Working Facilities and Support) Act, 1923, see 19 Halsbury's Statutes (2nd Edn.) 633–638. E

Cases referred to:

(1) *Dixon* v. *Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820; 43 L.T. 518; 45 J.P. 108; 29 W.R. 249, H.L.; 11 Digest (Repl.) 168, *395*. F

(2) *Midland Rail. Co.* v. *Miles* (1885), 30 Ch.D. 634; 55 L.J.Ch. 251; 53 L.T. 381; 34 W.R. 136.

(3) *Great Western Rail. Co.* v. *Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, *375*. G

(4) *New Moss Colliery, Ltd.* v. *Manchester Corpn.*, [1908] A.C. 117; 77 L.J.Ch. 392; 98 L.T. 467; 72 J.P. 169; 24 T.L.R. 386; 6 L.G.R. 809; sub nom. *Manchester Corpn.* v. *New Moss Colliery, Ltd.*, 52 Sol. Jo. 334, H.L.; 11 Digest (Repl.) 166, *383*.

(5) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 7, *4*. H

(6) *Humphries* v. *Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries* v. *Brogden*, 15 Jur. 124; 19 Digest 165, *1150*.

(7) *Buchanan* v. *Andrew* (1873), 2 Sc. & Div. 286; sub nom. *Henderson* v. *Andrew*, 37 J.P. 436, H.L.; 34 Digest 704, *926*. I

Also referred to in argument:

Fletcher v. *Great Western Rail. Co.* (1859), 4 H. & N. 242; 28 L.J.Ex. 147; affirmed sub nom. *Great Western Rail. Co.* v. *Fletcher* (1860), 5 H. & N. 689; 29 L.J.Ex. 253; 2 L.T. 803; 6 Jur. N.S. 961; 8 W.R. 501; 157 E.R. 1355; 24 J.P. 516, Ex.Ch.; 11 Digest (Repl.) 164, *373*.

Holliday v. *Wakefield Corpn.*, [1891] A.C. 81; 60 L.J.Q.B. 361; 64 L.T. 1; 40 W.R. 129; 7 T.L.R. 153, H.L.; 11 Digest (Repl.) 170, *407*.

A *Glasgow Corpn.* v. *Farie* (1888), 13 App. Cas. 657; 58 L.J.P.C. 33; 60 L.T. 274; 37 W.R. 627; 4 T.L.R. 781, H.L.; 11 Digest (Repl.) 163, *363.*

Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co. v. *Robinson* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100, H.L.; 11 Digest 162, *353.*

Ruabon Brick and Terra Cotta Co. v. *Great Western Rail. Co.*, [1893] 1 Ch. B 427; 62 L.J.Ch. 483; 68 L.T. 110; 41 W.R. 418; 9 T.L.R. 121; 2 R. 237, C.A.; 11 Digest (Repl.) 168, *393.*

Re Lord Gerard and London and North Western Rail. Co., [1895] 1 Q.B. 459; 64 L.J.Q.B. 260; 72 L.T. 142; 43 W.R. 374; 11 T.L.R. 170; 14 R. 201, C.A.; 11 Digest (Repl.) 163, *365.*

Williams v. *Bagnall* (1866), 12 Jur. N.S. 987; 15 W.R. 272; 34 Digest 703, *925.*

C *Dixon* v. *White* (1883), 8 App. Cas. 833, H.L.; 34 Digest 708, *946.*

Aspden v. *Seddon* (1875), 10 Ch. App. 394; 44 L.J.Ch. 359; 32 L.T. 415; 39 J.P. 597; 23 W.R. 580, L.JJ.; 34 Digest 710, *956.*

Pountney v. *Clayton* (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283; 47 J.P. 788; 31 W.R. 664, C.A.; 11 Digest (Repl.) 302, *2088.*

D **Appeal** from a decision of the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and BUCKLEY, L.JJ.), reported [1911] 2 Ch. 97, reversing a decision of EVE, J., reported 103 L.T. 261.

The London and North Western Railway, the respondents, were owners of a tunnel near Morley in the county of York. The appellants were the lessees of various seams of coal, and, among others, of a seam known as Top Beeston Bed Seam near the Morley tunnel. The coal in this seam was situate beyond forty yards E from the site of the tunnel. In an action in which the respondents were the plaintiffs and the appellants, the defendants, EVE, J., ordered that the appellants be perpetually restrained from working the Top Beeston Bed Seam outside the distance of forty yards from the tunnel site in such a manner as to withdraw lateral support from the tunnel. This decision was reversed by the Court of Appeal, and the appellants appealed.

F *Sir A. Cripps, K.C., P. O. Lawrence, K.C., J. Dixon* and *Ashworth James* for the appellants.

Sir R. Finlay, K.C., Ernest Page, K.C., MacSwinney and *Tweedale* for the respondents.

VISCOUNT HALDANE, L.C.—The question in this appeal is purely one of G law, and I find myself in such complete agreement with the judgments in the Court of Appeal that I do not feel it necessary to take time to consider further the reasons which I am going to offer to your Lordships for recommending an affirmance of the judgment.

The London and North Western Rail. Co., who are the respondents to the appeal, are owners, as part of the Yorkshire Railway, of a tunnel near Morley. The H appellants are the lessees of various seams of coal, and, among others, of a seam known as the Top Beeston Bed Seam, which lies near the Morley tunnel, and the coal of it, at present in question, is situate beyond forty yards from the site of the tunnel. The question to be determined, is whether the railway company were entitled to an injunction to restrain the appellants from so working their Top Beeston Bed Seam as to deprive the tunnel of its lateral support. Broadly I put, it is whether as between a vendor of land to a railway company and the railway company, upon a purchase subject to ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, a set of clauses which are commonly called the "Mining Code," the railway company acquires of right a support from minerals belonging to the vendor lying under other lands outside the distance of forty yards from the railway. The question turns upon the construction which is to be put upon the set of clauses in the Act of 1845, known as the "Mining Code." These clauses were introduced for the purpose of facilitating transactions between a railway company

and a landowner from whom land was acquired. They were passed to render it unnecessary for the railway company to purchase out and out the minerals which were necessary for the support of the railway. It might be some time before the taking away of these minerals would affect the support, and therefore it was thought less burdensome to the railway company that the owner of the land should be left with considerable freedom, and accordingly it was provided by s. 77 that the railway company should not get the minerals unless they were expressly conveyed to them. That was the starting point of the catena of propositions in the code. In the second place it was provided that the mineral owner should be free to work, provided always that he gave a thirty days notice to the railway company, which the railway company could meet by giving a counter-notice enabling them to stop the working by paying compensation, which might or might not amount to the whole value of the minerals.

It was decided by this House in a case which turned upon the corresponding sections, in practically identical terms, of the Scottish Railways Clauses Act, *Dixon* v. *Caledonian and Glasgow and South Western Rail. Co.* (1), that railway companies were free to give that counter-notice at any time, so that the effect of ss. 78 and 79 is this, that the railway company is protected, and the position of the landowner is easier. He may be able to work a considerable part of his minerals, and when the railway company require to stop him they have had full notice and can then give their counter-notice dealing with him at a later stage than the stage of the initial purchase of the land. That being so, it was natural that the legislature should go on to enact other clauses. Those clauses amount to this, that if the working is prevented by the railway company having given that counter-notice, then the owners of the minerals might make such ways for air, water, access, and so on, as would enable them to get the minerals without letting down the surface. If, upon the other hand, no counter-notice had been given, and the mineral owner chose to work, then he was to be at liberty to work, even to the extent of letting down the surface, so long as he worked in accordance with the ordinary customary fashion, and the railway company had, of course, the protection that, according to the doctrine of *Dixon* v. *Caledonian and Glasgow and South Western Rail. Co.* (1) they could give their counter-notice at any time, subject to this, that, so far as the minerals had already been worked out, the notice could not affect the state of things which had come into existence.

In that position of matters, with the law so ascertained, and with the statute, what is the position of a railway company which is situated as the London and North Western Rail. Co. is situated in this case? It has acquired the site of the tunnel, and it has acquired the protection which the statute gives as regards what is called the prescribed limit on each side of the tunnel, that is to say forty yards, in the absence of any variation in the special Act. Within these limits it has protection for its support under the railway and on each side of the railway. It has not only vertical support, but it has also lateral support, and it can make this support safe by putting in motion the machinery of the Mining Code. But the question in this case is as to how it stands as regards minerals outside the prescribed limits, because the minerals with which we have to deal are really outside these limits, and the question which is raised, as stated in argument, is this, whether the code is a new and exclusive code, which lays down the law for the two parties, so as to get rid altogether of any right at common law to lateral support, whether within the prescribed limits or without them. Now, that depends upon the construction of the sections, and when I turn to the sections the first words which I find are the words on which reliance was placed by the counsel for the appellants; the title which introduces the succession of sections is, "And with respect to mines lying under or near the railway, be it enacted as follows." But although the word used there is "near," it is plain when you pass to s. 78 that you find an interpretation of the word "near" by the prescribed distance. I do not say that it is the only meaning which could be attached to the word "near." In *Midland Rail. Co.* v.

Miles (2) PEARSON, J., suggested that the section which enabled ways to be made for the working of adjacent mines related to mines outside the forty yards limit. If so, that would give a further interpretation to the word "near." It is not necessary in this case to express any opinion as to whether PEARSON, J., was right or wrong in that case. It is sufficient to point out what he is said to have decided is very remote from anything which can assist the appellants in this case. It only shows, if he is right, that in the particular instance with which his Lordship was dealing there, of a way made to obtain access to a mine lying at a short distance, the mine might be outside the forty yards limit. I express no opinion upon that, because it is not necessary for the decision of the only question which we have before us, and that is whether ss. 78, 79, 80, and the subsequent sections relate to anything but minerals either under the railway or within the forty yards limit. For the reasons which were admirably given in the judgment of the Master of the Rolls, I think that they do not relate to any minerals outside these limits. It is plain that the legislature had in view what was to take place within these limits, and was not thinking of anything beyond.

Then it is said that, the words being what they are, there has been a decision of this House in *Great Western Rail. Co.* v. *Bennett* (3) which is in effect a decision that the sections apply to minerals which are outside the forty yards limit, because it has been discovered apparently since the hearing of that case, from an examination of the record, that part of the land in question, a small part I think, but still some part, was outside the limits. I can only say that I cannot regard that decision as an authority for the proposition that the sections apply to land outside the limit. The question whether the sections apply beyond the limit was not one which was present to the mind of the House, so far as one can discover from an examination of the terms of the judgment or of the arguments, and I do not think that a decision of this House on a point which was not presented, from mere implication of general words, can be relied upon as laying down a proposition which is binding by way of authority. To the other authorities quoted I make very little reference because they are purely negative. *New Moss Colliery, Ltd.* v. *Manchester Corpn.* (4), a case which was also decided in this House, was not only decided on a different statute, but related to quite a different point, and I do not think that much reliance was placed on it in the argument, nor is it an authority for the proposition put forward. Then as to the other authorities which were mentioned, they are purely negative, and lend no support to the appellants' arguments.

When you look at the matter on principle, free as it is from authority, it stands thus: The right to lateral support is not an easement which arises out of a grant or by some implication of the desire of the predecessor in title in making the conveyance. It is a mutual right of property. By the law of this country, and by the law of other countries, when a man has got land he is entitled to look to his neighbour whose land is laterally supporting the land which belongs to himself not to use that neighbour's property in such a way as to do injury to him. There is an obligation on the neighbour, and in that sense there is a correlative right on the part of the owner of the first piece of land, but the right is what has been described as a natural right of property, and does not arise out of grant. It is not necessary for me to enter upon the authorities for this proposition, which was one of the few, which were agreed upon by all, or nearly all, the learned judges who decided the great case of *Dalton* v. *Angus* (5). But if that be so, then in order to take away such a natural right of property you must look for something more than a conjectural intention on the part of any statute which may affect it; you would expect to find a plain indication of intention. Now, from the beginnning to the end of the group of sections with which we are dealing I can find no such intention. I find a clear intention to deal with subjacent and lateral support underneath the railway and within the prescribed limits. That was the very purpose for which the code was introduced, but, with that dubious exception which was referred to by PEARSON, J. in *Midland Rail. Co.* v. *Miles* (2), I cannot find anything inside the group of sections

which in any way bears upon the proposition that lateral support outside the limits is taken away. The notice and counter-notice clauses and the compensation clause all relate to matters within the prescribed area, and I find no machinery provided for the protection of the railway as regards the natural right of support from land lying beyond. It may be that the result of this case, and modern methods of working, may lead the parties on both sides to scrutinise anew their practice in making this bargain. What we have to do is to decide the question of law as submitted to us, and speaking for myself, I cannot entertain a doubt that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed, and I move your Lordships accordingly.

THE EARL OF HALSBURY.—I concur in the opinion which the LORD CHANCELLOR has delivered.

LORD ATKINSON.—I concur.

LORD SHAW.—Speaking for myself, in view of the importance of the question, I should have liked to have had time to consider the judgments to be delivered; but, on the other hand, I do not dissent from—on the contrary, I most heartily assent to—the conclusions reached by your Lordships, and for the reasons which have been stated by the Lord Chancellor. From one point of view I approach this question from a different standpoint. I have been accustomed to the jurisprudence of Scotland. With regard to that jurisprudence I may say quite frankly, and I hope that it will never be doubted, that upon this part of the law there is essentially no difference between the law relating to the rights of railway companies and coterminous owners in Scotland and in England. My view of the whole matter may be put in this proposition, that there is between the owners of coterminous properties a reciprocal right to lateral support for their respective lands, and a reciprocal duty upon the part of each owner to respect that right on the part of the other. That is not of the nature either of a servitude in Scotland or of an easement in England.

The whole of this branch of the law was dealt with very fully in the judgment delivered by LORD CAMPBELL, C.J., in *Humphries* v. *Brogden* (6), and that learned judge there cited a passage from ERSKINE bearing upon the same matter, and that passage I will respectfully cite to the House. LORD CAMPBELL dealt with the question as one of natural right, and he dealt with a question very frequently found in Scotland of the application of that principle of natural right to the case of tenement houses, in which, during a long period in the history of Scotland, there has been a variety of ownership in the various flats. LORD CAMPBELL cited the principle given by ERSKINE as exactly the same as that applicable to land laterally owned. ERSKINE says (INSTITUTE OF THE LAWS OF SCOTLAND, bk. 2, tit. 9, s. 11):

> "Where a house is divided into different floors or stories, each floor belonging to a different owner, as frequently happens in the city of Edinburgh, the property in the house cannot be said to suffer a full or complete division. The proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper storey, but to repair his own property."

But the whole of this part of the law is brought to a focus in the dictum of BELL in his PRINCIPLES OF THE LAW OF SCOTLAND (9th Edn.) applicable to the law of both countries, in which he quotes with high approval this clause (s. 965):

> "A proprietor's absolute use of his land is limited by the neighbourhood, so far as he is obliged to afford his neighbour's property such support as its natural situation in relation to his requires. So far at least as the natural soil is concerned, the reciprocal right of support exists as a common law right incident to the ownership of land both in England Scotland, the rules of law in both countries being the same, whether the support required is lateral as in the ordinary case of adjoining superficial estates, or vertical when the mineral strata are separated from the estate in the surface."

That in terms applies to the case which is before us but for the argument which has been presented by counsel for the appellants, that this natural right, and the doctrine which enforces it, are excluded by reason of the provisions of the Railways Clauses Act. With reference to that I lay down the first proposition, which is that, this being a fundamental natural right, it is open, of course, to show that ex contractu, or by reason of the statute, it has been excluded; but it must be excluded in the most express terms. A case which was very anxiously considered at the time, and has been the subject of much comment since, was *Buchanan* v. *Andrew* (7) in this House, where the House of Lords, reversing the unanimous judgment of the Scottish court, decided that there was such a contract which excluded the right to support. In this case what have we? It appears to me, upon a view of those sections, that instead of there being an exclusion of the right of support for property acquired by way of purchasing title by the railway company since the date of its giving notice to treat, there is throughout these sections a marked incidence of the Parliamentary mind to this effect, that there is a fundamental, or, I might put it, a pre-eminent, right of support guaranteed under the statute.

There are provisions for the purchase of the immediately subjacent minerals. There are provisions for the prevention of the working of the immediately subjacent minerals. There are provisions for the prevention of the working of minerals within an area of forty yards on either side of the line unless there be a contract to the contrary; but then there is 80 which appears to me to be of the utmost importance, and to bear directly upon the point which is before the House, because that section provides as follows:

> "If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom [that is to say, within the forty yards to which I have referred] be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, or occupiers of such mines, whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work the said mines, but no such airway, . . . shall be of"

certain dimensions; then follow these words,

> "nor shall the same be cut or made upon any part of the railway or works so as to injure the same, or to impede the passage thereof."

Then follows s. 81, which is a provision for the connection of the working of coal measures extending on both sides of the railway, and even on both sides of the forty yards limit, and that provision for inter-communication of the workings is by statute expressly provided to be under such restrictions as not to prejudice or injure the railway. In the present case what has been done, or what, as the result of the argument being successful might be done, would be to conduct operations in such a way as to deprive the railway of that lateral support which, under the natural rights to which I have referred, under the common law, as purchasers of the ground they would have. Where is there a Parliamentary bargain to that effect? On the contrary, the Parliamentary bargain seems manifestly to be to the very opposite effect for the protection of the railway which is the subject of the purchase. It may be said that there are serious consequences which would follow: probably there are. I agree that one of the serious consequences at least would be this, that, if the argument maintained by the appellants be correct, there would then have been granted a privilege to the owners of land coterminous with the forty yards limit to excavate their lands to an extent to which they could not have done if the lands had not been lands under Parliamentary railway right. I do not know what is the foundation for such an argument. It appears to me to be in flat contradiction to what the statute has provided, with the best judgment of Parliament,

within certain limits—namely, an arrangement for the purchase on the one hand, and the protection of both parties on the other; and that there is nothing, either by express contract or by the language of the statute, to warrant your Lordships in invading the common law rights as they exist in England and Scotland to the extent sought.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Mason, Fernandes & Greaves*, Wakefield; *C. de J. Andrewes.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

E. D. SASSOON & CO. *v.* WESTERN ASSURANCE CO.

[Privy Council (Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Mersey), April 23, 24, May 17, 1912]

[Reported [1912] A.C. 561; 81 L.J.P.C. 231; 106 L.T. 929; 12 Asp. M.L.C. 206; 17 Com. Cas. 274]

Insurance—Marine insurance—Perils of the sea—Goods stored in hulk—Damage by leakage—Natural decay.

Goods belonging to the appellants were stored in a hulk moored in a tidal river in smooth water, and were insured (inter alia) against perils of the seas. In consequence of natural decay, which could not be detected by ordinary examination, the hulk became leaky, and the goods were injured by water which found its way through the decayed woodwork of the bottom of the hulk.

Held: not to be a loss by the perils insured against.

Notes. Applied: *Grant, Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.*, [1918–19] All E.R. Rep. 378. Considered: *P. Samuel & Co., Ltd.* v. *Dumas*, [1924] All E.R. Rep. 66; *The Stranna*, [1938] 1 All E.R. 458.

As to perils insured against in a policy of marine insurance, see 22 Halsbury's Laws (3rd Edn.) 73 et seq., and for meaning of "perils of the seas" see ibid., p. 74. For cases see 29 Digest 197 et seq.

Case referred to:

(1) *Wilson, Sons & Co.* v. *Xantho (Cargo Owners)* (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp. M.L.C. 207, H.L.; 29 Digest 197, *1567.*

Also referred to in argument:

Thompson v. *Hopper* (1856), 6 E. & B. 172; 25 L.J.Q.B. 240; 26 L.T.O.S. 308; 2 Jur. N.S. 608; 4 W.R. 360; 119 E.R. 828; 29 Digest 195, *1550.*

Fawcus v. *Sarsfield* (1856), 6 E. & B. 192; 25 L.J.Q.B. 249; 26 L.T.O.S. 323; 2 Jur. N.S. 665; 119 E.R. 836; 29 Digest 198, *1580.*

Dudgeon v. *Pembroke* (1877), 2 App. Cas. 284; 46 L.J.Q.B. 409; 36 L.T. 382; 25 W.R. 499; 3 Asp. M.L.C. 393, H.L.; 29 Digest 198, *1581.*

Blackburn v. *Liverpool, Brazil and River Plate Steam Navigation Co.*, [1902] 1 K.B. 290; 71 L.J.K.B. 177; 85 L.T. 783; 50 W.R. 272; 18 T.L.R. 121; 9 Asp. M.L.C. 263; 7 Com. Cas. 10; 41 Digest 431, *2707.*

Merchants Trading Co. v. *Universal Marine Co.* (1870), cited in L.R. 9 Q.B. at p. 596; 2 Asp. M.L.C. 431, n., C.A.; 29 Digest 197, *1572.*

Magnus v. *Buttemer* (1852), 11 C.B. 876; 21 L.J.C.P. 119; 18 L.T.O.S. 276; 16 Jur. 480; 138 E.R. 720; 29 Digest 201, *1600.*

A *Paterson* v. *Harris* (1861), 1 B. & S. 336; 30 L.J.Q.B. 354; 5 L.T. 53; 7 Jur. N.S. 1276; 9 W.R. 743; 1 Mar. L.C. 124; 121 E.R. 740; 29 Digest 200, *1594*.
Hamilton, Fraser & Co. v. *Pandorf & Co.* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp. M.L.C. 212, H.L.; 29 Digest 203, *1624*.

B **Appeal** from a decision of the Supreme Court for China, in an action in which the appellants were plaintiffs and the respondents were defendants.

The appellants were insured by a risk note dated July 6, 1908, and issued by the agents of the respondents for 200,000 taels on opium per the *Corea* from noon of July 6 to noon of Aug. 6, 1908, with average as customary. The risk note referred to and incorporated the respondents' form of insurance policy, which was (inter alia) against perils of the sea. The *Corea* was a hulk owned by the appellants in which C as a bonded warehouse they stored their opium. She had been moored as a fixture for many years in the river Huang-Pu, off the Canton Road jetty at Shanghai. She was there in smooth water and did not move. On July 20, 1908, the *Corea*, due to its rotten condition, which was unknown to the appellants, the weak places being covered by some copper sheathing, was found to be leaking. A considerable quantity of water from the river found its way into her and the appellants' opium D was damaged by water to such an extent that if such damage constituted a loss under the respondents' contract of insurance they would be liable to pay to the appellants the amount claimed in the action—namely, taels 7418.05. The appellants claimed on the insurance contract for the damage to the opium by water as for a loss caused by perils insured against. The respondents contended that the damage was E not a loss caused by "perils of the seas." DE SAUSMAREZ, C.J., decided in favour of the respondents, and held that the damage to the opium was not a loss caused by any peril insured against.

Atkin, K.C., *Bailhache, K.C.*, and *Raeburn*, for the appellants.
Sir R. Finlay, K.C., and *Mackinnon*, for the respondents.

F May 17, 1912. **LORD MERSEY.**—This is an appeal from a judgment of His Majesty's Supreme Court for Shanghai, dated Jan. 28, 1911, dismissing the plaintiff's claim.

[HIS LORDSHIP then stated the facts and continued:]

The risks covered by the policy were the risks usually described in such a contract —namely,

G "perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . goods."

It was not contended on the plaintiffs' behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the seas; but it was said that the loss was due to such a peril. The learned judge held that the damage H was not due to a sea peril at all, but was solely due to the weakness of the hulk, and he thereupon dismissed the action. Their Lordships are of opinion that the learned judge was right. There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. I Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of LORD HERSCHELL in *The Xantho* (1), where he says (12 App. Cas. at p. 509):

"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these

words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear."

An attempt was made during the argument to attribute a different meaning to the expression "perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but LORD HERSCHELL said (ibid. at p. 510),

"It would, in my opinion, be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments."

In this case the damage, though doubtless proximately due to sea water, was not in any sense due to sea peril. It does not therefore fall within the policy. Their Lordships are of opinion that the appeal should be dismissed, and they will advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors: *William A. Crump & Son; Thomas Cooper & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

CALDWELL *v.* BETHELL

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Darling and Avory, JJ.), November 25, 1912]

[Reported [1913] 1 K.B. 119; 82 L.J.K.B. 101; 107 L.T. 685; 77 J.P. 118; 29 T.L.R. 94; 23 Cox, C.C. 225]

Licensing—Offence—Sale of liquor in unmarked measure—Sale by servant of licensee—Liability of servant to conviction—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 69.

By s. 69 of the Licensing (Consolidation) Act, 1910, it was made an offence to sell by retail intoxicating liquor in a quantity of half a pint or more otherwise than in a marked measure.

A sale within the section was not merely the transferring of liquor the property of the licensee by the licensee himself, but included a sale by one of his agents, e.g., a barman in his employ, and if there was a contravention of the statute by such agent, he was liable to be convicted.

Notes. Section 69 of the Licensing (Consolidation) Act, 1910, has been replaced by the Licensing Act, 1953, s. 130; 33 HALSBURY'S STATUTES (2nd Edn.) 261.

As to illegal sales of intoxicating liquor, see 22 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; as to offences relating to measure, see ibid., p. 673, and for cases see 30 DIGEST (Repl.) 100–101.

Cases referred to:

(1) *Police Comrs.* v. *Cartman*, [1896] 1 Q.B. 655; 65 L.J.M.C. 113; 74 L.T. 726; 60 J.P. 357; 44 W.R. 637; 12 T.L.R. 334; 40 Sol. Jo. 439; 18 Cox, C.C. 341, D.C.; 30 Digest (Repl.) 96, *721*.

(2) *Hotchin* v. *Hindmarsh*, [1891] 2 Q.B. 181; 60 L.J.M.C. 146; 65 L.T. 149; 55 J.P. 775; 39 W.R. 607; 7 T.L.R. 513, D.C.; 25 Digest 98, *222*.

(3) *Williamson* v. *Norris*, [1899] 1 Q.B. 7; 68 L.J.Q.B. 31; 79 L.T. 415; 62 J.P. 790; 47 W.R. 94; 15 T.L.R. 18; 43 Sol. Jo. 29; 19 Cox, C.C. 203, D.C.; 30 Digest (Repl.) 89, *672*.

Case Stated by the stipendiary magistrate of Liverpool.

An information was preferred by the appellant, the chief constable of Liverpool, before the stipendiary magistrate of Liverpool, against the respondent, a barman in the employ of the licensee of certain licensed premises in Liverpool, for selling beer by retail, in a quantity of not less than half a pint and not in cask or bottle, in a measure not marked according to the imperial standards. Payment was made to the barman in respect of the said beer. It was admitted by both parties that the licensee had no knowledge of the sale. The stipendiary magistrate dismissed the information on the ground that the barman was not in fact "the person selling," and that, under the statute, no person other than the actual licensee could be held liable, as he alone was the person who sold, or passed the property in the beer.

By s. 69 of the Licensing (Consolidation) Act, 1910, it is enacted:

> (1) All intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, shall be sold in measures marked according to the imperial standards. (2) If any person sells or suffers any person under his control or in his employment to sell any intoxicating liquor so as to contravene this section, he shall be liable in respect of each offence to a fine . . ."

Maxwell for the appellant.

Rigby Swift, K.C., and *Wimpfheimer* for the respondent.

LORD ALVERSTONE, C.J.—This appeal must be allowed. We are dealing with an alleged offence under s. 69 of the Licensing (Consolidation) Act, 1910, which corresponds with the provision of s. 8 of the Licensing Act, 1872. If there is any distinction to be drawn, in my opinion, s. 69 of the Act of 1910 is wider than s. 8 of the Act of 1872.

This section starts with a general provision which does not say anything about the person selling. Sub-section (1) is:

> "All intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, shall be sold in measures marked according to the imperial standards."

I wish to point out that there might be an offence under that section if it was established that liquor had been sold by anybody. That might give rise to a question as to whether or not it must be treated as a misdemeanour, but assuming that the person has sold liquor in fact not in the proper way, there would be a breach of the provision of sub-s. (1) of s. 69. Sub-section (2) says:

> "If any person sells or suffers any person under his control or in his employment to sell any intoxicating liquor so as to contravene this section, he shall be liable in respect of each offence to a fine not exceeding in the case of the first offence twenty pounds, and shall also be liable to forfeit the illegal measure in which the liquor is sold."

Counsel for the respondent contends that that must mean if the licensee sells or suffers any person under his control to sell on his behalf any intoxicating liquor, he shall be liable for the first offence, and so on; and he bases his argument upon the decisions which have held that the provision of s. 3 of the Licensing Act, 1872:

> "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed,"

applies to the licensee, and does not include his agent who actually carried out the sale. He says if the words in s. 3 of the Act of 1872, which are reproduced in s. 65 of the Act of 1910, practically speaking, in the same terms:

> "Subject to the provisions of this Act a person shall not sell or expose for sale"

mean only the licensee, and include only the licensee, because it is his liquor which is being sold, we ought to construe the words: "if any person sells," in sub-s. (2)

of s. 69, as meaning any person who is a licensee and sells. He has relied on a passage in LORD RUSSELL'S judgment in *Police Comrs.* v. *Cartman* (1), where he said:

> "It is clear that there is no machinery by which the person actually selling can be convicted; a penalty can only be inflicted on the licensee."

When one comes to look at that case it was a summons against the respondent "for that he, being a licensed person, did on Oct. 14, 1895, unlawfully sell intoxicating liquor to a drunken person." Therefore the particular summons was against the licensee. It could only be against him, because he was alleged to be a licensed person. Finally it was decided in accordance with other cases under the Licensing Act that the licensee could be held liable to a penalty because his barman had sold to an intoxicated person. But it was in reference to that particular offence that the observation made by LORD RUSSELL ([1896] 1 Q.B. at p. 658), and relied upon by counsel for the respondent, applies; and if it had been intended to have a wider application, I cannot see upon what it is founded.

There are, other cases which point in the other direction. There is, for instance, the case before LORD COLERIDGE, which was in respect of the sale of adulterated food, *Hotchin* v. *Hindmarsh* (2). The passage I refer to is at p. 186 of [1891] 2 Q.B., where it provides that no person shall sell to the purchaser, and so on. It would be equally open to contend in that case that the sale being of the goods of the employer, the agent who simply carried out the sale had not himself sold. But with reference to that, LORD COLERIDGE says:

> "In my opinion, a person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells within this section."

It seems to me we have to consider which principle shall be applied to this particular s. 69. The other authorities do not seem to me to carry it very much further. *Williamson* v. *Norris* (3), so often cited, was again a case under s. 3 of the Licensing Act, 1872, where it says that no person shall sell intoxicating liquor without a licence. In that particular case the Court of Queen's Bench thought that the waiter who handed over the liquor in the House of Commons and took the money, though he undoubtedly sold it, was not a person who could be proceeded against for selling without a licence, because the liquor he sold was the liquor of somebody else who ought, or ought not, as the case might be, to have a licence. That case does not seem to me to be sufficient authority for us to hold that the sale contemplated by s. 69 is only a sale by the licensee, and, therefore, nobody else can commit the offence.

Section 69 deals with the physical act of handing over beer, the pouring it out from the bigger vessel and the measuring it, and then giving it to the customer. In ninety-nine cases out of a hundred it would be done by the agent and not by the licensee himself, certainly in large public-houses. It is to be observed that in relation to the person selling being liable to a penalty, if a person suffers any person under his control to sell, the word "sell" there, means the act of sale by the agent, not the mere selling or passing of the property of the liquor of the licensee. This offence of not measuring the beer applies to a larger number of people than the mere person whose property the beer is. It also seems that under this proceeding, when it is established that the sale has been carried out not in a measured vessel, as at present advised, the man might be convicted on this summons for aiding and abetting; he would be a principal in the offence. But I do not base my judgment upon that, because the word "sale" here means more than the transfer of the property of the licensee. It means, conducts the sale in such a way that the person shall be protected by the measurement provision. If that sale, whether authorised by the licensee or not, is so carried out that the provision is broken or infringed, certainly the person who has carried out that sale, who has been the actual party

to sell, and possibly others, may be convicted. Therefore, this case must go back to the magistrate for him to hear and determine.

DARLING, J.—I am of the same opinion. Our decision does not in the least proceed upon the opinion that the licensee is liable under this section. Anybody and everybody is liable who can be said to sell the liquor in other than a measured vessel. That being so, it may well happen that the person employing the barman would be liable. It may be that he provides him with the very vessel which is not according to the proper measure, and that he provides it for the purpose of using it in the sale of beer. That might make him liable. The barman using such a vessel would be, in my opinion, liable. He would take part in the selling—a different part from that taken by the proprietor, but still he would take part in the selling; he would help the sale; he would sell; and if the proprietor says, "I will provide no measure at all as I ought to provide under the statute," and the barman says, "I am quite content, and I will sell without any measure at all," then they both of them may perfectly well be liable for the act of selling in such a way as to contravene the statute. The only doubt I have had all along was whether we were not bound by the words used by LORD RUSSELL OF KILLOWEN in *Police Comrs.* v. *Cartman* (1). If you take them as applicable to this case, there is no getting over them. There would be a decision of the court, given by the Lord Chief Justice, in which WRIGHT, J., had concurred, and if I had been satisfied that that really did apply to this particular sale and to the offence charged in this summons, then I should have had to say that the respondent ought to succeed. But that case is easily distinguishable from this one; that what LORD RUSSELL said, although it may be perfectly good in the connection in which he said it, does not apply to the case before us. I, therefore, am of opinion that this appeal should be allowed.

AVORY, J.—I am of the same opinion. The argument for the respondent really comes to this, that the only person who can be convicted under s. 69 of the Licensing Act, is the licensed person. This case ought to be decided upon the same principle as was acted upon by the court in *Hotchin* v. *Hindmarsh* (2), and applied to the Sale of Food and Drugs Act—namely, the person who performs the physical act of transferring the thing to the purchaser is the person who sells within the section. That is the proper principle to apply to this particular section of the Licensing Act. In so deciding, we are deciding nothing contrary to any previous case.

With regard to *Williamson* v. *Norris* (3) the whole pith of that case is to be found in those words of LORD RUSSELL, dealing as he was then with s. 3 of the Licensing Act, 1872, where he says ([1899] 1 Q.B. at p. 13):

> "I am of opinion that the true meaning of the section is that the sale which is prohibited must be a sale by the person who ought to be licensed."

Those words have no application to this particular section, and therefore the magistrate was wrong in the view which he took, and the barman was liable to be convicted, assuming the evidence established the offence. As regards *Police Comrs.* v. *Cartman* (1), unless I had been satisfied that the words quoted in LORD RUSSELL'S judgment were necessary for the purpose of that case, and were not obiter, I should have respectfully declined to follow it. When one comes to look at the nature of the offence that was then being inquired into, it becomes clear that it was an offence which could be committed only by a holder of a licence, and it was in that sense that LORD RUSSELL meant that there was no provision by which you could hit the servant, because he could not be described as the holder of a licence. But it is obviously true that those words have no application to this case; and there is no limitation in s. 69 which limits the case to a person who in fact is the licence holder.

Appeal allowed.

Solicitors: *F. Venn & Co.*, for *E. R. Pickmere*, Liverpool; *John Hands*, for *Edwin Berry & Co.*, Liverpool.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

Re BRADLEY AND ESSEX AND SUFFOLK ACCIDENT INDEMNITY SOCIETY, LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 27, December 20, 1911]

[Reported [1912] 1 K.B. 415; 81 L.J.K.B. 523; 105 L.T. 919; 28 T.L.R. 175]

Insurance—Condition—Condition precedent to liability of insurers—Need to be made clear by insurers in proposal and policy—Accident insurance—Premium based on wages paid to employees—Condition in policy that employer should keep wages-book—Construction against insurers.

In March, 1908, the insured effected a policy of insurance with an insurance society against his liability under (inter alia) the Workmen's Compensation Act, 1906, the consideration for the policy being the payment of a premium of 10s. per cent. per annum on the amount of the wages paid by the insured to his employees. The policy contained various conditions which were declared by the policy to be conditions precedent to liability thereunder. Condition 5 was as follows: "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during such period of insurance. The name of every employee and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages-book. The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance," and if the total amount so paid should differ from the amount on which premium had been paid an adjustment would be made. In February, 1909, the sole employee of the insured was injured during the currency of the policy. Compensation under the Act of 1906 became payable to him by the insured, who claimed from the society under the policy. The society, however, refused to pay on the ground that the insured had not complied with the condition that the name and wages of every employee should be duly recorded in a proper wages-book.

Held (FLETCHER MOULTON, L.J., dissenting): a policy of that nature, in case of ambiguity or doubt, ought to be construed against the society and in favour of the insured; condition 5 was one and entire and it was unreasonable to hold that one sentence in the middle of it was a condition precedent while the rest of the condition could not be so considered: and, therefore, compliance with the middle provision of the condition was not a condition precedent to the liability of the insurers under the policy.

Per FARWELL, L.J.: It is especially incumbent on insurance companies to make clear both in their proposal forms and in their policies the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses and may inflict loss and injury on the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the insurers from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed contra proferentes applies strongly against the insurers. It is incumbent on insurers to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefit of the insurance. It is scarcely honest to induce a man to propose on certain terms and then to accept the proposal and send a policy as in accordance with it when such policy contains numerous provisions not mentioned in the

proposal which operate to defeat any claim under the policy, and all the more so when such provisions are couched in obscure terms.

Notes. Considered: *Welch* v. *Royal Exchange Assurance*, [1938] 1 All E.R. 451. Referred to: *Re United London and Scottish Insurance Co.* (1915), 31 T.L.R. 202.

As to conditions in an insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 217 et seq., and cases there cited.

Cases referred to:

(1) *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911; 43 L.T. 390; 45 J.P. 4; 28 W.R. 893, H.L.; 29 Digest 412, *3236*.

(2) *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863; 77 L.J.K.B. 1108; 99 L.T. 712; 24 T.L.R. 898; 52 Sol. Jo. 740, C.A.; 29 Digest 353, *2858*.

(3) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; 78 L.J.K.B. 684; 100 L.T. 568; 53 Sol. Jo. 266; sub nom. *Etherington* v. *Lancashire and Yorkshire Accident Insurance Co.*, 25 T.L.R. 287, C.A.; 29 Digest 396, *3148*.

(4) *Collett* v. *Morrison* (1851), 9 Hare, 162; 21 L.J.Ch. 878; 68 E.R. 458; 29 Digest 347, *2809*.

(5) *Griffiths* v. *Fleming*, [1909] 1 K.B. 805; 78 L.J.K.B. 567; 100 L.T. 765; 25 T.L.R. 377; 53 Sol. Jo. 340, C.A.; 29 Digest 349, *2826*.

Also referred to in argument:

Re Coleman's Depositories, Ltd. and Life and Health Assurance Association, [1907] 2 K.B. 798; 76 L.J.K.B. 865; 97 L.T. 420; 23 T.L.R. 638, C.A.; 29 Digest 405, *3200*.

Pordage v. *Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T. Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, *3520*.

General Accident Corpn., Ltd. v. *Day* (1904), 21 T.L.R. 88; 29 Digest 404, *3196*.

Appeal from an order of BRAY, J., made in an action tried by him without a jury.

In March, 1908, the plaintiff, John Rogers Bradley, made a written proposal to the defendant society for a policy of insurance against his liability as an employer for injury to his employees in consideration of a minimum premium of 10s. per cent. per annum on the amount of wages, salaries, and other earnings paid by him to his employees during the period of the policy. Appended to the form of proposal was a declaration in the following terms:

"I, the undersigned, this 25th day of March, 1908, desire to effect an insurance in terms of the policy to be issued by the Essex and Suffolk Accident Indemnity Society, Ltd., against my statutory and common law liability as above mentioned, and I agree to render, at the end of each period of insurance, a statement in the form required by the company of all wages actually paid, and to pay premium on the wages paid in excess of the amount estimated above, and I hereby declare that all the above statements and particulars, which I have read over and checked, are true, and that I have not suppressed, misrepresented, or misstated any material fact, and that I have fairly estimated my total wages and salaries expenditure, and I agree that this declaration shall be the basis of the contract between me and the company."

On Mar. 31, 1908, a policy was issued which provided that, in consideration of the payment to the society of the premium [of ten per cent. on the actual amount of wages paid by the assured during the period of the policy] for the following indemnity from Mar. 28, 1908, to April 1, 1909, both dates inclusive, it was agreed that if at any time during the said period, subject to the receipt of premium as provided in the conditions hereunder, and during the continuance of this policy by renewal any employee in the assured's immediate service should sustain any personal injury by accident or disease as described in the third schedule to the Workmen's Compensation Act, 1906, while engaged in the service of the insured

in work forming part of or a process in the business above mentioned, and in case the insured shall be liable to make compensation for such injury either under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1906, or at common law the society should indemnify the insured against all sums for which the insured should be so liable, and would, in addition, be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation. The following proviso followed:

"Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy."

A number of conditions were included in the policy, condition 5 being as follows:

"The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during such period of insurance. The name of every employee and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages-book. The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance, and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society as the case may be."

The insured's son, William James Bradley, was, at and from the date of the policy to the date of the accident, hereinafter referred to, employed in the immediate service of the insured in his business of currier and farmer and was the sole person so employed. The first renewal premium was paid by the insured to and was received by the society on April 5, 1909. The wages paid by the insured to his son were the sum of £1 per week at and from the time of effecting the policy, and board was provided by the insured for the employee of the estimated value of about 5s. per week during such period. The name of this employee and the amount of wages paid to him were not recorded in any wages-book, nor was any record kept in any such a book showing any estimate of the board which was provided for him. The insured did not supply the society with any account of the wages paid or of the board provided during the period of insurance within one month after the expiry of such period. There was no adjustment of premium on renewal or at all.

On Feb. 15, 1909, the employee sustained personal injury by accident while engaged in the service of the insured in work forming part of or a process in the business of the insured who became liable to pay compensation for such injury under the Workmen's Compensation Act, 1906. A claim was made against the insurers by the insured that the insurers should indemnify him against all sums for which he was and would be liable in respect of the employee's claim for compensation. The insurers repudiated all liability under the policy in respect of the claim for compensation and gave the insured notice that he must act as he thought fit. After such repudiation and notice the amount of the compensation to be paid by the insured to the employee in respect of the injury by the accident was settled by an agreement between them at the sum of 6s. per week from the date of the accident which agreement was duly recorded in the county court of Westmorland, holden at Appleby, pursuant to s. 9 of the second schedule to the Workmen's Compensation Act, 1906.

A dispute having, under these circumstances, arisen between the insured and the insurers in respect of the policy and in respect of liability arising or alleged to have arisen thereunder, and otherwise connected therewith directly and indirectly, an arbitrator was appointed pursuant to s. 5 of the Arbitration Act, 1889. The

arbitrator made his award on Sept. 23, 1910, whereby he found and awarded upon the facts proved before him that the insurers were liable to indemnify the insured against the sum of 6s. per week from the date of the accident for which the insured was liable, subject to the opinion of the court upon the following questions, which were stated as part of his award in the form of a Special Case: (i) Was compliance with cl. 5 of the conditions, a condition precedent to the liability of the insurers under the policy? (ii) Was there on the facts stated a compliance with that clause? (iii) Was there on the facts stated a waiver by the society of compliance with that clause? The Special Case came on to be heard before BRAY, J., on May 15, 1911, who held that condition 5 was one condition and not two separate and independent conditions. It was treated as one condition by being put under a separate number by the society. It was obviously framed with one object—namely, that of adjusting the premium of the policy. Inasmuch as part of the condition could not be a condition precedent, neither could any of the rest of it. The condition must be read as a whole. Therefore, the failure of the insured to comply with that part of the condition did not disentitle him from recovering from the insurers. From that decision the insurance society appealed.

Ernest Pollock, K.C. (with him *Sims Williams* and *T. C. P. Gibbons*), for the society.

Eustace Hills, for the insured.

Cur. adv. vult.

Dec. 20, 1911. The following judgments were read.

COZENS-HARDY, M.R.—This is an appeal from a decision of BRAY, J., who has held that a particular condition in a policy is not a condition precedent.

The insured, Bradley, is a currier and small farmer. His only employee was his son who met with an accident on Feb. 15, 1909, in respect of which he has obtained compensation from his father at the rate of 6s. per week. The propriety of this compensation is not questioned. The father claims under the policy which he effected on Mar. 31, 1908. The proposal, which is to be "considered as incorporated" in the policy, stated the estimated number of employees as one to two and their total estimated wages. It gave other particulars, upon which no question arises, and at the end there is a statement that Bradley desired to effect an insurance "in terms of the policy to be issued" by the society against his statutory and common law liability, and he agreed to render at the end of each period of insurance a statement in the form required by the company of all wages actually paid and to pay premiums on the wages paid in excess of the amount estimated above. The premium was 10s. The policy itself refers to the proposal which was agreed to be the basis of the contract, and it witnessed that in consideration of the payment to the society of 10s. premium, which premium "is subject to adjustment as hereinafter provided," for indemnity from Mar. 28, 1908, to April 1, 1909. After stating the extent of the indemnity, which included claims under the Workmen's Compensation Act, there is a proviso in the following terms:

> "Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy."

Then followed eight conditions. It is perfectly clear that some of these so-called conditions are not and cannot be conditions precedent, although some of them may be and are conditions precedent. Numbers 1 and 2 dealing with notices, may be conditions precedent. Number 3, so far as any meaning can be attributed to it, seems to me not to be a condition precedent. The same remark applies to Nos. 4, 6, and 7. The question in this appeal, however, turns upon condition 5. This is obviously that which is referred to in the policy itself in the words "subject to adjustment as hereinafter provided." The first sentences is not a condition precedent.

"The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during such period of insurance."

The third sentence also is not.

"The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salaries, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance, and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society as the case may be."

The second sentence is in the following words:

"The name of every employee and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages-book."

It is found by the arbitrator, who made his award in the form of a Special Case, that this small farmer did not keep any wages-book, and the question is whether this suffices to relieve the society from all liability, or whether it is merely a part of the provision for adjusting the premium and evidencing the amount of wages in respect of which premium was payable. BRAY, J., has held that the policy-holder is not disentitled to claim by reason of the omission to keep a proper wages-book, and I agree with his decision. I think the fifth condition is one and entire, and it is to my mind unreasonable to hold that one sentence in its middle is a condition precedent while the rest of the condition cannot be so considered. A policy of this nature, in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder, and it seems to me unreasonable to hold that the office can escape from all liability by reason only of the omission duly to record in a proper wages-book the name of every employee and the amount of his earnings. This is only required for the purpose of the statement which by the proposal the insured agreed to render at the end of each period of insurance. In my opinion, it ought not to be regarded as in any sense a condition precedent, and it follows that in my opinion the appeal fails and must be dismissed with costs.

FLETCHER MOULTON, L.J.—In this matter the claimant, John Rogers Bradley, entered into a policy of insurance with the respondents against his liability under the Workmen's Compensation Act, 1906. An accident arose within the meaning of the policy, and the claimant has had to pay to the injured workman 6s. a week under the provisions of that Act. He made a claim for indemnity against the society, who disputed the claim, and the matter was in accordance with the provisions of the policy referred to arbitration. At the request of the parties the arbitrator found his award in the form of a Special Case which for the purposes of this appeal may be taken to award to the claimant the indemnity asked for subject to the opinion of this court on one question—namely, was compliance with cl. 5 of the policy a condition precedent to the liability of the society under the said policy? In my opinion, this question is purely a question of construction, and is unaffected by the special facts of the case. But it may be well to state here one or two facts which were referred to in the arguments. They are as follows.

The claimant signed in the first place a proposal for the policy, in which he stated that the estimated number of employees was one to two. He was a currier and farmer, and at the time of signing such proposal, and during all material times, he only employed one workman—viz., his son. The son's wages were £1 a week and board. In chopping wood the son lost his hand. No question arises about the injury or the amount of the compensation to be paid in respect of it. The policy (which incorporates the proposal) is framed on the following lines. The indemnity granted by it is a complete indemnity under the Workmen's Compensation Act, 1906, the Employers' Liability Act, 1880, the Fatal Accidents Act,

1846, and common law, and applies to all the employees in the assured's immediate service. The premium is 10s. per cent. on the total wages paid. In the proposal the applicant inserts an estimate of the total annual wages and salaries and other earnings. On or before the issue of the policy the insured pays to the society 10s. per cent. on the amount of such estimate, and at the end of the year the true premium is arrived at by adjustment. This adjustment is effected by taking the total wages, &c., actually paid during the year to the employees of the insured. The 10s. per cent. is taken upon this total of wages actually paid, and the difference between it and the premium paid on entering into the policy is paid to or by the society as the case may be, the result being that the actual premium is 10s. per cent. on the actual amount of wages paid during the year. It is evident, therefore, that it is of vital importance to the society that all payments of wages should be included in the total of wages actually paid upon which the adjustment is made. Accordingly, cl. 5 (upon the interpretation of which the present case turns) is inserted in the policy as one of the conditions. These conditions are subject to a proviso which is in the following words:

> "Provided always that the due observance and fulfilment of the conditions of this policy, which conditions are to be read as part of this policy, shall be a condition precedent to any liability of the society under this policy."

There is no ambiguity in the language of cl. 5, and it is found by the arbitrator and is an admitted fact that the claimant kept no record whatever of the wages paid by him. If, therefore, the observation of this condition is a condition precedent to liability under the policy (as the language of the policy expressly declares to be the case) the society are entitled to our judgment. But on certain grounds which I shall presently examine, the learned judge in the court below has found that the parties did not intend the observance of the condition to be a condition precedent to liability under the policy, and has, therefore, given judgment for the claimant, and it is from this judgment that the present appeal is brought.

Before dealing with the main point, it is necessary to get rid of certain contentions which have been put forward during the argument, but which, in my opinion, have no real bearing on the question. In the first place much emphasis was laid on the fact that the claimant here was a currier and farmer employing one or at the most two workmen. I cannot see what relevance that fact has. It might have some bearing on the interpretation of the phrase "duly recorded in a proper wages-book," inasmuch as a proper wages-book for a large employer might be of a different kind to a proper wages-book for a small employer. But in the present case it is found by the arbitrator that he did not perform this condition at all. No wages-book was kept and no entry made, so that, however leniently the court might be inclined to construe those words in the case of a small employer, it is impossible to say that he performed the condition. It is for this reason that I am of opinion that the case before us is a pure question of law—namely, the construction of the contract. And if we decide that the performance of this obligation is not a condition precedent in the present case, that ruling will apply to every policy of the society.

It was further sought to base an argument on the fact that there is no reference to this condition in the proposal form which was signed by the claimant. That is true, but I fail to see what bearing that has on the question before us. That proposal was only a proposal for a policy in the form used by the society. It did not purport to contain the conditions of the policy, and indeed it did not refer to any one of those conditions excepting the rendering of a statement in the form required by the society of all wages actually paid and the payment of premium on the excess over the estimate. It expressly states that the signing the proposal form does not bind the applicant to complete the insurance. It is not, nor could it be, suggested that the applicant thought that the proposal form was the policy, or included all its terms. But it is not necessary to enlarge on this point because

this is not a case in which the insured is disclaiming the policy as not being in accordance with that which he intended to enter into. He is himself claiming under the policy, and he cannot be allowed to claim under the policy and yet contend that he is not bound by its terms. A

I come now to the main question as to the due observance and fulfilment of cl. 5 being a condition precedent to the liability of the society under the policy. It is clearly and unmistakably pronounced to be so in the policy itself, and I ask myself whether there is any reason why we should declare it to be otherwise. I can see none. The clause appears to me to be a most reasonable precaution necessary for the protection of the society, and wisely made by it a condition precedent. By the scheme of insurance the premium is fixed, not at the inception of the risk, but after it is over, and the amount of the premium is calculated upon the total of the wages actually paid within the year. It follows that if there is any omission either of persons employed or of wages paid to them in calculating the adjustment the society gets a diminished premium. By the time the adjustment has to be made the risk is over, and, therefore, it is directly to the interest of the insured to make such omissions. But if the insured is bound to keep a contemporary record of the names of his employees and the wages paid to them there is no such temptation to him to fail in his duty because the risk is not then over, and as he wishes to be covered for all his employees he necessarily has an interest in entering them as such at the time. It will be seen, therefore, that the duty of making contemporary records of the names of the employees and of the wages paid is a most valuable protection to the society against fraud or forgetfulness on the part of the insured. I may go further and say that it is in substance their only protection. It would be impossible for them actually to check the correctness of the statements as to the employees and their wages which are rendered to them by the insured at the end of the year since they probably have many thousands of policies. But by making it a condition that all wages shall be duly recorded in a proper wages-book, and that such wages-book shall at all times be open to the inspection of the society, the latter has a really effective check upon the insured. It becomes much too dangerous to leave unrecorded the wages paid, and in this way the insured are spared the temptation of omitting to make records of wages paid to persons with regard to whom the risk is over, such as persons taken on temporarily whose period of service has expired. To my mind, a provision such as this is precisely correlative to a condition that notice of an accident shall be given as soon as practicable. The latter protects the society from unfounded claims of liability by putting it in the best position for testing the justice of the claims, and the former protects the society from loss on its premiums by providing that it shall have the best material for checking their correctness. And these two conditions are alike in another respect. However vital to the society their observance may be they can only be rendered effective by stipulating that they shall be conditions precedent, i.e., that a claimant, in order to make good his claim must aver and prove their performance down to the date of bringing his action. If they are merely independent obligations the breach of which gives ground for a cross claim in damages they might as well be struck out of the policy because from their nature it is impossible to establish the quantum of damage resulting from a breach. The condition, therefore, seems to me to be one of such a nature that it can be made, and would naturally be made, and by the language of the policy has expressly been made a condition precedent, and inasmuch as ex concessis it has not been performed in this case, I am of opinion that the liability of the society under the policy has ceased. B C D E F G H I

It remains to examine the arguments by which it has been sought to establish the contrary. It is said, and the learned judge in the court below has adopted the contention that condition 5 is mixed up with a number of other conditions which cannot have been intended to be conditions precedent, and that accordingly we ought not to regard it as such. I confess that I am suspicious of such an argument.

In the well-known case of the *London Guarantie Co.* v. *Fearnley* (1), the House of Lords enforced the terms of a policy much more open to objection on such a score than the present policy, holding that the stipulation that a certain condition should be a condition precedent must have full effect given to it. But for the purpose of the present case I am content to take the judgment of Lord Selborne, the dissentient judge in that case. With regard to the interpretation of language such as that in the present policy, he says (5 App. Cas. at pp. 920, 921):

> "It is admitted, and it is undeniable, that some of the provisoes contained in this policy in this case are of a nature which makes it impossible that they should be conditions precedent to the liability of the company to pay the amount guaranteed, in the event of such a loss as is contemplated by the policy. The express declaration, therefore, that the policy is granted, 'subject to the conditions herein contained which shall be conditions precedent to the right on the part of the said employer to recover under this policy,' can have no greater effect than this, that such of the subsequent provisoes as, according to their true intent and meaning (to be collected in the usual manner upon a sound construction of the whole instrument), may be restricted to things to be done on the part of the employer before any right of action accrues to him under the policy, are to be conditions precedent of the right to recover."

He, therefore, decides the question by considering whether the condition is such that ex naturâ it can be a condition precedent and not by considering whether it is in company with others that cannot.

But the present policy, in my opinion, is free from reproach on the ground that there is a confusion between conditions precedent and subsequent. It is true that some of the conditions do not in their nature relate to time, and therefore, can be neither conditions precedent nor conditions subsequent. This applies, for instance, to condition 6, which stipulates that the policy shall not apply to the insured's liability to the employees of sub-contractors, and to condition 7, which fixes precisely the period of time covered by it. But they are limitations of the policy, and their insertion in the list leads to no difficulty of interpretation, and does not, in my opinion, affect in any way the status of the other conditions. Great exception was taken in this connection to the first sentence of condition 5. To my mind, it is properly there as making it clear what are the premiums to which the remainder of the condition relates. It bears much the same relation to the latter part of condition 5 as condition 1 does to condition 2. The one describes how the notice must be given which is made a condition precedent in condition 2.

The main ground on which the learned judge in the court below declined to consider condition 5 a condition precedent was that the clause was solely directed to ascertain the amount of the premium to be paid. With the greatest respect for his opinion I think he failed to realise the object of the clause. It is very much more than a question of arithmetic. As I have already pointed out it is to secure substantially contemporaneous entries of payments of wages for which it is true the arithmetical calculation of the premium would be made but which are far more important from the point of view of the quality of the evidence which will be at the disposal of the society in the way of contemporary records. It is true that the condition does not state absolutely that the entries are to be made at the time nor do I think that necessary. But the words "duly recorded in a proper wages-book" are sufficient to insure that the entries are made at or about the time of the payment. No one would say that prime entries were duly made in a trade book if they were not made in due course of business as the events happened.

The only other argument pressed upon us related to condition 3 which provides that the insured shall not incur any expense, litigation, or otherwise, or make any payment, settlement, or admission of liability in respect of any injury for which

the society shall be liable under this policy without the permission of the society. The clause is badly worded (and indeed I think that the word "of" is accidentally omitted after the word "expense") and it is difficult to construe. But both of these matters seem to me immaterial on the question whether it is or is not intended to be a condition precedent. To my mind, the nature of such parts as are clear shows that it was intended to be a condition precedent. The society retains in its hands the right to dispute claims made upon the assured, and, therefore, if the assured without its permission makes an admission of liability the society is fairly entitled to protect itself from the liability so admitted. But, however this may be, I fail to see how the imprudence on the part of the assured in accepting a vaguely worded condition such as No. 3 should affect the court in giving full effect to the language of No. 5. For these reasons I am of opinion that the appeal should be allowed.

FARWELL, L.J.—Contracts of insurance are contracts in which uberrima fides is required not only from the assured but also from the company insuring. It is the universal practice for the companies to prepare both the forms of proposal and the form of policy. Both are issued by them on printed forms kept ready for use. It is their duty to make the policy accord with and not exceed the proposal, and to express both in clear and unambiguous terms, lest, as FLETCHER MOULTON, L.J., says, quoting LORD ST. LEONARDS in *Joel* v. *Law Union and Crown Insurance Co.* (2) ([1908] 2 K.B. at p. 886), provisions should be introduced into policies which

> "unless they are fully explained to the parties will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact from the very commencement the policy was not worth the paper on which it was written."

It is especially incumbent on insurance companies to make clear both in their proposal forms and in their policies the conditions which are precedent to their liability to pay. For such conditions have the same effect as forfeiture clauses and may inflict loss and injury on the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed contra proferentes applies strongly against the company: see *Re Etherington and Lancashire and Yorkshire Accident and Insurance Co.* (3). It has been further held that if the proposal be in one form and the office draws up the policy in a different form, varying the rights of the assured, courts of equity would rectify the policy so as to make it accord with the proposal: *Collett* v. *Morrison* (4); *Griffiths* v. *Fleming* (5), and in cases like the present, where the proposal is "considered as incorporated" in the policy, the court will, on construction of the two documents read together, give effect to the proposal as overriding the policy where they differ. These considerations are particularly applicable to insurances under the Workmen's Compensation Act, 1906. That Act has rendered it practically necessary for all who desire to avoid the risk of bankruptcy and cannot afford to be their own insurers to insure. Tens of thousands of small shopkeepers with one assistant, lodging-house keepers and others with one "general," small farmers, tenants of small holdings and the like with one man are driven to insure. They receive a printed form of proposal, and it is reasonable to assume that they read and rely on it, and they receive in exchange for the form signed by them a policy which they are entitled to assume, and do assume in most cases without careful perusal of the document, to accord with the proposal form. It is, in my opinion, incumbent on the company to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefit of the insurance. It is contended that it is of the utmost importance to insurance companies that they should be able to

defend themselves against fraud by inserting conditions precedent, such as keeping wages-books and the like. Be it so. There is no objection whatever to the insertion of such conditions so long as the intending assurer has full and fair notice of them and assents to them. This can easily be done by stating them shortly in the proposal form with the addition that payment may be refused if they or any of them are not complied with. But it is, in my opinion, scarcely honest to induce a man to propose on certain terms and then to accept that proposal and send a policy as in accordance with it when such policy contains numerous provisions not mentioned in the proposal which operate to defeat any claim under the policy, and all the more so when such provisions are couched in obscure terms.

In the present case both proposal form and policy offend against both the requirements to which I have referred; and the form of policy is to my mind very objectionable. The insurer is a currier and farmer, who employs one man only—his only son. The condition precedent, for non-performance of which the society claims to escape liability, is the failure to keep a "proper wages-book." The proposal form says nothing about keeping a wages-book, but contains these words:

> "I agree to render at the end of each period of insurance a statement in the form required by the company of all wages actually paid, and to pay premium on the wages paid in excess of the amount estimated above."

There is no question here of actual payment of the wages. The arbitrator has found that the wages were paid. It is a perfectly honest claim. There is nothing in the proposal form to suggest to a man who employs one workman only the necessity of keeping a wages-book at all, nor is there any evidence that it is usual or proper for a currier or farmer employing one man only to keep such a book. In the absence of evidence I decline to assume it, and all the more so because I feel sure that the contrary is the fact. Then I turn to the policy and I find a provision that may be common, but is, in my opinion, most objectionable. The policy states that the due observance and fulfilment of the conditions of this policy "shall be a condition precedent to any liability of the society under this policy." The policy then sets out in small print eight clauses, of which it is admitted that several are not conditions precedent, and some are not conditions at all. Clause 5 contains the provision relied on by the society. It is in the middle of a clause the first and last provisions of which are clearly not conditions precedent. The first paragraph is not a condition at all, and the last is obviously subsequent because the amount due on the policy may become due before the event happens. BRAY, J., has held that the provision for keeping a proper wages-book, inserted as it is in the middle of cl. 5, cannot fairly be read as an independent condition precedent, but is merely machinery for that ascertainment and adjustment of premium which is mentioned in the proposal form. I agree with him because I think that reading the policy with the proposal form (in accordance with the provision in the form that the form is incorporated in the policy) and construing the policy most strongly against the society in the interests of honesty and fair dealing, this is the better construction. Any other construction would convict the society of having issued a tricky policy calculated to deceive and entrap the unwary, and of insisting on the success of their devices. I think it is the duty of all insuring companies to state in clear and plain terms as conditions precedent, those provisions only which are such, not to wrap them up in a number of clauses which are not conditions precedent at all, and I think, further, that it is their duty to call attention to such conditions in their forms of proposal so as to make sure that the insurers understand their liabilities.

London Guarantie Co. v. *Fearnley* (1), on which the insurers in the present case relied, was a decision on a particular clause in a particular policy, on which eight judges were evenly divided. It lays down no new principle and has no bearing on the present case. There is another ground on which also I think the judgment of BRAY, J., can be supported. The condition, if it be one, is to keep "a proper wages-book." That must mean, in my opinion, "proper under the circumstances

of the case and for the business or trade of the insurer." Take the case of a lodging-house keeper with one maid. I think it would be absurd to lay it down as a matter of law without evidence that it is proper or usual for such a woman to keep a wages-book. And I think the same observation applies to a small farmer (even although he adds a currier's business to his farming) who employs his son as his only servant. I think BRAY, J., was right, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *G. F. Hudson, Matthews & Co.*, for *Isaacs & Heath*, Sunderland; *Nicol, Son & Jones*, for *Cant & Fairer*, Penrith.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re BROAD. Ex parte OFFICIAL RECEIVER

[KING'S BENCH DIVISION (Phillimore and Bucknill, JJ.), October 24, 1911]

[Reported 105 L.T. 719; 56 Sol. Jo. 35]

Executor—Retainer—Executor's right to retain whole of testator's chattels for payment of debt due to him—Payment of balance to other creditors.

Bankruptcy—Administration in bankruptcy of the estate of a person dying insolvent—Executor's right of retainer—Right to retain after administration order goods in his possession before making of order—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 125 (9).

An executor can retain the whole of his testator's chattels for the payment of a debt due to him from the testator, and he is not obliged to appropriate chattels of the exact amount of his debt. When the chattels are realised the balance over, if any, is payable to the other creditors.

The exercise of the right of retainer by an executor, after an administration order under s. 125 of the Bankruptcy Act, 1883 [now s. 130 of the Bankruptcy Act, 1914], of chattels in his possession before the making of the order, to which he had not signified his election, is not forbidden by s. 125 (9) [now s. 130 (8) of the 1914 Act].

Notes. Section 125 of the Bankruptcy Act, 1883, was repealed by the Bankruptcy Act, 1914, and replaced by s. 130 of that Act, itself repealed by s. 56 and Second Schedule, Part 1 of the Administration of Estates Act, 1925, but re-enacted and made permanent by the Expiring Laws Act, 1925, s. 1 (2) and First Schedule (24 HALSBURY'S STATUTES (2nd Edn.) 424).

As to executor's right of retainer, see 16 HALSBURY'S LAWS (3rd Edn.) 307 et seq., ibid., vol. 2, pp. 362, 363, and for cases see 23 DIGEST (Repl.) 373 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. 347; 68 L.J.Q.B. 804; 80 L.T. 742; 15 T.L.R. 407; 6 Mans. 277; sub nom. *Re Rhoades, Ex parte Official Receiver (Trustee)*, 47 W.R. 561; 43 Sol. Jo. 571; 23 Digest (Repl.) 376, *4464*.

(2) *Re Gilbert, Ex parte Gilbert*, [1898] 1 Q.B. 282; 67 L.J.Q.B. 229; 77 L.T. 775; 46 W.R. 351; 14 T.L.R. 125; 42 Sol. Jo. 118; 4 Mans. 337; 23 Digest (Repl.) 377, *4468*.

Also referred to in argument:

Re Williams, Ex parte Lewis and Evans (1891), 8 Morr. 65; 23 Digest (Repl.) 386, *4573*.

Woodward v. *Lord Darcy* (1558), 1 Plowd. 184; 75 E.R. 282; 23 Digest (Repl.) 373, 4425.

Appeal by the official receiver from the decision of the county court judge at Truro allowing the respondent, as executrix, to retain a debt due to her from her deceased husband.

The respondent, before her marriage, had lent her husband, a farmer, £200 on an I.O.U. He died on Mar. 5, 1911, and the respondent, as his executrix, proved his will on April 4. On April 12 she called a meeting of the creditors of the estate, and told them that it was insolvent. She also informed them of her debt, and that she intended to retain it out of the proceeds of the sale of the stock and effects. Soon afterwards the respondent instructed an auctioneer to sell the live stock, &c., belonging to the testator's estate, and informed the auctioneer that she would retain the amount of her debt out of the proceeds. The sale took place on May 5, and the respondent was paid £200 out of the proceeds. On May 2 a petition for an administration order under s. 125 of the Bankruptcy Act, 1883, was filed, and an order was made on May 13.

By the Bankruptcy Act, 1883, s. 125 (9) [now s. 130 (8) of the Bankruptcy Act, 1914]:

> "Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid, nothing in this section shall invalidate any payment made, or any act or thing done in good faith by the legal personal representative before the date of the order for administration."

Hansell for the official receiver.

Clayton, *K.C.*, and *W. T. Lawrence*, for the executrix, were not called on to argue.

PHILLIMORE, J.—In order to succeed in this case, as I understand it, the appellant would have to convince us of two propositions, and I will take the second part first—that the exercise of the right of retainer by an executor after an administration order under s. 125 of the Bankruptcy Act, 1883, of goods or assets which he has had in his possession before the administration order, but as to which he has not yet signified his election, is forbidden by sub-s. (9) of s. 125 as being a payment by himself to himself. I have not consulted my brother upon this point, as it has not been so fully in our minds as the first point, therefore all I will say on it is that at present I do not view that contention with favour. My brother says that I may say it for him too. I do not think that LINDLEY, M.R., in *Re Rhoades* (1) would have given voice to the expression which he uses in more than one place in his judgment in that case if he had thought that that was good law. I do not desire, however, only to shelter myself under that very great opinion. In my own view the contention is not sufficiently made out for me to accept.

But before we get to that point counsel for the official receiver has to convince us that this executrix did not effectually exercise the right of election and right of retainer before May 3, 1911. We have been very much assisted by learned counsel in his argument on this somewhat archaic point, and by the reference to WENTWORTH UPON EXECUTORS which he has given us. When one comes to think it out, I think I understand what is meant by WENTWORTH, and possibly, though it is not too carefully dealt with by the observations in 1 PLOWDEN 185. When you consider the position of an executor you have not only to look into his rights, but his liabilities. WENTWORTH was thinking of a creditor saying to an executor who wanted to retain his debt, "Ah, but I deem you have retained. You succeeded to all the testator's

estate. I point out certain particular chattels or pieces of property which you have succeeded to and those as it were are appropriated. I say you must be deemed out of those" (possibly for the reason that he first laid hands on them or something else) "to have retained your debt, and you cannot retain it out of anything else." WENTWORTH says that that is not the law—it is not that some of the property changes at once, because you cannot tell which piece of property changes at once, unless indeed all the assets are less than and not more than the executor's debt, in which case you may say that the property has passed to him. That may be the case. If, however, the property is more or appears to be likely to be more than the executor's debt, you cannot say against the executor, "You have appropriated 'this' or 'that,' nor of course, by a similar process can the executor say that he has appropriated this or that until he has done some act which shows his election. There may be, as WENTWORTH says, a sum of money proportionate to the debt, and very little then will be needed to support the suggestion that the executor has elected to pay himself out of that or retain that in satisfaction of his debt.

There is very old law dating from the time when chattels were never converted into money, but passed from hand to hand, particularly those used in connection with agriculture. Other considerations arise now. You must indicate some change or you must indicate a sum of money plus a change. You must indicate in some way what your are going to retain your debt out of. It would be nonsense to say that you must, at your peril, choose a chattel or chattels which will just give the value of your debt. If it so happens that the chattels cannot provide the exact value of your debt, if your debt is worth £100 and there are six articles each worth £15, you cannot get the exact amount of your debt out of the chattels, but are you to lose the balance of £10, because fifteen goes into ninety and does not go into 100, or are you to be deemed a tortfeasor or a misfeasor because you have retained chattels worth £110 for a debt of £105? It is nonsense. Take the case that my brother referred to. I was thinking of the Scriptural allegory of the pearl of great price, but I will mention a horse, as my brother mentioned a very valuable race-horse, worth many times more than the debt due to the executor, and at the same time, possibly the only article known as forming the testator's estate. May you not, in some way signify, and is it not according to common sense, and obviously according to business, that you are going to retain your debt out of that chattel, as against the other creditors, although at the same time you freely admit that when the chattel comes to be realised it will be worth a great deal more than your debt. That is good sense, and I see nothing to prevent its being good law. I confess that I have the strongest view, that in these matters law and common sense always ought to go together.

Taking this view, let me see what this lady, by her solicitor, did. She intimated that she was going to retain her debt out of the assets. That may not have been specific appropriation, it may have been a claim to retain all the assets for her debt. I do not see why she should not do that. In that case the property in all the goods has passed to her and she is liable for the consequences. But it is not necessary to decide it in that way, because when she came to deal with the matter she told (by the mouth of her solicitor) the man who was to act for her as her factor or agent in this matter, the auctioneer, that he was to sell certain articles—not all the assets because no doubt there were some that were not sold—and that she was going to retain her debt out of those. I think that for that purpose she appropriated all those articles for the moment as those out of which she was going to pay her debt, and she retained them none the less because she knew that when they were sold the balance would have to go to the other creditors. The case has been attempted to be put as if the trustee for the creditors was concerned with what the relations between the lady and the auctioneer were. Whether the auctioneer paid the money to the lady or not, that is a purely domestic matter between the lady and the auctioneer. If, instead of selling these goods by auction, the lady had sold them herself, and all these articles had been sold and then, having

sold them, having converted them into money, and receiving the value, if you like, in sovereigns, she had then set apart in the bank 200 sovereigns for herself, she would have retain her debt none the less because she was going to give the rest to the other creditors, and she would not thereby, because she was so selling them in bulk, in any way derogated from any previous election which she might have made to retain as many of these articles or as much of this money as would be necessary for her debt, or, to put it in another way, to retain them all in satisfaction of her debt subject to her duty to account to the other creditors. I think, that, having regard to what happened in this case, the decision of the learned county court judge was right, and that this appeal ought to be dismissed.

BUCKNILL, J.—I am of the same opinion. I agree with what my brother PHILLIMORE has said, and I will not say more about the effect of s. 125 (9). The simple question here is whether the executrix, who was a creditor of the estate to the extent of £200, exercised her right of retainer before the presentation of the petition for an administration order. This depends, in the first place, entirely on the facts.

Her husband, the deceased person, a farmer, who owed her £200 on a promissory note or an I.O.U., died in March. His estate was insufficient to pay his creditors in full, and in April, shortly after his death, the creditors were brought together by the solicitor to the executrix, and they were told what the condition of things was. They were told that she was a creditor for £200 and that she intended, out of the assets, to retain the £200 so due to her as aforesaid. That was in April. The sale did not take place until after notice under s. 125, and, therefore, one has to consider, in the first instance, what she did before May 2. She did all that she could reasonably have done at that time. She was in possession, as executrix, of the assets; she said that she was going to convert them into money, and she gave full notice that out of the money produced by the sale of the farming stock and so on, she intended to pay herself this £200. Now, it is settled law that, if the debt exceeded the value of the estate in specie she was not bound to sell. That has been settled by *Re Gilbert, Ex parte Gilbert* (2) before WRIGHT, J. The only observation that WRIGHT, J., made in that case which has given me difficulty is this ([1898] 1 Q.B. at p. 286):

> "If the assets had been of greater value than her debt, it might very well be that she was not entitled to retain before she had realised, or unless she had clearly appropriated some specific assets in payment of her debt."

What she did, in my opinion, was a clear appropriation of the assets of the testator in payment of her debt, and therefore that sentence of WRIGHT, J.'s, judgment is not to be taken as hostile to the judgment of the learned county court judge, which is not appealed from.

I will refer to my suggested illustration of the racehorse. It is clear from this judgment of WRIGHT, J., that if the racehorse had been of less value than the executor's debt, or rather of less value than the amount of his claim against the estate, he need not have gone to the trouble of selling the racehorse at all, but might have retained the debt from the racehorse, so to speak, without going to the trouble of selling it. But here the estate was of greater value than the debt. What did she do? She did all that she could. She declared her intention (perhaps that by itself is not sufficient) at a subsequent period to retain the debt out of the proceeds of the sale, and she did more than that. She had these assets in her possession at that time, and her declaration and her acts before she received the notice of May 2 appear to me to justify the judgment of the learned county court judge on the facts and also in law, and therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; King, Wigg & Co.*, for *J. Pethybridge*, Bodmin.

[*Reported by* J. A. THEOBALD, ESQ., *Barrister-at-Law.*]

A

CATHCART *v.* CHALMERS

[House of Lords (Lord Loreburn, L.C., Lord Kinnear, Lord Atkinson and Lord Shaw), March 21, 1911]

[Reported [1911] A.C. 246; 80 L.J.P.C. 143; 104 L.T. 355]

B

Agriculture—Agricultural holding—Compensation—Clause in lease limiting time in which claim by tenant may be made—Validity—Agricultural Holdings (Scotland) Act, 1883 (46 & 47 *Vict.*, *c.* 62), *s.* 36—*Agricultural Holdings Act*, 1900 (63 & 64 *Vict.*, *c.* 50), *s.* 1 (1).

By s. 1 (1) of the Agricultural Holdings Act, 1900, which applied to Scotland: "Where a tenant has made on his holding any improvement . . . he shall . . . be entitled at the determination of a tenancy on quitting his holding to obtain from the landlord" compensation for the improvement. By s. 2 (2) "Any claim by the tenant for compensation . . . shall not be made after the determination of the tenancy." By s. 36 of the Agricultural Holdings (Scotland) Act, 1883, in identical terms with s. 55 of the Agricultural Holdings (England) Act, 1883: "Any contract or agreement by a tenant by virtue of which he is deprived of his right to claim compensation under the Act in respect of any improvement . . . so far as it deprives him of such right be void."

C

D

A clause incorporated in a lease contained the following provision: "Provided always that no claim to compensation shall be made by the tenant later than one month prior to the determination of the tenancy."

E

Held: the clause was void as being an agreement depriving the tenant of his right to claim compensation at the determination of the tenancy.

Notes. The Agricultural Holdings (England) Act, 1883, the Agricultural Holdings (Scotland) Act, 1883, and the Agricultural Holdings Act, 1900, have been repealed. See now the Agricultural Holdings Act, 1948, and for Scotland, the Agricultural Holdings (Scotland) Act, 1949. By s. 65 (1) of the Agricultural Holdings Act, 1948, a tenant or landlord may recover compensation under the Act and not otherwise and "shall be entitled notwithstanding any agreement to the contrary." By s. 70 all claims under the Act must be made by notice in writing served on the landlord or tenant before the expiration of two months from the termination of the tenancy.

F

G

As to compensation under agreements on quitting agricultural holdings, see 1 Halsbury's Laws (3rd Edn.) 306, 307, and for cases see 2 Digest (Repl.) 72, 73. For the Agricultural Holdings Act, 1948, see 28 Halsbury's Statutes (2nd Edn.) 25.

Appeal from a judgment of the Second Division of the Court of Session (the Lord Justice-Clerk (Macdonald), Lord Salvesen, Lord Ardwall, and Lord Dundas) who had reversed a judgment of the Lord Ordinary (Guthrie) granting interdict.

H

The respondent, who was a tenant of the appellant, gave notice in terms of his lease of his intention to terminate his tenancy of the farm of Camregan, Ayrshire, on Nov. 28, 1908, being the Martinmas term agreed on between the parties. Upon Nov. 9, 1908, the respondent sent to the appellant notice of his claim for compensation for improvements, in terms of the Agricultural Holdings (Scotland) Acts, 1883 to to 1900, and on Nov. 26, 1908, he sent an amended claim. The receipt of these notices was admitted by the appellant. The claims were made to the landlord in proper time, in terms of the Agricultural Holdings Act, 1900. The tenant quitted his farm on Nov. 28, 1908. The arbiter was appointed on Sept. 7, 1909, but the landlord, by process of interdict, had prevented him from acting.

I

The appellant maintained that the respondent had lost his right to compensation by virtue of a provision embodied in a document called estate regulations, and

incorporated by reference in the lease between the parties. The provision was in the following terms:

"Provided always that no claim for compensation under the said Acts, or under these conditions, shall be made by the tenant later than one month prior to the determination of the tenancy."

The appellant contended that the provision was equivalent to a stipulation that, if the tenant failed to make a claim not later than one month before the termination of the tenancy, he was deprived of all right to compensation. The contention of the respondent was that the Agricultural Holdings (Scotland) Acts conferred on the tenant a right to compensation for improvements made by him on the holding, which he could not be deprived of by virtue of any agreement into which he had entered. The Agricultural Holdings Act, 1900, which applied to the present case, enacts in

"Section 1. Where a tenant has made on his holding any improvement comprised in the first schedule to this Act, he shall, subject as in the Agricultural Holdings (England) Act, 1883 (in this Act referred to as the principal Act) [This is by the application of s. 10 to be read for Scotland as "Agricultural Holdings (Scotland) Act, 1883"] and in this Act mentioned, be entitled at the determination of a tenancy on quitting his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant. . . . Section 2 (2). Any claim by a tenant for compensation under the principal Act or this Act, in respect of any improvement comprised in the first schedule to this Act, shall not be made after the determination of the tenancy."

The improvements embraced in the respondent's claim were admittedly improvements comprised in the first schedule of the 1900 Act. It was submitted that the right conferred on the tenant by the foregoing sections was a right to obtain the value of his improvements, and to make a claim at any time up to the final day of his tenancy. The Agricultural Holdings (Scotland) Act, 1883, enacts:

"Section 36. Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void."

This section is identical with s. 55 of the Agricultural Holdings (England) Act, 1883. The court below held that the proviso was void. The landlord appealed.

C. N. Johnston, *K.C.*, and *A. R. Brown* (both of the Scottish Bar) for the appellant.

The Lord Advocate (*Ure*, *K.C.*) and *F. Watt*, for the respondent, were not called on to address their Lordships.

LORD LOREBURN, L.C.—In this case I think that the appeal has been fairly, fully, and ably argued by the counsel for the appellant, but to my mind (to paraphrase the Act of Parliament itself) the substantial meaning is this—You shall not by private contract deprive a tenant of his right to claim compensation under this Act, or, if you do, your contract, so far as it deprives him of such right, shall be void. But there is the exception that you may by private contract substitute a scale of compensation different from the scale provided by the Act. That, I think, is the true effect of the exception. Beyond that you may do nothing which deprives him of his right to claim compensation under this Act. Here, in this case, a lease has substituted a different scale. Whether it is or is not different is immaterial. It is common ground that the scale is a fair one, but can you add in that lease a condition as to the time within which a tenant has to give notice of his claim? That depends upon whether the condition requiring him to give notice within a

month is, or is not, something which deprives him of his right to claim compensation under the Act. I think that it does clearly deprive him of his right, and for this reason. It says that you cannot give notice during the whole month prior to the end of the lease, whereas the Act allows the notice to be given during the whole of that month. It deprives him of one month within which he would be otherwise entitled to give notice of his claim for compensation, and therefore it deprives him of the right to claim compensation under the Act. I therefore move that the appeal be dismissed with costs.

LORD KINNEAR.—I agree entirely with the noble Lord on the Woolsack, and only add that I think that the last sentence of LORD DUNDAS' opinion expresses exactly the view which I take of this case.

LORD ATKINSON.—I agree. I do not think that it is necessary to determine whether it is proper to introduce any condition whatsoever into an agreement under s. 5 of the Act. The vice of this condition is that it does deprive the tenant of the right which the Act secured to him—namely, that he should be able to serve his claim up to the last moment of his tenancy.

LORD SHAW.—I do not find this case to be a difficult one, but I think that it is one of very great importance. The position of one of the parties to the case depends upon an appeal to sub-s. (1) of s. 1 of the Act of 1900. One of the learned judges in the court below calls this the charter of the tenant. It provides, in simple language, that the outgoing tenant shall be entitled to compensation under the Act to such sum as fairly represents the value of improvements to the incoming tenant. That seems to represent the real, simple equity of the position. The position taken up by the tenant in this case is a quotation of that Act of Parliament, an appeal to that simple equity. It is perfectly clear that in the history of the legislation on this subject Parliament was confronted with a situation in which contracting-out occurred. Contracting-out is dealt with by ss. 5 and 36 of the Act of 1883. Substantially, what has been provided is a series of provisions to prevent confiscation by the landlord of the value of improvements made by a tenant. There is always a question as to the extent to which s. 36 covers the situation of private contract. I desire to say that, having read the lengthy and involved document called "articles and regulations" of various estates belonging to the appellant, I can conceive —and it requires no effort of imagination to conceive it—that a tenant reading that might possibly be bewildered. Such a document appears to me to fit this necessity for protection which the Act of 1883 specially provided. The flaw which the appellant has found in the respondent's proceedings is that he gave nineteen days' notice, instead of a month, of his claim for compensation. Founding upon that flaw, it is maintained for the landlord that the tenant is to get no compensation at all. With regard to the Act, and particularly s. 36, I cannot hold that it means anything else in the way of protection, but that the agreed compensation be substituted for statutory compensation, and, secondly, that it shall be compensation upon a fair and reasonable scale. I, like my noble and learned friend who preceded me, adopt strongly as bringing it into a crystallised form the concluding words in the judgment of LORD DUNDAS:

> "The question is as to the legality or the reverse of such a provision as we have here. I think it is an illegal provision. The statutes sanction a pactional substitution of compensation, in terms of agreement for compensation, in terms of the Acts, but not, as I consider, the adjection of a collateral stipulation, such as this, which might, at least indirectly, operate to deprive the tenant of his right to obtain any compensation at all."

I desire to adopt that language as part of my own opinion. Had it not been for the opinion of the Lord Ordinary, I should have held that this was an idle, although oppressive, action. I hold that the appellant would have been well advised

to rest content with the judgment of the Second Division. I am of opinion that this is an idle and oppressive appeal, and that it constitutes an attempt to break down that protection which the law has thrown round an improving tenant.

Appeal dismissed with costs.

Solicitors: *Martin & Co.*, for *Skene, Edwards & Garson*, Edinburgh; *Godden, Son & Holme*, for *James Purves*, Edinburgh, and *Rankin & Aitken*, Stranraer.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

DONKIN *v.* PEARSON (ON BEHALF OF THE AMALGAMATED SOCIETY OF ENGINEERS)

[King's Bench Division (Lord Alverstone, C.J., Bray and Lord Coleridge, JJ.), April 11, 1911]

[Reported [1911] 2 K.B. 412; 80 L.J.K.B. 1069; 104 L.T. 643]

County Court—Removal of action into High Court—"If High Court or judge thereof shall deem it desirable"—Test to be applied—County Courts Act, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 126.

By the County Courts Act, 1888, s. 126 [now s. 115 of the County Courts Act, 1959] an action commenced in the county court may be removed into the High Court "if the High Court or judge thereof shall deem it desirable that the action or matter shall be tried in the High Court."

The test to be applied in determining whether or not it is desirable that the proceedings should be heard and determined in the High Court is whether the action is one which is more fit to be tried in the High Court than in the county court, and the onus is on the party applying for the order for removal of the action into the High Court to prove that point.

Notes. As to removal of action to High Court from county court by certiorari, see 9 Halsbury's Laws (3rd Edn.) 331, and for cases see 13 Digest (Repl.) 486 et seq. For the County Courts Act, 1959, s. 115, see 39 Halsbury's Statutes (2nd Edn.) 190, 191.

Cases referred to:

(1) *Osborne* v. *Amalgamated Society of Railway Servants*, ante p. 102; [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289, C.A.; 43 Digest 93, *972*.

(2) *Banks* v. *Hollingsworth*, [1893] 1 Q.B. 442; 62 L.J.Q.B. 239; 68 L.T. 477; 57 J.P. 436; 41 W.R. 225; 37 Sol. Jo. 190; 4 R. 228, C.A.; 34 Digest 536, *99*.

Also referred to in argument:

Staples v. *Accidental Death Insurance Co.* (1861), 10 W.R. 59; 13 Digest (Repl.) 487, *1144*.

Soloman v. *London, Chatham and Dover Rail. Co.* (1861), 10 W.R. 59; 13 Digest (Repl.) 488, *1154*.

Appeal by the defendant from an order of Horridge, J., sitting at chambers.

In 1870 the plaintiff became a member of the Amalgamated Society of Engineers, a registered trade union, and paid subscriptions to the society for about thirty years with the object of securing financial assistance for his old age under its rules. He was incapacitated from work for several years as the result of ill-health, and during that time he received sick pay from the society at the rate of 5s. a week. In December, 1909, the plaintiff, who was sixty-two years of age, claimed to be

entitled to receive 9s. a week as superannuation benefit instead of the 5s. a week sick pay of which he had been in receipt up till that time. His claim not being admitted by the society, he commenced an action in the Manchester County Court to recover the superannuation benefit to which he alleged that he was entitled. It was contended on behalf of the society that, but for the Trade Union Acts, it would be an unlawful society at common law by reason of the fact that its objects and purposes were in restraint of trade; and it was further contended that the action was not maintainable, since it was instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits for members contrary to the provisions of s. 4 of the Trade Union Act, 1871. The learned county court judge held that the society was not an illegal society at common law, and that the action was, therefore, maintainable; but upon the rules of the society he held that it had power to consider and reject applications for superannuation benefit. He, therefore, gave judgment for the society. In respect of its costs in that action the society paid to its solicitors the sum of £6 16s. After the action in the county court the society ceased to make any payments to the plaintiff in respect of sick pay, and claimed that he must refund the costs incurred in defending the action brought by the plaintiff before he could receive any further benefits. The plaintiff thereupon commenced the present action against the defendant, who was the representative of the society, claiming the sum of £4 as arrears of sick pay alleged to be due to him. The defendant applied to the master in chambers, under s. 126 of the County Courts Act, 1888, that the action should be removed into the King's Bench Division. That section provides as follows:

> "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the court under the provisions of this Act if the High Court or a judge thereof shall deem it desirable that the action or matter should be tried in the High Court, and upon such terms as to payment of costs, giving security or otherwise, as the High Court or a judge thereof shall think fit to impose."

Upon the defendant's application the master made an order directing the removal of the action into the High Court upon the following terms: (a) payment (without prejudice to the defendant's rights) of 5s. a week from the date of order to the date of trial; (b) that the defendant pay, in any event, the difference in costs between proceedings in the county court and in the High Court, and he ordered the case to be tried before a judge at Manchester. The plaintiff appealed from this order to HORRIDGE, J., sitting in chambers, who allowed the appeal. The defendant appealed.

C. A. Russell, K.C., and *J. D. Crawford* for the defendant.
E. G. Palmer for the plaintiff.

LORD ALVERSTONE, C.J.—It seems to me that this is a case in which we might give judgment either for the plaintiff or for the defendant upon equally good grounds because we might say that the case was one for the exercise of the learned judge's discretion, and that we did not see sufficient grounds for interfering with the exercise of his discretion. Such a decision, however, would not be altogether satisfactory in this case because I think we ought to consider and if possible lay down some sort of guide as to what ought to be done when an application is made under s. 126 of the County Courts Act, 1888, to remove an action out of the county court into the High Court.

That section provides that the action may be removed to the High Court

> "if the High Court or a judge thereof shall deem it desirable that the action shall be tried in the High Court, and upon such terms as to payment of costs, giving security or otherwise as the High Court or a judge thereof shall think fit to impose."

A The present case is not merely an appeal from the exercise of his discretion by the learned judge, because the learned judge had discharged an order previously made by the master. It is conceded as the basis of the whole of this argument that the only defence the society desire to raise is the defence that the society is an illegal one. There had been a previous decision of the learned county court judge upon that point, and it is suggested that since the recent decision of the Court of Appeal in B *Osborne* v. *Amalgamated Society of Railway Servants* (1), the question involved in the present case raises difficult questions of law. Prima facie, I should have thought, therefore, that the present case was one which came directly within s. 126 of the County Courts Act, 1888, as being a case which it was desirable should be tried in the High Court. It is not suggested that there is any question of witnesses' expenses or complication in the matter, or question of fact to be tried, the sole C question in dispute is as to the meaning of the rules and regulations of the society. The master made an order for the removal of the action into the High Court upon the following terms, payment (without prejudice to the defendant's rights) of 5s. a week from the date of order to the date of trial. I only refer to that because counsel for the plaintiff said something with regard to the hardship of the way in which the plaintiff had been treated by the defendants. If that did influence the D mind of the learned judge, I doubt whether it was a legal or proper consideration to be regarded by him in exercising his discretion, and if it was a proper matter to be taken into consideration at all, it seems to me to have been met by the terms upon which the defendants were willing to be put—namely, "that the defendants pay in any event the difference in costs between the proceedings in the county court and in the High Court."

E In my opinion, so far as one can express an opinion in the matter, I think that the order made by the master was the proper order to make. If, when the case came before the learned judge, he decided that it ought not to be tried in the High Court because the defendants had not acted in a way of which he approved with regard to the payment to the plaintiff of the sick pay or because they had told the plaintiff that they would not pay him any more benefit until he had repaid the F £6 16s., the costs incurred by them in the previous action, I do not think that those were matters to be taken into consideration in deciding whether it was desirable that the action should be tried in the High Court. In my opinion, therefore, as this is a case in which possibly the learned judge has exercised his discretion upon grounds that were not strictly germane to his discretion, and as the terms made by the master seem to me to be the proper terms upon which the case ought G to be removed into the High Court, I think that this appeal should be allowed.

BRAY, J.—I am of the same opinion. Section 126 of the County Courts Act, 1888, allows the court to say whether they deem it desirable that the action should be transferred to the High Court. In deciding this, the first thing that the court have to consider is before which tribunal it is proper that it should be tried. I have H always acted in chambers upon the rule laid down in *Banks* v. *Hollingworth* (2) (although that case was decided upon a section of another Act dealing with the removal of a case from the mayor's court)—namely, to apply the test whether the action is one which is more fit to be tried in the High Court than in the county court. It is, of course, for the person applying to have the action removed to satisfy the court as to that, and when it appears, as it does in the present case, I that there is only one question to be tried and that it is undoubtedly a difficult question of law, it seems to me that the defendants have shown the court that the action is one which it is most desirable should be tried in the High Court. No doubt the word "desirable" in the section would include other things besides the fitness of the case to be tried in the High Court; for instance, the court is bound to consider the fact that the plaintiff is a poor man and that it would be hard that he should have to pay large sums for costs. From such a hardship the court is bound to protect him, and that they do under the words at the end of the section:

"Subject to such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose."

I think in this case the master imposed the proper terms upon which this case should be removed into the High Court. I do not think there is anything in this case which would justify the learned judge in saying that the society had behaved badly, and that the case ought not to be removed as a consequence. I will not say that such a suggestion may not have had some influence with him, but it seems to me that there were no grounds for making such a suggestion. It would be a ground for not removing the action, as is pointed out in one of the cases, if there is no bona fide defence to it, because in such circumstances the case is equally fit to be tried in the county court as in the High Court. But taking all these things into consideration it seems to me that the order made by the master was right, and that this appeal should be allowed.

LORD COLERIDGE, J.—I agree.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.*, for *Barlow & Rowland*, Accrington; *R. B. Wheatley, Son & Daniel*, for *Cobbett, Wheeler & Cobbett*, Manchester.

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

NEWQUAY URBAN DISTRICT COUNCIL *v.* RICKEARD AND ANOTHER

[King's Bench Division (Lord Alverstone, C.J., Pickford and Lush, JJ.), April 26, 27, 1911]

[Reported [1911] 2 K.B. 846; 80 L.J.K.B. 1164; 105 L.T. 519; 75 J.P. 382; 9 L.G.R. 1042]

Street—Private street works—Expenses—Apportionment—Premises to which access obtained through "court, passage, or otherwise"—Application of ejusdem generis rule—Access by public street existing or in the making—Private Street Works Act, 1892 (*55 & 56 Vict., c. 57*), *s. 10.*

By s. 10 of the Private Street Works Act, 1892 [now s. 176 (3) of the Highways Act, 1959], an urban authority about to execute private street works in any street might include in a provisional apportionment of expenses of the works any premises which did not front, adjoin, or abut on the street, "but access to which is obtained from the street through a court, passage, or otherwise," and which in their opinion would be benefited by the works.

Held: while the words "or otherwise" in the section were not to be construed ejusdem generis with the preceding words and, therefore, to bring the section into operation the access to the premises need not be obtained through a way of limited width in the nature of a court or passage.

Per Curiam: The local authority cannot include in the apportionment a property the access to which is by a street which is either already public or is a public street in the making.

Notes. Considered: *Chatterton* v. *Glanford Rural Council*, [1915] 3 K.B. 707; *Oakley* v. *Merthyr Tydfil Corpn.*, [1921] All E.R. Rep. 292.

As to private street works, see 19 Halsbury's Laws (3rd Edn.) 437–449, and for cases see 26 Digest (Repl.) 609 et seq. For the Highways Act, 1959, s. 176 (3) see 39 Halsbury's Statutes (2nd Edn.) 601, 602.

Case referred to :

(1) *Hall* v. *Bolsover U.D.C.* (1909), 100 L.T. 372; 73 J.P. 140; 7 L.G.R. 403, D.C.; 26 Digest (Repl.) 618, *2705*.

Case Stated by justices of the peace for the county of Cornwall.

At the court of summary jurisdiction sitting at the town hall in St. Columb on Nov. 8, 1910, an application was made to such court by the appellants to determine the matter of certain objections made by the respondents respectively to a provisional apportionment of expenses made by the appellants under s. 10 of the Private Street Works Act, 1892 (hereinafter called "the said Act") in respect of certain works proposed to be executed in certain streets within the appellants' district called Springfield Roads and entrance roads from Berry Road on the west side thereof and the entrance road from the main street leading to and including Oakleigh Terrace Road which apportioned a portion of such expenses on the respondents respectively.

At the hearing the following facts were proved or admitted: The appellants were an urban authority who have duly adopted the Private Street Works Act, 1892, and within whose district were certain streets known as Springfield Roads and entrance roads from Berry Road on the west side thereof and the entrance road from the main street leading to and including Oakleigh Terrace Road. The respondent Silas Rickeard was the owner of certain building lands access to which was obtained from the said streets through two partly made roads which are marked "S. R." on a plan attached to the case belonging to Silas Rickeard, but he had other means of access to his lands. The respondent George Hawke was the owner of certain building land access to which was obtained from the streets through an unmade road belonging to him, but he had other means of access to his lands. At a meeting held on June 7, 1910, the appellants resolved to do the private street works in Springfield Roads and other streets before mentioned, and resolved that the expenses of carrying out the above-mentioned works be apportioned, regard being had to (i) the greater or less degree of benefit to be derived by any premises from any such work, and (ii) the amount or value of any work done by the owners or occupiers of any such premises, and also upon any lands or premises access to which is obtained from the streets through a court, passage, or otherwise, and which will be benefited by such works; and at the same meeting the appellants approved the plans and sections, specifications and estimates, and provisional apportionments which had been prepared by the surveyor. On July 2, 1910, a copy of the resolution approving the specifications, plans and sections, estimates and provisional apportionment, was duly published and copies thereof served upon the owners of the premises shown as liable to be charged in the provisional apportionment, and, among others, upon the respondents as owners of certain premises access to which, it was alleged by the appellants, was obtained from the streets through a court, passage, or otherwise, within the meaning of s. 10 of the Act of 1892. On July 25, 1910, the respondent Silas Rickeard, who had received the notice, served on the appellants a notice of which, omitting formal parts, the following is a copy :

> "I beg to give you notice that I object to the assessments served on me with regard to the making up of certain streets. I am not a frontager, and have no interest in the making up of the streets referred to in the notice served on me, and I shall resist any claim made on me in respect of the cost of making up the said streets."

On July 25, 1910, the respondent George Hawke, who had received two notices of apportionment in accordance with s. 7 of the Act, served on the appellants two notices of objection. Omitting formal parts, the following was a copy of one of the two notices served by the respondent George Hawke :

> "Referring to the notice served on me by the above council, dated July 2, 1910, I hereby give you notice that I object to the charge on my land of £10

in respect of the works proposed to be carried out in the streets named in the said notice, on the ground that such charge is excessive having regard to the degree of benefit to be derived by me in respect of such streets."

The other notice was identical except as to the amount, which is therein stated to be £7 13s. 9d., instead of £10. In pursuance of the resolutions the appellants, in making the provisional apportionments, had in some cases made no apportionment against the owners of premises fronting, adjoining, or abutting on the streets, and in other cases had made no apportionment according to the frontage, but had charged for the amount of benefits which they considered would be derived by the premises in respect of such works. On the receipt of such notice the appellants applied to the court of summary jurisdiction to appoint a time for determining the matter of such objections, and on Oct. 28, 1910, duly served notices on the respondents of the date of the hearing.

It was contended on behalf of the appellants: (a) That the notice of objection given by the respondent Silas Rickeard was bad, it not being within s. 7 of the Act; (b) that the justices had no jurisdiction to consider objections other than those of which notice had been given; and (c) that the means of access to the premises of both the respondent Silas Rickeard and the respondent George Hawke from the streets are through a court, passage, or otherwise, within the meaning of s. 10 of the Act. It was contended on behalf of the respondent Silas Rickeard that the notice served on him was bad inasmuch as he was described as being owner of building land which he did not own, although the notice contained the number of the apportionment and an inspection of the plan would have shown the property in respect of which the apportionment was made, and that the notice given by the respondent Silas Rickeard was not bad, and that in pursuance of the judgment of the Lord Chief Justice in *Hall* v. *Bolsover U.D.C.* (1) could consider other objections than those included in the notices, and that the appellants by virtue of ss. 6 and 10 of the Act were bound to charge according to the frontage subject to the greater or less degree of benefit derived by any premises, and that the means of access to the premises of the respondents respectively from the streets were not through a court, passage, or otherwise, within the meaning of s. 10 of the Act.

The justices overruled the appellants' objection to the notice of objection by the respondent Silas Rickeard and the respondent Silas Rickeard's objection to the notice served on him, and they held that they had jurisdiction to entertain objections other than those notice of which had been given, and they decided that the premises of the respondents upon which a provisional apportionment had been made had not a means of access from the streets through a "court, passage, or otherwise," within the meaning of s. 10 of the Act, and that they had jurisdiction to amend the provisional apportionment. They accordingly ordered the provisional apportionment to be amended by striking out the apportionments made in respect of the premises belonging to the respondents respectively. They gave no decision on the other points raised by the respondents.

By s. 10 of the Private Street Works Act, 1892:

"In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just . . . include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

Bodkin for the appellants.

J. A. Hawke for the respondents.

A **LORD ALVERSTONE, C.J.**—This case must go back to the justices, as I am not satisfied what they meant by the finding that the respondents' premises had not a means of access from the streets in question "through a court, passage, or otherwise," within the meaning of s. 10 of the Act.

The principle upon which the inclusion of a large area was authorised by that section was the fact of the property so included had access to the new street and B received benefit from its improvement. Prior to the Act of 1892, which is an adoptive Act, there was not, so far as I know, any power to include in the apportionment premises which did not abut, front, or form part of the street. By s. 10 of that Act the urban authority obtained power to include premises that do not front, adjoin, or abut on the street, but they must be premises to which access is obtained from the street "through a court, passage, or otherwise." It has been argued that C the words "court" and "passage" limit the means of access included under the words "or otherwise." I am not prepared so to hold. No doubt, in many cases the words "or otherwise" in a statute must be construed ejusdem generis with the preceding words, so that, if that principle was applied here, the words "or otherwise" would denote something in the nature of a court or passage. But in this case it seems to me that to hold that the question whether the property is to D be included or not depends on the width of the way along which access to it is obtained would be to shut one's eyes to the real object of the Act, which was to enable the urban authority to include in the apportionment, on such terms as they think just, a property to which access is obtained from the new street. I am not prepared to hold that the properties in question cannot be included because the piece of ground along which access is obtained is not of such a character that E it could be called a court and is too wide to be described as a passage. It is plain that in many cases, although the entrance to a court may be narrow, the court itself would be wide. I cannot see that the use of the words "court" and "passage" shows that if all the other conditions are fulfilled the urban authority may not include a property simply because the piece of ground over which access to it is obtained is wide. I do not think that that is conclusive of the case.

F The governing principle is that access is obtained to the street by something which is described by the words "court, passage, or otherwise." But I am not prepared to say that the urban authority ought to include a property if the intervening space is already a public street, so that that public street becomes the means of access to the property from the new street. The real question in this case is as to the nature of the means of access. They are described in one case as two partly G made roads, and in the other as an unmade road. In my view, the justices ought to consider whether they are roads, or I might almost say streets, in the making. If the position is that building land has been laid out along them and they exist not for the purpose of giving access to the respondents' properties, but are roads along which other houses may be built and which in the course of time will probably be dealt with by the urban authority as streets, it would not be right to say that H access to the respondents' properties is obtained along them from the new street in respect of which the charge is made. In that case access to the respondents' properties from the new street in respect of which the charge is made is obtained along roads or streets in the course of making. It may be difficult to define exactly at what point to draw the line, but I think that the governing principle is that, if the owner of property gets access to the newly made road he ought to contribute, but I if he only gets access to something which leads to the newly made road it does not follow that he ought to contribute. The best instance that I can give of a property that could be included by the urban authority is that of a large house, the grounds of which have no actual frontage to the street, but which has a lodge and a wide carriage drive. It seems to me that if access to a newly made street from that property is by means of that carriage drive, that property could be included on just terms by the urban authority, but if between the property and the newly made street there is a road in the course of making, along which houses will in course

of time be built so that it will itself become a street, it would not be right to say that that property at a distance from the new street obtains access to the new street within the meaning of the section. A

The justices ought to say whether they decided this case merely on the question of width, treating the ways in question as a reserve means of access to the respondents' properties or whether they considered that they were partly formed roads, giving those properties access to the newly made street. In the first case they would not be right in their decision, and in the second case they would be right. We do not think that it is open to the appellants to have the premises included as fronting, adjoining, or abutting on the new street. As the apportionment was framed, the premises were not so treated, and it is not open to us to decide in favour of the appellants on the ground that the premises were properly fronting, adjoining, or abutting on the new street. B C

PICKFORD, J.—I am of the same opinion. From the way in which the Case is stated, it is impossible to know exactly upon what ground the justices decided it. If they decided it on the mere question of width, they were, in my opinion, wrong. I think that, although a passage is narrow, the word "otherwise" in the section does not necessarily refer to a narrow means of access, but it refers to something which gives access to the new street in the same way as a court or passage would give access to the new street. I agree that access by another street which leads into the new street is not within the section. Access to a public street gives an opportunity of getting to an almost indefinite number of other places. By entering the street from this building [the Royal Courts of Justice] we may eventually reach Chelsea Embankment, but it would be an abuse of language to say that we have means of access from here to Chelsea Embankment. Therefore, it seems to me clear that "access" must be restricted by excluding any case of that description. But in this case we do not know exactly the view which the justices took of these ways (to use a negative term), and it seems to me that they will have to direct their attention to the question whether these ways substantially formed a means of access from he respondents' premises to the new street in the manner in which a court or passage gives access, or whether they are really roads made for another purpose—e.g., for the use of houses built or to be built upon adjoining land, and only incidentally affording access from the respondents' premises to the new street by reason of their being converted into roads for that other purpose. If they come within the first part of the definition, then they come within the section. That is the question to which the justices will have to apply their minds, and not the mere question of width. D E F G

LUSH, J.—I agree.

Appeal allowed.

Solicitors: *Rodyk, Williamson & Co.*, for *G. Fraser Nicholls*, Newquay; *Gibbs, White & Co.*, for *Greenway & Sons*, Newquay.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

THE OLYMPIC

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), November 28, 1912, March 4, 1913]

[Reported [1913] P. 92; 82 L.J.P. 41; 108 L.T. 592; 29 T.L.R. 335; 12 Asp. M.L.C. 318; 57 Sol. Jo. 388]

Shipping—Seaman—Wages—Termination of service—Meaning of "wreck"—Merchant Shipping Act, 1894 (*57 & 58 Vict., c. 60*), *s. 158.*

By s. 158 of the Merchant Shipping Act, 1894: "Where the service of a seaman terminates before the date contemplated in the agreement [of service], by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period."

The word "wreck" within this section means something less than total loss. Any damage to a ship from a cause for which neither the master nor the owner, on the one side, nor the seaman, on the other, is actively responsible, which damage does not constitute loss of the ship, but of necessity renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into and so terminates the service of the seaman, will render the ship a "wreck" within the section.

So **held** by Vaughan Williams and Buckley, L.JJ., Kennedy, L.J., dissenting.

Where, therefore, a ship on the day she left port was in collision with another vessel and received damage which prevented her from continuing on her voyage and took nine weeks to repair,

Held by the majority of the court: she was a "wreck" within s. 158; the service of the plaintiffs, members of the crew, were thereby terminated; and the plaintiffs were only entitled to wages up to the time of the termination.

Notes. Considered: *Mayer* v. *"Solon" Ship Owners* (1929), 22 B.W.C.C. 424; *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1933] All E.R. Rep. 52; *The Terneuzen, Marsh* v. *Lensen Shipping, Ltd.*, [1938] 2 All E.R. 348. Distinguished: *Re Petition of Right of Court Line, Ltd., The Lavington Court*, [1944] 2 All E.R. 249. Referred to: *Horlock* v. *Beal*, [1916–17] All E.R. Rep. 81.

As to a seaman's right to wages, see 35 Halsbury's Laws (3rd Edn.) 168 et seq., and for cases see 41 Digest 224 et seq. For the Merchant Shipping Act, 1894, see 23 Halsbury's Statutes (2nd Edn.) 395.

Cases referred to:

(1) *Constable's Case* (1601), 5 Co. Rep. 106a; 77 E.R. 218; 41 Digest 818, *6777*.
(2) *R.* v. *Forty Nine Casks of Brandy* (1836), 3 Hag. Adm. 257; 166 E.R. 401; 41 Digest 819, *6783*.
(3) *R.* v. *Two Casks of Tallow* (1837), 3 Hag. Adm. 294; 6 L.T. 558; 166 E.R. 414; 41 Digest 818, *6780*.
(4) *Legge* v. *Boyd* (1845), 1 C.B. 92; 14 L.J.C.P. 138; 9 Jur. 307.
(5) *The Elizabeth* (1819), 2 Dods. 403; 165 E.R. 1527; 41 Digest 252, *939*.
(6) *Tindle* v. *Davidson* (1892), 61 L.J.M.C. 107; 66 L.T. 372; 56 J.P. 390; 7 Asp. M.L.C. 169, D.C.; 41 Digest 253, *949*.
(7) *The Florence* (1852), 19 L.T.O.S. 304; 16 Jur. N.S. 572; 41 Digest 846, *7091*.
(8) *The Warrior* (1862), Lush. 476; 6 L.T. 133; 1 Mar. L.C. 204; 167 E.R. 214; 41 Digest 229, *669*.
(9) *The Neptune* (1824), 1 Hag. Adm. 227; 166 E.R. 81; 41 Digest 845, *7078*.
(10) *Beale* v. *Thompson* (1804), 4 East. 546; (1813), 1 Dow. 299.

Also referred to in argument:

Union Steamship Co. of New Zealand, Ltd. v. *Melbourne Harbour Trust Comrs.* (1884), 9 App. Cas. 365; 50 L.T. 337, P.C.; 41 Digest 985, *n*.

The Woodhorn (1891), 92 L.T. Jo. 113; 41 Digest 229, *678*.

Sivewright v. *Allen*, [1906] 2 K.B. 81; 75 L.J.K.B. 476; 94 L.T. 778; 70 J.P. 290; 54 W.R. 604; 22 T.L.R. 482; 50 Sol. Jo. 440; 10 Asp. M.L.C. 251; 11 Com. Cas. 167, D.C.; 41 Digest 229, *676*. A

Taylor v. *Caldwell* (1863), 3 B. & S. 826 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, *5333*.

Nickoll and Knight v. *Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp. M.L.C. 209; 6 Com. Cas. 150, C.A.; 41 Digest 460, *2923*. B

Appeal by the plaintiffs, a seaman and a fireman serving on board the *Olympic*, which was owned by the defendants, from a decision of BARGRAVE DEANE, J., that they were not entitled under s. 162 of the Merchant Shipping Act, 1894, to damages for wrongful discharge. C

The plaintiffs, T. D. Fraser and William Weller, served on board the *Olympic* under articles which they signed on Sept. 16, 1911, under which they were entitled to £6 and £5 per month respectively. The voyage for which they agreed to serve was described as from Southampton to New York (via Cherbourg and Queenstown), and/or, if required, to any port or ports within the North Atlantic and South Atlantic oceans, trading as might be required until the ship returned to a final port of discharge in the United Kingdom, for any period not exceeding twelve months. There was also a clause in the articles which provided that D

> "if from any cause the said ship cannot sail on the date appointed, or should the vessel put back into port through accident, the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named." E

On Sept. 20 the *Olympic* sailed from Southampton with the plaintiffs on board, and, while proceeding on her voyage to New York, and off Cowes was in collision with H.M.S. *Hawke* and sustained damage. On Sept. 21 the *Olympic* returned to Southampton. On Sept. 22 the owners of the *Olympic* tendered to the plaintiffs three days' wages, and refused to pay more. The plaintiffs claimed to be entitled to the sums of £6 and £5 being a month's wages, on the ground that they had been discharged otherwise than in accordance with the terms of the agreement before one month's wages had been earned and without their consent, within s. 162 of the Act of 1894. The owners refused to pay any such sum on the ground that the only wages the men were entitled to were wages up to the time of the termination of the service, and that the service had terminated by reason of the wreck of the ship. On Sept. 25 the plaintiffs applied for a summons against the owners claiming the sums of £6 and £5. On Oct. 11 the summons was by consent of all parties referred to the Admiralty Court under s. 165 (iii) of the Merchant Shipping Act, 1894. The plaintiffs admitted that the *Olympic* could not have proceeded to America after the collision and that they would not have liked to proceed in her in the condition in which she was after the collision, and that only eighteen days would have been occupied on the voyage. The owners proved that the repairs would take some months to do, that the only place they could be effected was at Belfast, and that the vessel's passenger certificate was withdrawn by the Board of Trade. They also proved that no other steamship ran in the place of the *Olympic*, so that the crew could not be transferred. F G H I

The case comes before the Admiralty Court on Mar. 5 and 6, 1912, when BARGRAVE DEANE, J., held that after the collision the *Olympic* became a "wreck" within s. 185 of the Merchant Shipping Act, 1894, that thereupon the service of the plaintiffs terminated, and that they were entitled to wages up to the time of such termination and no more. The plaintiffs appealed.

By the Merchant Shipping Act, 1894:

"Section 158. Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period.

"162. If a seaman, having signed an agreement, is discharged otherwise than in accordance with the terms thereof before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying that discharge, and without his consent, he shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage caused to him by the discharge not exceeding one month's wages, and may recover that compensation as if it were wages duly earned."

Emanuel for the plaintiffs.
Laing, K.C., and *Raeburn* for the defendants.

Cur. adv. vult.

Mar. 4, 1913. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—I agree with BARGRAVE DEANE, J., that the only question raised on the hearing before him in this case was whether the *Olympic* was a "wreck" within s. 158 of the Merchant Shipping Act, 1894, or whether she was not. If she was a "wreck," then s. 158 applies; if she was not, then it does not apply. It further seems to me that, if s. 158 applies, the plaintiffs respectively were not discharged within the meaning of s. 162 of the Merchant Shipping Act, 1894, but the service of these seamen terminated before the date contemplated in the agreement. I agree further that in construing the word "wreck" in s. 158 of the Merchant Shipping Act, 1894, one should construe the word in relation to the subject-matter of the section, and should not limit the meaning of the word "wreck" to the meaning laid down in the cases decided with reference to whether goods belonged as "wreck" to the owner of the foreshore. Section 158 of the Merchant Shipping Act, 1894, deals with a very different subject-matter; it deals with the termination of the service of a seaman before the date contemplated by the agreement by reason of certain specified causes, each of which fall within the category of involuntary causes for which neither the master nor owner, on the one side, nor the seaman, on the other, is actively responsible. I think it follows that any damage to the ship from a cause falling within the category I have mentioned, which does not constitute a loss of the ship but of necessity terminates the service of the seaman, will come within the term "wreck" in s. 158. I think the word "wreck" means something less than total loss. I think that, in determining whether the wreck in question has terminated the service of the seaman, the tribunal which has to determine this question must first satisfy itself that the damage which is alleged to have terminated the service is physical damage caused at sea by perils of the sea to the ship; and, secondly, that such damage, although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture. I think, therefore, that this appeal must be dismissed.

BUCKLEY, L.J.—The question upon this appeal is as to the meaning of the word "wreck" in s. 158 of the Merchant Shipping Act, 1894. If there has not been a wreck of the ship the plaintiffs are entitled to succeed. If there has, then they fail.

The words "wreck" or "wrack," for both were originally the same, import primarily injury, including, but not necessarily amounting to, destruction. I may speak of the wreck of a railway train, or, metaphorically, of the wreck of a woman's happiness or the wreck of a man's fortunes. The question is as to the meaning to

be attributed to the word in maritime affairs. What amount of injury or destruction, and how occasioned, satisfies the words "the wreck of a ship"? The plaintiffs have argued that there can be no wreck of a ship unless she has touched the ground. If this were right, it would follow that a ship could never be wrecked in mid-ocean unless she went to the bottom. If by collision with another vessel or by violence of the wind and the waves she was so injured as to cease to be navigable as a ship, she would not be wrecked. The contention seems to me to be impossible. It is rested solely upon authorities which, as I shall show, have no bearing upon the question.

The word "wreck" in maritime matters is used in two senses which for the present purpose it is essential to distinguish. The first (that with which I am here concerned) is the casualty, the injurious accident, or event, which is described by the words "the wreck of the ship." The word in its other use describes goods, or something physical, which by reason of the casualty are affected in a particular manner. Goods or broken pieces of the vessel herself which in consequence of the casualty are cast into or found in the sea are described as flotsam (goods floating) or jetsam (goods thrown overboard to lighten the ship), or ligan, sometimes called lagan (goods cast overboard but buoyed so as to be capable of being recovered), or, lastly, "wreck." The characteristics of all these will be found detailed in *Constable's Case* (1). As regards "wreck" in this latter sense, it is essential that the goods or articles shall have touched the ground. If they have not, they may be flotsam, jetsam, or ligan, but are not wreck. The importance of this characteristic of touching the ground was that, if the goods had ceased to float and had stranded on the foreshore, they became subject to the land jurisdiction, whereas, if that were not the case, they were within the Admiralty jurisdiction. The lord of the manor in the one case and the Lord High Admiral in the other might be entitled to claim them. The cases of *R.* v. *Forty Nine Casks of Brandy* (2) and *R.* v. *Two Casks of Tallow* (3) are cases of that kind. *Legge* v. *Boyd* (4) is another case of similar character, except that the question was there discussed whether the goods were wrecked because the ship was wrecked, and that led to a consideration whether the ship was wrecked. TINDAL, C.J., there said that "the ship remained entire." ERLE, J., repeated that statement, and added that after she was lightened she floated, and MAULE, J., said that she was repaired and might have continued her voyage. The case, therefore, whatever might otherwise have been its value, is, I think, of no assistance where the ship was so injured as that she could not have continued her voyage. I may add that that case was not decided under this Act, and has no bearing except as some guide as to what in maritime matters is understood by the words "wreck of a ship." Not one of these cases gives any assistance in determining the present case, for they were all decisions upon the meaning of the word "wreck" in the sense which I secondly above stated. They throw no light upon the meaning of the word when used to describe the casualty spoken of by the words "the wreck of a ship." I, therefore, reject the consideration of touching the ground as having any weight in the matter we have to decide.

The one authority which deals with the meaning of "wreck" in the sense of casualty to the vessel is *The Elizabeth* (5). The result of SIR WILLIAM SCOTT'S judgment in that case, so far as it bears upon the question here to be decided is, I think, that, inasmuch as the vessel had encountered what he called a semi-naufragium (which, as a matter of fact, meant that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman was entitled to receive. This was held to be gratuitous conveyance home (which from the statement 2 Dods. at p. 404 seems to have been offered him) and payment of his wages until he arrived home. The decision is that the misfortune had arisen from vis major, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master an authority to discharge the crew under proper conditions.

A The proper conditions or consequences of his so discharging them were then determined to be as above stated. The consequences of termination are now supplied by s. 158 of the Act of 1894, and, even if the rule in *The Elizabeth* (5) were held operative in this case, it would give them no more than they have received, for in the present case they were at home when discharged at Southampton.

B I notice that in the present case the learned judge puts the question whether the *Olympic* was, within the meaning of s. 158, a "wreck." It follows from what I have said that this, in my judgment, does not accurately state the question. I have not to inquire whether the ship was a wreck—that is to say, whether she had become a certain physical thing—but whether there had been a wreck of the ship—that is to say, whether a certain casualty had happened to the ship. This is not necessarily the same question. Further, I think the question is not whether the C vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question—namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure —the subject of the seaman's contract. Looking to the Merchant Shipping Act, 1894, I find that there are two sections which seem to me to deal with different subject-matters. The one is s. 162, which uses the word "discharged," meaning, D as I understand it, not "paid off," but "dismissed." It is a section which reproduces s. 167 of the Merchant Shipping Act, 1854, upon which *Tindle* v. *Davison* (6) was decided; but without some words in which the expression "so improperly discharged" occurred. Those words, no doubt, made the point more plain, but, in my judgment, the true construction of the present section is the same. The present section speaks of "without fault on his part justifying that discharge." E Section 162 deals with the case where a seaman is discharged—that is, dismissed—otherwise than in accordance with the terms of his agreement, and under circumstances conferring upon him a right to a month's wages. This section is one dealing with the case of the employer dismissing the seaman without fault on the part of the seaman, and without the seaman's consent. The other section is s. 158, and the verb there is "terminates." The section applies in an event—namely, F "where the service of a seaman terminates"—and deals with that event in two aspects: first, where the termination results from something happening to the ship; and, secondly, the case where it terminates from something happening to the seaman. The latter of these is unfitness or inability on the part of the seaman to proceed on the voyage. The former is "the wreck or loss of the ship." In this context the meaning to be attributed to these last words is, I think, prima facie G something which renders the ship, like the man, unfit or unable to proceed on the voyage. The section contemplates that by reason of something for which neither party is voluntarily responsible a case has arisen in which the agreement between the ship and the seaman cannot be performed because either the seaman by reason of his unfitness or inability or the ship by reason of the wreck or loss of the ship has become unable to proceed on the voyage, and the service of the seaman has H terminated by reason of that fact. The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into. Under these circumstances the wreck of the ship for the purposes of the section includes, I think, such a structural injury to her hull as to render her incapable of continuing the adventure the subject of the contract.

I I have purposely limited this to structural injury to the hull because that is all it is necessary to decide in this case. I do not say whether this is or is not exhaustive. If there has been such a structural injury to the hull as that the ship is incapable of being used as a ship for the contemplated adventure, the words of s. 158, I think, are satisfied. It must in every case be a question of fact whether the result is such as I have stated. If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure. In every case it will be necessary to investigate what was

the adventure the subject of the contract, and whether the injury is such that the ship cannot continue the adventure notwithstanding that after repair she could perhaps perform some other adventure. The facts here are that, as the learned judge states, the *Olympic* was so seriously damaged that she ceased to be a navigable ship, and that the Board of Trade forbade her to proceed on her voyage because she was not in a seaworthy condition to do it. The facts found seem to me to show that, as the judge says, the agreed voyage was brought to a summary and proper conclusion. This being the case, the services of the seaman terminated under s. 158, and he was entitled to wages up to the termination, but not for any longer period. This appeal, therefore, fails and must be dismissed.

KENNEDY, L.J.—The appeal in this case is an appeal on the part of the plaintiffs against the judgment of BARGRAVE DEANE, J., who dismissed their claims for compensation under s. 162 of the Merchant Shipping Act, 1894. The case is one of general importance.

The material facts are these. On Sept. 20, 1911, the defendants' steamship *Olympic* sailed in the forenoon from Southampton on a voyage to New York. The plaintiffs were respectively a fireman and a seaman on board that vessel. The plaintiffs had signed articles on Sept. 11. The agreement was for

> "a voyage from Southampton to New York, via Cherbourg and Queenstown, and/or if required to any port or ports within the North Atlantic and South Atlantic Oceans trading as may be required until the ship returns to a final port of discharge in the United Kingdom for any period not exceeding twelve months."

The agreement also provided that

> "if from any cause the said ship cannot sail on the date appointed, or should the vessel put back into port through accident, the said crew will be transferred to any other vessel belonging to the same owners taking the place of the vessel herein named, at the same rate of wages and in the several capacities herein named."

The wages to which the plaintiffs were entitled under the agreement were £6 per month and £5 per month respectively. Within a short time after leaving Southampton, the *Olympic* came into collision with H.M.S. *Hawke* and sustained damage to her hull at a point on the starboard side about 90 ft. forward from her stern. Anchor was dropped and she remained at anchor until Sept. 21, when she steamed back into Southampton. The damage was local, but it was so far serious that she could not proceed to sea again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton, she proceeded under her own steam to Belfast and remained there for some time while those repairs were being executed, and it was not until Nov. 29—i.e., almost nine weeks after her mishap—that the *Olympic* resumed her place in the defendants' Atlantic service. Her passenger and freeboard certificates were on Sept. 22, upon an official application, returned to the Board of Trade surveyor at Southampton, to whom, in accordance with the terms of the passenger certificate, the defendants were bound to report in writing within twenty-four hours after the occurrence "any material damage affecting the seaworthiness of the *Olympic* either in the hull or in any part of the machinery," and who, of course, upon receiving such report of this mishap, was bound to require the return of these documents in order to ensure before she made an Atlantic voyage that sufficient repairs had been executed, and that the nature of the repair was such as not to alter the position of the centre of the load-line disc. These certificates were returned to the defendants a day or two before the *Olympic* sailed for New York on Nov. 29. On the same Sept. 22, the plaintiffs, without their consent, were discharged by the defendants, together with the rest of the crew of the *Olympic*. The defendants have either paid, or have always been willing to pay, their wages up to that date, but have

refused to pay them any compensation for the loss of wages which the plaintiffs would have earned if the contract period of service had been completed. Hence the present action, which the plaintiff's have brought, claiming to be paid compensation in the nature of wages under s. 162 of the Merchant Shipping Act, 1894.

The plaintiffs' claims were brought in the first instance before the justices at Southampton, sitting as a court of summary jurisdiction under the Merchant Shipping Act, 1894, s. 164. The circumstances which I have stated in regard to the plaintiffs' engagement, service, and discharge, and also their pecuniary loss, inasmuch as they were in fact unable to get their employment, were duly proved. The justices, after hearing this evidence, referred the claims to the Admiralty Division of the High Court under the provisions of the Merchant Shipping Act, 1894, s. 165 (iii). There never has been any dispute as to the facts. There has never been any suggestion that the plaintiffs committed any fault justifying their discharge without their consent. Nor has any controversy been raised by the defendants as to the amount of the compensation not exceeding one month's wages which the plaintiffs are entitled to recover, if s. 162 applies to this case, although it appears from the evidence that in ordinary course the *Olympic's* voyage to New York and back would have occupied a period variously stated to be seventeen or eighteen or twenty-one days. The defendants' contention is that s. 162, which I have just quoted, and which would seem prima facie to be applicable to the facts of the present case, is not the section to be applied, but that the rights of the parties are governed by s. 158. That enactment is in substance and without any material alteration of language a re-enactment of s. 185 of the Merchant Shipping Act, 1854. It is indisputable that, if the defendants are right in their contention that this section is applicable to the circumstances of the present case, the plaintiffs' claims cannot be allowed. The defendants, as I have already stated, have either paid or been willing to pay them their wages up to Sept. 22, when they were discharged, as I have said, at Southampton.

The question is whether the facts bring the case under s. 158 as the defendants contend or not. Have the services of these seamen, within the true meaning of this section, terminated before the date contemplated in the agreement by reason of the wreck or loss of the *Olympic*? Or, in other words, did that which happened to the *Olympic* constitute a wreck or loss of the *Olympic*, whereby the voyage contract of the seamen on board of her was determined so that they could rightly be discharged by her owners without any compensation at all? BARGRAVE DEANE, J., has held that this question must be answered in favour of the shipowners. I am unable to concur in his decision. It is a decision which so materially affects the relative rights of seamen serving under voyage contracts and of those whom they serve that I feel it to be my duty to deal with it at some length, especially as I have the misfortune to differ from my brethren in this court as well as from the learned judge in the court below.

I think it will be the most convenient course, for the case of clearness, if I indicate, in the first place, the grounds of my dissent from some points in the reasoning of the judgment of BARGRAVE DEANE, J. After citing ss. 158 and 162 of the Merchant Shipping Act, the judgment commences with the statement that, if the *Olympic* was a wreck, then s. 158 applies; if she was not, then it does not apply. This is true; but, at the same time, it is, in my view, important, in construing the section, not to regard that word alone, but also to consider the language which immediately precedes it. The enactment, as I have said, continues, and is an almost literal re-enactment of, s. 185 of the Merchant Shipping Act, 1854, and, as it seems to me, the legislature, when alike in the earlier and the later Act it used the expression

> "where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship,"

is referring to two events, wreck and loss, which it regarded as being, at the time

of the passing of the Act, recognised causes of termination—viz., the termination by wreck and the termination by loss. It is, therefore, material in seeking the true interpretation of the statute, and finding out, if we can, what "wreck" denotes, to consider by reason of what degree or kind of misfortune (to use a neutral word) to his ship it was, at the time of the passing of the Act of 1854, recognised that a seaman's services terminated before the date fixed by his agreement, by which words I understand to be intended come automatically to a conclusion. The learned judge, after stating the question in the words which I have quoted, proceeds to consider what "wreck" ought to be held to mean. I agree with him that we are not materially assisted by the decisions or the dicta to be found in the cases to which he refers—*Legge* v. *Boyd* (4), *R.* v. *Forty Nine Casks of Brandy* (2), and *R.* v. *Two Casks of Tallow* (3). I agree that the law to be deduced from them as to Wreccum Maris, which included both parts of ships and seaborne cargo, is not pertinent to our present inquiry. But when the judgment goes on to found itself upon the theory that

> "the words of the section are 'wreck' or 'loss'; wreck must be something short of loss . . . a wreck is something in which the vessel falls short of being a loss,"

I must respectfully confess my inability to see any sort of foundation in the language of the section for such an assumption. When we read in the text of s. 158 "terminates by reason of wreck or loss," the natural and the only necessary inference, as it appears to me, is that "wreck" and "loss" refer to two events either of which may happen to a vessel, and either of which the legislature recognises as terminating the services of a seaman serving on board that vessel. There is nothing in the text, grammatically considered, which warrants the learned judge's assumption that the first of the two events mentioned must be something less serious than the second. If any inference from the collocation of the words is justifiable, it is, I think, that as "wreck" precedes "loss" the legislature intends to say "wreck or any other kind of loss."

There are two other matters upon which stress appears to be laid in the judgment of the court below. The first of these is the judgment of Lord Stowell in *The Elizabeth* (5). With this I think it will be more convenient to deal somewhat later. The other matter is the requirement of the Board of Trade that the passenger and freeboard certificates should be returned to their Southampton officer. This, as I have said, was in the circumstances of such an incident a matter of course. The learned judge, however, relies upon this action as constituting an embargo by the Board of Trade which brought this voyage so far as the voyage was concerned which the men had agreed upon to a summary and proper conclusion. If this comparison of the action of the Board of Trade to an "embargo" is just, it is, in my view, clear that it creates an argument in favour, not of the defendants, but of the plaintiffs. The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded. Referring to such an embargo, Lord Tenterden, in his Law of Merchant Ships and Seamen (5th Edn.) p. 450, (14th Edn.), p. 252, says:

> "The latter case does not in general dissolve the contract between the owners and merchant by the law either of France or England, . . . yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are, therefore, not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them."

In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion even in the case of the embargo of a laden ship—i.e., in the case of an obstacle to the prosecution of the voyage imposed by the government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not)—that, while, in his own interest and in order to save himself the

risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship. And I may add that what is true of an embargo by the government to which the ship belongs is true also of seizure for temporary purpose by a hostile Power. The same learned author at a later page (5th Edn., p. 462: 14th Edn., p. 265), summarising the judgment of the King's Bench delivered by LORD ELLENBOROUGH in *Beale* v. *Thompson* (10), says:

> "The court thought it unnecessary to decide in this case whether or not the the dissolution of contracts for freight and wages is the necessary effect of perfect and complete capture, where the right of the original proprietor is not re-vested by subsequent recapture nor recognised as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as an act of hostile seizure with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the Power by whom the seizure had been made; and observing that there was no case where property so dealt with had been considered as captured, or the contract, for freight, or wages, dissolved."

Briefly, then, if the action of the Board of Trade is, as the learned judge has held, to be likened to an embargo, it was not an act which operated in any way to terminate, in the eye of the law, the seaman's contract of service on board the vessel so detained. If in either case the shipowner prefers in his own interest to discharge the seaman rather than to keep them on the ship's articles so that they can have the advantage of their contract of service, he must pay compensation for such loss, if any, as they actually sustain in consequence, the amount of which by virtue of s. 162 of the Merchant Shipping Act, 1894, has now been limited to a sum not exceeding one month's wages.

I come now to the consideration of *The Elizabeth* (5), which I have already mentioned, which was decided by LORD STOWELL in 1819. I agree with the learned judge in the Admiralty Court that it proceeds upon principles which ought to be affirmed. But, in my opinion, when the case is rightly apprehended, the application of them to the facts of the present case, so far from supporting his judgment, justifies the present appeal. The *Elizabeth*, in June, 1818, sailed from the United Kingdom to St. Petersburg and back to Portsmouth. The plaintiff was a seaman on board, engaged for the whole voyage, outward and homeward. She sailed from St. Petersburgh on Sept. 25 with a homeward cargo, and, two days later, without the default of any person, ran on a reef near the island of Gothland. After the cargo had been unloaded, she was with much difficulty got off the reef by the exertions of the crew and with native assistance, and was carried to Ostergam. So severe were the injuries to the *Elizabeth*, that she then filled with water, and the crew could not stay on board. In LORD STOWELL'S words:

> "It was doubtful whether she would at all receive such repairs as could restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state."

The master seeing that if he kept them his owners would be put to great expense for several months, determined to discharge the members of the crew, of whom the plaintiff Brokershaw was one. The crew protested against being thus discharged before the service for which they had been engaged had ended. The master persisted, discharged them, and sent them home without paying them either the expenses of the voyage home or compensation. The plaintiff sought redress in the

Admiralty Court. He claimed (i) those expenses, (ii) wages up to the time when in fact the *Elizabeth*, after having been repaired in Sweden and sailed for Portsmouth, arrived at Portsmouth in April, 1819. What did LORD STOWELL decide? So far as regards the expenses, he decided (and the present law is the same) that the plaintiff being discharged in a foreign port was entitled to the expenses of his passage home. That does not affect the present case. But he also decided that while the master had a right in the circumstances to discharge the crew, and, therefore, the plaintiff was not entitled to claim wages until the actual return of the *Elizabeth* to Portsmouth in April, 1819, the exercise of the right involved a liability on the part of the shipowner not merely to pay the expenses of the homeward passage of the seamen, but also to pay compensation to them for the loss of the wages occasioned by their discharge. In other words, while he held that it was, in the language of LORD TENTERDEN, which I have cited in reference to the embargo, in the interests of the shipowners reasonable for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the language of s. 158) "terminate"—upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve.

That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right which the law has recognised in s. 162, while it recognises in the enactment limiting the amount of compensation recoverable by the provision in favour of the shipowner that the seaman's compensation shall not exceed one month's wages. LORD STOWELL, not being fettered by any such statutory limitation, awarded the plaintiffs in *The Elizabeth* (5) wages up to the time of their being landed in their own country, and this was in effect, though not in intention, giving them wages for the whole of the period which the homeward voyage of the *Elizabeth* would have lasted, if she had not been damaged, for LORD STOWELL says (2 Dods. at p. 410):

> "They have all that they could have had under their first contract; they are set down where they were taken up in their own country, and with some money in their pockets, and open for further employment."

The damage to the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. She actually filled with water, and the crew could not stay on board. In the present case, the damage to the *Olympic* was damage only to a section quite small as compared with the whole hull; she remained navigable, although, until repaired, unfit for an Atlantic voyage. It was indeed, very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired; it was never doubtful in the case of the *Olympic*, and it was, in fact, a matter only of some nine weeks. And yet, in his judgment, LORD STOWELL would not describe even the case of the *Elizabeth* as "naufragium," "wreck," but as "semi-naufragium," "A half wreck," and, as I have said, would not hold that the services of the seamen serving on her to have been "terminated" by the disaster, but held them to be terminable by the owner subject to the right—in LORD STOWELL'S time not a statutory but an equitable right—to be paid wages as and from the period which I have stated from the report. The principle of the decision is that which since 1854 has been embodied in the Merchant Shipping Acts—in s. 185 of the Act of 1854, and in s. 162 of the Act of 1894. The only just inference from his judgment in *The Elizabeth* (5) is, in my mind, that if LORD STOWELL had had to apply the Merchant Shipping Act, 1894, in the present case, he would have applied s. 162, and not s. 158. He would have said to the defendants: "It is to your interest, no doubt, to discharge your seamen, but if you do so, you are discharging them otherwise than in accordance with the terms of your contract with them, and you must therefore pay them that compensation, which in such circumstances s. 162 provides."

I have now dealt with the points upon which the defendants in the present action rely. I proceed to deal, as shortly as the importance of this case permits, with the case, as it presents itself to me, generally. Let us consider in the first place what is the meaning of the word "wreck" in ordinary parlance and apart from the context of s. 158. Would anyone, sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a "wrecked" ship, or describe the disaster as the "wreck" of the *Olympic*. In my view, "wreck" means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a "congeries of planks." I think that this is what would be ordinarily understood. If one turns to the dictionaries, I find WEBSTER (NEW INTERNATIONAL DICTIONARY) describes "wreck" as "that which has been wrecked or in a state of ruin; the remains of anything ruined or fatally injured." JOHNSON describes "wreck" as "destruction by being driven on rocks or shallows at sea; destruction by sea," and the verb "to wreck" as "to destroy by dashing on rocks or sands." Of course, neither ordinary parlance nor dictionary is conclusive where we have to construe a word in a particular context. Is there any reason in this context in which we find "wreck" in s. 158 of the Merchant Shipping Act, 1894, to induce us to give "wreck," not its ordinary meaning, but some less serious meaning which will under the term "wreck" include, as the defendants here contend, such a damage by collision as, although it does not render the ship innavigable, requires some two or three months' repair in order that she may safely carry passengers and cargo on an intended Atlantic voyage? In my humble judgment the context in s. 158 plainly indicates the reverse. The words are:

> "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship . . ."

The maritime law, as it existed at and before the time of the Act of 1854 was strict—one might almost be tempted to say harsh—towards the seaman on account of the rigidity with which the indissoluble character of his contract was maintained in the face of misfortune to the ship on which he served. The "wreck" which was held to "terminate" his service was a wreck in the fullest possible sense of the word. One quotation is, I think, a sufficient illustration. In his judgment in *The Florence* (7) in 1852, DR. LUSHINGTON had occasion to consider the seaman's contract, and in regard to shipwreck he says: "In shipwreck the contract continues so long as a plank can be saved." The judgment of the same learned judge in *The Warrior* (8) in 1862, and the judgment of LORD STOWELL in the well known case of *The Neptune* (9) in 1824, appear to me also to illustrate the same point. No case has been cited, and I venture to think that no case could be found, to justify the defendants' contention (and it is a contention which they must establish in order to bring the case within s. 158) that a seaman's services terminate by reason of the "wreck" of the vessel, where the vessel remains in specie and actually navigable, although not seaworthy for the prosecution of the intended voyage without repairs being executed which will cause a considerable temporary delay. And it may be noted that in the course of his judgment in *The Elizabeth* (5) LORD STOWELL says in regard to the law: "A total loss by wreck happens. This operates a total loss of wages."

But then it is said on behalf of the plaintiffs if the defendants' interpretation is right, why are the words "wreck or loss" used? I regret that I am unable to see the force of this comment. "Wreck" denotes destruction by the collision of the vessel with some external object, either moving or stationary. But it is not the only form of loss which the maritime law has recognised, and did recognise in 1854, when the expression found a place in s. 185 of the Merchant Shipping Act of that year, as making a termination of the seaman's services. There may be

loss of the ship by fire, by internal explosion, and by foundering, or, as DR. LUSHINGTON mentions in his judgment in *The Florence* (7), by capture. The learned judge said: A

> "By capture certainly. If there be no re-capture, the contract [between the shipowner and seaman] is at once put an end to, and this, I apprehend, whether by an enemy or by pirates."

B

The legislature, it seems to me, used a very natural phrase when by "wreck or loss" it intended to express all the forms of loss (of which "wreck" is the commonest) by which the law recognised that the services of the seaman, ipso facto, terminated. No decision has been cited to us to show that any of the courts have recognised that those services terminated upon the ship being merely damaged to an extent which requires her to undergo repairs for a period of time which is so long as to make it the interest of the shipowner to put an end to the contract and discharge the seamen. If he did discharge them, then, as LORD STOWELL decided in *The Elizabeth* (5) when there was no Merchant Shipping Act which dealt with such a case, he may do so, but he must compensate them for their loss of prospective wages under their contract, unless, of course, they got other equally beneficial service elsewhere; and if he so acts now, I think that he is, upon the same principle, obliged by the legislature to compensate them, but to a more limited extent, under s. 162 of the Merchant Shipping Act, 1894, upon which the plaintiffs are suing in the present action. C D

There is only one further remark which I desire to add. The learned counsel for the defendants invited us to treat the misfortune to the *Olympic* as one which brought the adventure to an end, and the learned judge in concluding his judgment, after referring to the delivery to the Board of Trade of the passenger and freeboard certificates, and the voyage of the *Olympic* to Belfast for repairs, speaks of the "voyage, so far as the voyage was concerned which the crew had agreed upon, being brought to a summary and proper conclusion." If this is intended as the statement of a legal proposition, I respectfully dissent. In the absence of some special terms, the damage caused to the *Olympic* by collision with the *Hawke* in no way terminated or dissolved the contracts of the owners in respect of passengers or cargo. Why, in point of law, should it terminate or discharge their contract with the seamen? The voyage of the *Olympic* was delayed, but the delay, in my opinion, could not justify its owners in treating any contract with the crew as at an end, simply because it would cost them so large a sum to keep them and pay them until the *Olympic* was sufficiently repaired to proceed on an Atlantic voyage. In my view, if they chose for their own pecuniary advantage to relieve themselves of this burden, and, in the words of s. 162, to discharge the seamen otherwise than in accordance with the terms of their agreement, i.e., before the completion of the contract voyage, that section required them to pay the compensation, not exceeding one month's wages, which they have claimed in these proceedings. For the reasons which I have been obliged to state at greater length than I should have desired, I am of opinion that this appeal ought to have been allowed. E F G H

Appeal dismissed.

Solicitors: *Nicholls, Herbert & Co.*, for *C. A. Emanuel & Emanuel*, Southampton; *Thomas Cooper & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* L. F. C. DARBY, ESQ., *Barrister-at-Law.*]

KISH AND ANOTHER v. TAYLOR, SONS & CO.

[House of Lords (Earl Loreburn, L.C., the Earl of Halsbury, Lord Macnaghten and Lord Atkinson), February 5, 8, May 10, July 26, 1912]

[Reported [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 28 T.L.R. 425; 56 Sol. Jo. 518; 12 Asp. M.L.C. 217; 17 Com. Cas. 355]

Shipping—Freight—Dead freight—Lien—Breach by shipowners of warranty of seaworthiness—Delivery of cargo undamaged on due date—Right of owners to recover dead freight under lien—Deviation—Justifiable deviation—Effect on validity of contract of affreightment.

By a charterparty, the terms of which were incorporated in a bill of loading, it was provided that the shipowners should have a lien on the cargo for dead freight. The charterparty also contained a clause authorising the ship to deviate to save life and property, and a last clause providing that any difference between charterparty and bill of lading freight should be settled at the port of loading before the vessel sailed. The charterers failed to load a complete cargo, and the owners loaded other cargo in order to minimise the loss. An excessive quantity of deck cargo was loaded with the result that the ship became unseaworthy at the time of sailing, and she was compelled to deviate and put into a port of refuge for repairs, after which she completed her voyage, arriving at her port of discharge ready to unload undamaged and at the due date the cargo loaded by the charterers. On a claim by the shipowners against indorsees of the bill of lading for dead freight,

Held: the breach by the shipowners of the implied warranty of seaworthiness did not put an end to the contract of affreightment and relegate the shipowners to their rights as common carriers by sea; the presence of peril and not its cause determined the character of a deviation; in the circumstances of the case the deviation was justifiable, and so the contract of affreightment was not void ab initio; "dead freight" was not "freight" properly so-called, but was in reality damages for breach of contract, and so it did not fall to be settled before the vessel sailed under the last clause of the charterparty; and, therefore, the shipowners were entitled to succeed.

Notes. Considered: *Reed* v. *Page and East* (1927), 137 L.T. 77. Explained: *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.*, [1961] 2 All E.R. 257. Referred to: *Bank of Australasia* v. *Clan Line Steamers* (1915), 21 Com. Cas. 13; *The Christel Vinnen*, [1924] P. 61; *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.*, [1924] All E.R. Rep. 135; *Akt. Ocean* v. *Harding*, [1928] 2 K.B. 371; *Cosmopolitan Shipping Co. (Inc.)* v. *Hatton and Cookson, Ltd. (Liverpool)* (1929), 143 L.T. 296; *Tempus Shipping Co.* v. *Louis Dreyfus & Co.*, [1931] 1 K.B. 195; *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R. Rep. 480; *Tate and Lyle, Ltd.* v. *Hain Steamship Co.* (1934), 151 L.T. 249; *Northumbrian Shipping Co.* v. *E. Timm & Son, Ltd.*, [1939] 2 All E.R. 648; *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405; *Monarch Steamship Co.* v. *A/B. Karlshonns Oljefabriker*, [1949] 1 All E.R. 1; *Minister of Food* v. *Reardon Smith, Ltd.*, [1951] 2 T.L.R. 1158.

As to deviation and lien for freight, see 35 Halsbury's Laws (3rd Edn.) 269 et seq., 470–475, and for cases see 41 Digest 483–490, 582 et seq.

Cases referred to:

(1) *McLean and Hope* v. *Fleming* (1871), L.R. 2 Sc. & Div. 128; L.R. 6 Q.B. 558, n.; 25 L.T. 317; 1 Asp. M.L.C. 160, H.L.; 41 Digest 464, *2949*.

(2) *Dakin* v. *Oxley* (1864), 15 C.B.N.S. 646; 33 L.J.C.P. 115; 10 L.T. 268; 10 Jur. N.S. 655; 12 W.R. 557; 2 Mar. L.C. 6; 143 E.R. 938; 41 Digest 653, *4857*.

(3) *The Europa*, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 24 T.L.R. 151; 11 Asp. M.L.C. 19, D.C.; 41 Digest 480, *3129*. A

(4) *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp. M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(5) *Gilroy, Son & Co.* v. *Price & Co.*, [1893] A.C. 56; 68 L.T. 302; 7 Asp. M.L.C. 314; 1 R. 76, H.L.; 41 Digest 479, *3121*.

(6) *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.*, [1892] 1 Q.B. 253; 61 L.J.Q.B. 121; 66 L.T. 66; 8 T.L.R. 56; 7 Asp. M.L.C. 130; affirmed sub nom. *Baumvoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A.C. 8; 62 L.J.Q.B. 201; 68 L.T. 1; 9 T.L.R. 71; 7 Asp. M.L.C. 263; sub nom. *Scheibler* v. *Furness*, 1 R. 59, H.L.; 41 Digest 355, *2042*. B

(7) *Joseph Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.*, [1907] 1 K.B. 660; 76 L.J.K.B. 595; 96 L.T. 488; 23 T.L.R. 338; 51 Sol. Jo. 289; 10 Asp. M.L.C. 431; 12 Com. Cas. 51, 251, C.A.; 41 Digest 488, *3185*. C

(8) *Strang, Steel & Co.* v. *Scott & Co.* (1889), 14 App. Cas. 601; 5 T.L.R. 705; 6 Asp. M.L.C. 419; sub nom. *Steel & Co.* v. *Scott & Co.*, 59 L.J.P.C. 1; 61 L.T. 597; 38 W.R. 452, P.C.; 41 Digest 592, *4165*.

(9) *Schloss* v. *Heriot* (1863), 14 C.B.N.S. 59; 2 New Rep. 33; 32 L.J.C.P. 211; 8 L.T. 246; 10 Jur. N.S. 76; 11 W.R. 596; 1 Mar. L.C. 335; 143 E.R. 366; 41 Digest 604, *4313*. D

(10) *Gardner* v. *Trechmann* (1884), 15 Q.B.D. 154; 54 L.J.Q.B. 515; 53 L.T. 518; 5 Asp. M.L.C. 558, C.A.; 41 Digest 405, *2515*.

Also referred to in argument: E

Guibert v. *Readshaw, The Nancy* (1781), 2 Park's Marine Insurances (8th Edn.), P. 637; 29 Digest 153, *1080*.

Woolf v. *Claggett* (1800), 3 Esp. 257; 170 E.R. 607, N.P.; 41 Digest 476, *3090*.

Weir v. *Aberdeen* (1819), 2 B. & Ald. 320; 106 E.R. 383; 29 Digest 193, *1523*. F

Forshaw v. *Chabert* (1821), 3 Brod. & Bing. 158; 6 Moore, C.P. 369; 129 E.R. 1243; 129 Digest 160, *1159*.

Quebec Marine Insurance Co. v. *Commercial Bank of Canada* (1870), L.R. 3 P.C. 234; 7 Moo. P.C.C.N.S. 1; 39 L.J.P.C. 53; 22 L.T. 559; 18 W.R. 769; 3 Mar. L.C. 414; 17 E.R. 1, P.C.; 41 Digest 475, *3071*.

Balian & Son v. *Joly, Victoria & Co.* (1890), 6 T.L.R. 345, C.A.; 41 Digest 488, *3189*. G

Internationale Guano Co. v. *Macandrew & Co.*, [1909] 2 K.B. 360; 78 L.J.K.B. 691; 100 L.T. 850; 25 T.L.R. 529; 53 Sol. Jo. 504; 11 Asp. M.L.C. 271; 14 Com. Cas. 194; 41 Digest 489, *3193*.

Kopitoff v. *Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp. M.L.C. 163; 41 Digest 473, *3045*. H

Gray v. *Carr* (1871), L.R. 6 Q.B. 522; 40 L.J.Q.B. 257; 25 L.T. 215; 1 Asp. M.L.C. 115; sub nom. *Grey* v. *Carr*, 19 W.R. 1173, Ex.Ch.; 41 Digest 346, *1958*.

Kettell v. *Wiggin*, 13 Massachusetts Rep. 68.

Lyon v. *Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, *3039*. I

Stanton v. *Richardson* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp. M.L.C. 449; affirmed (1874), L.R. 9 C.P. 390; 30 L.T. 643; 2 Asp. M.L.C. 228, Ex.Ch.; affirmed (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp. M.L.C. 23, H.L.; 41 Digest 303, *1651*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), reported [1911]

1 K.B. 625, reversing a decision of WALTON, J., in an action tried by him in the Commercial Court without a jury, reported [1910] 2 K.B. 309.

The facts are stated in the opinion of LORD ATKINSON.

Bailhache, K.C., *Adaire Roche* and *Spratt* for the appellants.
Atkin, K.C., and *Holman Gregory*, K.C., for the respondents.

Their Lordships took time for consideration.

May 10, 1912. **LORD ATKINSON** read the following opinion: In this case the appellants, the owners of the ship *Wearside*, claim a lien upon the goods of the respondents, the indorsees of a bill of lading, dated Jan. 23, 1908, which purported to incorporate all the conditions, provisos, and exceptions contained in a charterparty, dated Dec. 18, 1907, made between these owners and the Mississippi Transportation Co. of Gulfort, Mississippi. By this charterparty the *Wearside* was bound to proceed to Mobile, and there or at Pensacola load a full and complete cargo of timber of the kind described, and being so loaded to proceed to a port on the continent between Bordeaux and Hamburg (Rouen excluded), and, at charterer's option, to discharge at two ports on the continent and one port in the United Kingdom. The port of Liverpool was ultimately selected as the port of discharge in the United Kingdom. The charterparty contained the following clauses, among others: (i) A clause authorising the *Wearside* to deviate for the purpose of saving life and property; (ii) a clause to the effect that the master or owners of the ship were to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and (iii) a clause that any difference between charterparty and bills of lading freight was to be settled at the port of loading before the vessel sailed; if in favour of vessel, to be paid in cash at current rates of exchange less insurance; if in the charterer's favour, by captain's bills payable ten days after arrival at port of discharge.

The vessel duly arrived at Mobile, and subsequently went to Pensacola to load. The charterers were admittedly under this charterparty absolutely bound to furnish a full cargo. They failed to do this. They only shipped 801¼ standards, all of which were properly stowed in the hold of the vessel. Fully loaded she would have carried 1,390½ standards; the cargo shipped was, therefore, short by 589¼ standards. Now it is not suggested that at the time when the charterers thus broke their contract the vessel was not perfectly seaworthy, was not fit in every way to receive her full cargo, or that her owners had, up to that time, failed in any respect to carry out, or were not ready and willing to carry out their contract fully. There was, therefore, nothing to justify or excuse this breach of contract by the charterers, and the right to recover damages for the breach had accordingly accrued to the owners. These damages are what is styled dead freight. In CARVER ON CARRIAGE (5th Edn.), para. 666, dead freight is defined to be the compensation payable to the shipowner when the charterer has failed to ship a full cargo. Freight is the recompense which the shipowner is to receive for carrying the cargo to its port of discharge. The two things are wholly dissimilar in their nature, though, of course, the freight which the shipowner would have earned if the charterers had fulfilled his contract will in most cases be a fair measure of the damages which he is entitled to recover, and it is, in my view, clear, from the decision of your Lordships' House in *McLean and Hope* v. *Fleming* (1), that an agreed lien does not cover such damages though they be unliquidated.

WALTON, J., states in his judgment that it was not disputed before him that the words occurring in the bill of lading—"all other conditions as per charter"—import into that document the provision of the charterparty giving to the owners of the vessel an absolute lien on the cargo for dead freight among other things. Indeed, in the face of the authorities this could not be disputed successfully. They are, I think, clear upon the point. So that before the vessel had loaded more than the 801 standards the right to recover this compensation had accrued to the

owners, and they had become entitled to a lien on the cargo in respect of it. The master of the vessel, after the default of the charterers, and in their relief, obtained additional cargo from other sources. Unfortunately, he overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and, by reason of her overloaded condition, her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portions damaged, and the vessel herself was so much damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo re-stowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss which they have sustained, and do not claim from anyone concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship. They do not seek in any way to take, in this respect, any advantage of their own wrong, in the proper sense of that expression.

The *Wearside* duly arrived at Liverpool. The respondents' portion of the cargo was uninjured, and the ship was ready to deliver it. The respondents, however, dispute the existence of the ship-owners' lien for dead freight to any amount, mainly on two distinct grounds. First they contend that as every shipowner is held to warrant the seaworthiness of his ship, the breach of that warranty puts an end to the contract of affreightment contained in the bill of lading, which becomes, they say, void ab initio, and, consequently, that, though the goods in specie have been duly carried to their destination undamaged, the indorsees of the bill of lading are only obliged to pay the shipowners for their services such sum as they may be entitled to as common carriers by sea instead of the remuneration stipulated for in the bill of lading. Second, they contend that the deviation to the port of Halifax was unjustifiable in this respect, that, however necessary it may have been in order to save the ship and cargo and the lives of the crew owing to the perilous condition to which the vessel was in fact reduced, yet, as that condition was in part due to the act of the master in overloading her with deck cargo to such an extent as to make her unseaworthy, the deviation must be treated as a deviation made without any necessity whatever, a gratuitous alteration of the voyage rendering the contract of affreightment contained in the bill of lading void ab initio. Of the several points raised by the respondents in the Court of Appeal this latter was the only one decided. The lords justices held that the respondents' contention was right, that the deviation constituted a new voyage different from that with which the bill of lading and charterparty were conversant, and that the former of these documents, if not both, were therefore void ab initio.

Counsel on behalf of the respondents was driven to admit that if his contention on the first point were sound, it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed port of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of the master, which have been held to render a vessel unseaworthy—such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew—he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and, not having been performed, the contract of affreightment was entirely displaced. No authorities were cited in support of this proposition. I think that it is in conflict with the principles of English law.

In *Dakin* v. *Oxley* (2), WILLES, J., deals exhaustively with the question whether, under the laws of different continental and other foreign countries, the indorsee of a bill of lading is relieved from his contract where the cargo arrives at the port of lading in specie, though damaged through the negligent navigation of the ship by her master and crew, and as to the law of England on this point he speaks thus:

A "The test to the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and, according to English law, freight is earned by the carriage and arrival of the goods, though they be in a damaged condition when they arrive. Freight must be paid even where the damage is culpable, and the parties must be left to their cross-action."

B *The Europa* (3) is, I think, an authority against the respondents' contention. There the action was brought by the shipowner against the charterer in respect of goods damaged by one of the perils of the sea excepted by the charterparty, not by the unseaworthiness of the ship, which was admitted. It was held by Bucknill and Bargrave Deane, JJ., on a line of reasoning which appears to me convincing, that the charterparty, notwithstanding this unseaworthiness, was not displaced;
C that, on the contrary, the clause excepting perils of the sea was alive and operative; and that the shipowner, despite his breach of warranty, was protected under it from liability for the injury done to the goods.

Neither in *Steel* v. *State Line Steamship Co.* (4) nor in *Gilroy, Son & Co.* v. *Price & Co.* (5) was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment, and relegated the shipowner to his rights
D as a common carrier by sea. On the contrary, the observations of Lord Blackburn in the former case seem to indicate that the indorsee of the bill of lading might be disentitled to recover despite the fact of unseaworthiness, unless that unseaworthiness caused the damage. He is reported to have used these words (3 App. Cas. at pp. 88, 91):

E "So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it. . . . I have no doubt what the result will be; it will be a question, taking the whole circumstances together, was this ship reasonably
F fit when she sailed to encounter perils, and was the damage that happened a consequence of her being unfit, if she was unfit,"

which appears to me to imply that if the damage was not a consequence of this unfitness, the ship-owner's liability must be determined by the provision of his contract of affreightment so far as it dealt with that liability.

In *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.* (6), Lord Esher,
G M.R., is reported to have used these words ([1892] 1 Q.B. at pp. 257, 258):

"The first cause of action which they allege is for breach of the bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but it must also be shown that the unseaworthiness was the cause of loss."

H The fact that a ship is not in a fit condition to receive her cargo or is from any cause unseaworthy when about to start on her voyage will justify the charterer or holder of the bill of lading in repudiating his contract and refusing to be bound by it, and, of course, the parties can, by mutual consent, rescind their contract of affreightment, but repudiation or recission are questions of fact. They have not been found upon by the judge at the trial in this case. It lay upon the respondents
I to procure findings upon them, if they wished to escape on these grounds from the obligations of their contract.

Having regard, therefore, to the authorities which I have cited, and to the absence of all authority to support the respondents' contention on their first point, it is, I think, unsound and unsustainable according to the law of this country.

On the second point it is not disputed that it is prima facie not only the right but the duty of the master of a ship to deviate from the course of his voyage and seek a harbour or place of safety, if that course be reasonably necessary in order to

save his ship and the lives of his crew from the perils which beset them. Neither is it disputed by the appellants that they are answerable in damages to every person who sustains loss or injury by reason of the breach of their warranty of the seaworthiness of their ship, and they further admit that they cannot require the owners of the cargo or any portion of it to recoup them to any extent for any loss which they may have sustained or expense to which they may have been put as a result of this breach of warranty, or of any course which they may have had to take in consequence of it. The appellants further admit that voluntary or unwarranted deviation may render the contract of affreightment void ab initio, as was decided by the Court of Appeal in *Joseph Thorley, Ltd.* v. *Orchis Steamship Co.* (7). What they contend is, in effect, this, that justifiable deviation does not avoid the contract; that, to use the language of LORD WATSON in a case presently to be referred to, "it is the presence of the peril and not its causes" which justify it, and that it is, therefore, immaterial whether the unseaworthiness of the ship or her negligent navigation contributed directly to the peril or not. Judged by that test it is not disputed that the deviation in the present case was justifiable, and if so, that the contract of affreightment was not void ab initio, so that the question for decision resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives.

The Court of Appeal appears to have considered that they found in LORD WATSON'S judgment in *Strang, Steel & Co.* v. *Scott & Co.* (8), a principle which was applicable to the present case. They did not refer to any other authority in support of their decision on this point. With the utmost respect I am quite unable to concur with them. In that case, through the negligence of the master, the ship was driven ashore and part of her cargo was jettisoned. The question with which LORD WATSON was dealing in the passage cited from his judgment by FLETCHER MOULTON, L.J., was what he styled the first question raised in the case—namely, "whether innocent owners of cargo, sacrificed for the common good, are disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault?" He says (14 App. Cas. at p. 606):

> "Each owner of jettisoned cargo becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo for a pro rata contribution towards his indemnity, which he can enforce by direct action."

Further on he says (ibid. at p. 609):

> "The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence."

And before the passage last cited, he says (ibid. at p. 608):

> "The principle upon which contribution becomes due does not appear to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrified, and the property of the others has been thereby preserved. There are two well-established exceptions to the rule of contribution for general average which it is necessary to notice."

A He proceeds to deal with the first exception in the passage cited. Then he deals with the second exception, deck cargo and says (ibid. at p. 609):

> "But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck."

B And after stating that such exceptions as are recognised in *Schloss* v. *Heriot* (9) are in truth limitations of the rule introduced from equitable considerations in the case of actual wrongdoers, he states the conclusion of the Judicial Committee thus (ibid. at p. 610):

> "The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equit-
C able claim to be indemnified for loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

To permit a wrongdoer to recover contribution in such a case would indeed be to permit him to take advantage of his own wrong, for his wrongdoing necessitated the sacrifice out of which his claim for contribution would spring. The present case
D is wholly different. Here the claim of the appellants arose before they were in default at all. It does not spring from their default. It springs, on the contrary, from the respondents' fault, and the contract of the respondents provides a specific and particular method, a lien, by which it may be enforced. It is, in truth, the respondents, not the appellants, who seek to take advantage of the appellants' wrong, in order to deprive the appellants of a right which the respondents' wrong
E gave them. This distinction between the case of *Strang, Steel & Co.* v. *Scott & Co.* (8) and the present case is, to my mind, crucial, and prevents the decision in that case from being any help whatever to the proper decision of the present. On the whole, therefore, I am of opinion that a master, whose ship is, from whatever cause, in a perilous position does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to
F recover damages for all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation nor are the rights of the owners under it lost.

Speaking for myself, I may say that I think that it would not be consistent with any principle of justice that these rights should be lost. The fact that by a policy
G of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is, therefore, his right not to have these risks increased, differentiates, I think, altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brought safely and undamaged to the port of discharge. The respondents' contention on the second point is to my mind, therefore,
H as unsustainable as that on the first.

The respondents' contention on their third point amounts, as I understand it, to this. The freight mentioned in the bill of lading is, they say 26*s*. per load of 50 cubic feet. *Gardner* v. *Treachmann* (10) decides that where the freight mentioned in the charterparty is more than that mentioned in the bill of lading, the indorsee of the latter, claiming as such, is, in the absence of special agreement to the
I contrary, only bound to pay the lesser freight. Here there is a special agreement in the last clause of the charterparty, providing that any difference between the two should be settled at the port of lading before the vessel sails. Therefore, as dead freight is still freight it should either not be paid at all, as it is not included in the freight mentioned in the bill of lading, or, if payable at all, it should under the last clause of the charterparty have been settled and paid at the period of loading before the vessel sailed at all. The answer to this ingenious, but very fallacious, argument is, that dead freight is not freight at all properly so called, but is in reality damages

for breach of contract, for convenience nick-named dead freight, and that neither the last clause in the charterparty nor *Gardner* v. *Trechmann* (10) has any application whatever to it.

On the whole, therefore, I am of opinion that on the three points argued before your Lordships the respondents fail, and that the appeal ought to be allowed with costs, and further that the case should be remitted to the Court of Appeal to deal with the award of damages by WALTON, J., against which both parties have appealed.

THE EARL OF HALSBURY concurred.

LORD MACNAGHTEN.—I have had the advantage of reading the opinion of LORD ATKINSON and I agree.

EARL LOREBURN, L.C.—I also agree. I think the best course would be for the parties to frame an order in accordance with the opinions expressed by LORD ATKINSON.

Appeal allowed.

Solicitors: *Botterell & Roche; Trinder & Capron.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re FARAKER. FARAKER *v.* DURELL

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), July 8, 1912]

[Reported [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 56 Sol. Jo. 668]

Will—Lapse—Gift to charity—Charity consolidated with other charities under scheme—Objects of consolidated charity not identical to those of pre-existing charity.

Under the will of a testatrix who died in 1756 there was constituted a charity known as "Hannah Bayly's Charity" for the benefit of widows resident in Rotherhithe. In 1905 the Charity Commissioners sealed a scheme under which Hannah Bayly's Charity and thirteen other charities were consolidated under the name "Consolidated Charities" and the funds of all fourteen charities were thereafter held as one fund for the benefit of the poor of Rotherhithe in the manner specified in the scheme. By her will dated Feb. 19, 1908, M.A.F. gave to "Mrs. Bailey's Charity, Rotherhithe" a legacy of £200. In 1911, M.A.F. died, and the question arose whether the legacy was effective.

Held: notwithstanding the failure of the scheme of 1905 to make special provision for widows in Rotherhithe, Hannah Bayly's Charity had not ceased to exist, and the legacy took effect in favour of the Consolidated Charities.

Notes. Applied: *Re Bagshaw, Westminster Bank, Ltd.* v. *Taylor*, [1954] 1 All E.R. 227. Referred to: *Re Lucas, Sheard* v. *Mellor*, [1948] 2 All E.R. 22; *Re Pochin, Midland Bank Executor and Trustee Co.* v. *Godkin*, [1948] Ch. 182, n.; *Re Hutchinson's Will Trusts, Gibbons* v. *Nottingham Area No. 1 Hospital Management Committee*, [1953] 1 All E.R. 996; *Re Hanbey's Will Trusts, Cutler's Co. (Sheffield)* v. *London Corpn.*, [1955] 3 All E.R. 874.

As to failure or uncertainty of object at date of creation of trust, see 4 HALSBURY'S LAWS (3rd Edn.) 278 et seq.; and for cases, see 8 DIGEST (Repl.) 418 et seq.

Cases referred to in argument:

Re Betton's Charity, [1908] 1 Ch. 205; 77 L.J.Ch. 193; 98 L.T. 35; 72 J.P. 105; 24 T.L.R. 143; 6 L.G.R. 638; 8 Digest (Repl.) 458, *1583.*

Re Sutton Coldfield Grammar School (1881), 7 App. Cas. 91; 51 L.J.P.C. 8; 45 L.T. 631; 30 W.R. 341, P.C.; 19 Digest 589, *192*.

Re Ovey, Broadbent v. *Barrow* (1885), 31 Ch.D. 113; 55 L.J.Ch. 103; 53 L.T. 723; 34 W.R. 100; 8 Digest (Repl.) 378, *703*.

Re Joy, Purday v. *Johnson* (1888), 60 L.T. 175; 5 T.L.R. 117; 8 Digest (Repl.) 414, *1072*.

Appeal from an order of NEVILLE, J., made on an originating summons issued by the trustees of the will of Mary Ann Faraker, deceased.

Mary Ann Faraker by her will, dated Feb. 19, 1908, after appointing executors and trustees thereof and after bequeathing legacies and making certain specific bequests, bequeathed a legacy in the following terms:

> I also give to Mrs. Bailey's Charity, Rotherhithe, a legacy of two hundred pounds; and I direct that the receipt of the treasurer thereof for the time being shall be a sufficient discharge for such legacy.

As to all the residue of her personal estate and also all her real estate (if any), the testatrix bequeathed and devised the same to her trustees on the trusts therein mentioned. The testatrix died on Oct. 2, 1911.

It appeared that there was no charity known as "Mrs. Bailey's Charity, Rotherhithe," but a charity known as "Hannah Bayly's Charity" was founded by the will of Mrs. Hannah Bayly, of St. Mary, Rotherhithe, who died in 1756, for the benefit of certain persons in that parish. The will of Hannah Bayly was dated Feb. 2, 1756, and, after making certain bequests and devises therein contained, she thereby bequeathed the residue of her personal estate and effects as follows:

> All the rest, residue, and remainder of my goods, chattels, estate, and effects whatsoever and wheresoever and of what nature or kind soever the same may consist and be I give and bequeath the same and every part thereof unto John Donnington, John Coulter, and William Coote . . . in trust nevertheless that the said John Donnington, John Coulter, and William Coote and the survivors and survivor of them and the executors or administrators of such survivor from and immediately after the same shall be converted into specie or ready money shall and do give and dispose of the same and every part thereof unto and amongst such poor unhappy objects who shall be widows resident and parishioners of St. Mary, Rotherhithe, aforesaid as to them shall seem meet not doubting their faithful and true performance of the trust hereby in them reposed.

After payment of Hannah Bayly's funeral and testamentary expenses and debts and all the legacies given by her will there remained a considerable surplus of her estate which John Couter and William Coote invested in the public funds to be applied to the charitable purposes directed by the will of Hannah Bayly. John Coulter and William Coote received the dividends of the trust funds, part of which they applied towards the charitable purposes for which the funds were bequeathed.

William Coote died, leaving John Coulter him surviving, who continued to receive the dividends which from time to time became due thereon, and applied a part only thereof to the charitable purposes aforesaid and with the remainder of such dividends purchased other stock. John Coulter died in January, 1793, having by his will appointed Samuel Farar and James Bate executors, who possessed themselves (amongst other things) of the sum of £3,300 three per cent. annuities, standing in the name of John Coulter belonging to the charity, and Samuel Farar and James Bate received the dividends which from time to time became due during the life of James Bate, but they did not distribute the same or any part thereof among any of the charitable objects described in Hannah Bayly's will.

James Bate died in September, 1809, having in his hands a considerable sum of money, part of the charity fund or arising therefrom, which was taken possession of by his executrix. After the decease of James Bate, Samuel Farar possessed himself of

the sum of £3,300 three per cent. annuities, and he continued to receive the dividends thereon.

By a decree in Chancery dated Dec. 1, 1813, the Master of the Rolls ordered (among other things) that it should be referred to one of the masters of the court to take an account of the property belonging to the charity; that the master should approve of a scheme for the application of the funds belonging to the charity according to the directions contained in the will of Hannah Bayly; and that Samuel Farar should transfer the sum of annuities then standing in his name into court, and this was accordingly done. By further order, dated May 25, 1814, the Master of the Rolls ordered the executrix of James Bate to pay a sum belonging to the charity and proved to be due from her into court (which was accordingly done); and it was ordered that the scheme set forth in the master's report should be confirmed, and that the dividends to accrue on the three per cent. annuities should be paid from time to time to the person to be appointed clerk, and to be applied for the purposes mentioned in the master's report.

The scheme as settled by the court provided for the appointment of certain inhabitants of Rotherhithe, together with the rector, curate, and churchwardens of that parish for the time being, to be trustees of the charity, and for the appointment of a clerk thereof, who should receive the interest and dividends half-yearly on the trust funds; that there should be paid to thirty widows, or as near that number as the funds would permit, being resident parishioners not having received or receiving parish relief, of the age of fifty or upwards, £5 each by two equal half-yearly payments upon Jan. 20 and July 20, preferring, as near as might be, the most needy and most deserving, and that every distribution should be made and every question carried by the votes of the majority of the trustees present at a meeting to be held as therein directed.

Robert Shafto Hawks, formerly clerk of the trustees, who died in 1880, by his will dated Jan. 25, 1876, bequeathed the sum of £1,000 upon trust after the decease of his wife to pay and apply so much of the capital of such sum as would enable the trustees of the charity to appoint and pay five additional widows, being resident parishioners in Rotherhithe not having received or receiving parish relief, of the age of fifty years or upwards, £5 each by two equal half-yearly payments in like manner in all respects as if the sum intended to be subject to that direction or bequest had formed a portion of the original fund of the charity. On Nov. 14, 1905, the Charity Commissioners for England and Wales sealed a scheme in the matter of the charity of Hannah Bayly and of thirteen other charities therein mentioned in the ancient parish of Rotherhithe. That scheme provided (inter alia) that the charities and the endowments thereof specified in the schedule thereto and all other the endowments (if any) of the charities should be consolidated and should be administered and managed by the body of trustees thereinafter constituted subject to and in conformity with the provisions of the scheme under the title of the "Consolidated Charities," and that any freehold or leasehold lands comprised in the scheme should be vested in the Official Trustee of Charity Lands, and that all sums of stock comprised in the scheme should be transferred into the names of the Official Trustees of Charitable Funds.

The scheme provided that the body of trustees should, when complete, consist of sixteen competent persons—namely, one ex officio trustee, who should be the rector for the time being of the parish of Rotherhithe; seven representative trustees, to be appointed by the council of the borough of Bermondsey from among the councillors representing on that body the wards into which the parish of Rotherhithe is divided; and eight co-optative trustees, being persons residing or carrying on business in or near the said parish. The scheme further provided that, after payment of expenses of administration and management, a part of the yearly income of the charities should be applied in making payments, under one or both of the following heads, for the benefit either of the poor of the ancient parish of Rotherhithe generally or of such deserving and necessitous persons resident therein as the

trustees should select for this purpose and in such way as they should consider most advantageous to the recipients and most conducive to the formation of provident habits—namely (i) contributions to an amount not exceeding £50 in any one year towards defraying the cost of providing proper care and supervision (including any necessary cost of locomotion) for poor children requiring temporary change of air or special protection or treatment; (ii) the supply of clothes, linen, bedding, fuel, tools, medical or other aid in sickness or convalescence, food, or other articles in kind to an amount not exceeding £100 in any one year.

The scheme further provided that the trustees should appropriate a yearly sum of £30 for application for the benefit of such poor as aforesaid in the supply of temporary relief in money or otherwise in cases of unexpected loss or sudden destitution, and that subject as aforesaid the yearly income of the charities should be applied by the trustees for the benefit of pensioners as thereinafter prescribed, but that the appointment of pensioners under the scheme should be made without prejudice to the interests of existing pensioners, if any.

The scheme further provided that the pensioners should be poor persons of good character who were resident in the ancient parish of Rotherhithe, who were not at the date of application for appointment as pensioners in receipt of poor law relief, who from age, ill-health, accident, or infirmity were wholly or in part unable to maintain themselves by their own exertions (except in special cases to be approved by the Charity Commissioners), and who had resided in the ancient parish for not less than ten years next preceding the time of their appointment, and that there should be paid to each pensioner out of the income of the charities, by weekly or other periodical payments as the trustees should think fit, such a stipend, being at the rate of not less than 6s. a week and not more than 10s. a week, as the trustees might from time to time fix, having regard to the needs and circumstances of the respective pensioners and to the income and other circumstances of the charities, and that each pension should be granted for a term of three years in the first instance, but might be prolonged by the trustees if they should think fit.

At the date of the sealing of the scheme there remained about twenty-seven widows, pensioners under the charity of Hannah Bayly, each receiving £5 a year, and those pensions were continued under the scheme and increased to 6s. a week, and about sixteen of such pensioners were still living. As such pensions ceased to be payable on account of the deaths of the pensioners, those pensions fell in and became available for fresh pensioners of 6s. a week elected by the trustees of the Consolidated Charities.

Under these circumstances doubt arose as to whether the legacy of £200 had lapsed. An originating summons was accordingly taken out by the trustees of the will of Mary Ann Faraker asking for the determination of the following questions: (i) Whether the legacy of £200 bequeathed by the will of the testatrix to "Mrs. Bailey's Charity, Rotherhithe," had lapsed. (ii) If the legacy had not lapsed, to whom the same was now payable.

The summons was adjourned into court and came on to be heard before NEVILLE, J., on Feb. 23, 1912, when his Lordship decided that the legacy had lapsed, the charity intended by the testatrix to be benefited thereby being extinct.

From that decision the Attorney-General now appealed in pursuance of special leave granted by the Court of Appeal on May 18, 1912, subject to any objection on the part of the respondents. The respondents raised an objection that the Attorney-General, not having been made a party to the proceedings in the court of first instance, had no locus standi to appeal. The court overruled this objection.

Sargant for the Attorney-General.

H. M. Humphry for the respondents, the residuary legatees.

A. J. Spencer for the respondents the trustees of the testatrix's will.

COZENS-HARDY, M.R.—This is an appeal from an order of NEVILLE, J., raising a rather curious question.

In 1908, the testatrix, Mrs. Mary Ann Faraker, made a will, and among a great number of other legacies she provides : A

> "I also give to Mrs. Bailey's Charity, Rotherhithe, a legacy of two hundred pounds; and I direct that the receipt of the treasurer thereof for the time being shall be a sufficient discharge for such legacy."

That is the whole of that part of the will which is in question in the present case. What was "Mrs. Bailey's Charity, Rotherhithe"? It was a charity created by a will in 1756. That charity was dealt with by a decree of the Court of Chancery made in 1813 under which the application of the fund, after providing for a clerk, and so on, was directed in this way : There was to be B

> "paid to thirty widows, or as near that number as the funds will permit, being resident parishioners not having received or receiving parish relief, of the age of fifty or upwards, £5 each by two equal half-yearly payments upon Jan. 20 and July 20, preferring, as near as may be, the most needy and most deserving, and every distribution shall be made and every question carried by the votes of the majority of the trustees present at a meeting to be held" C

as therein directed. The income of this charity was roughly £180 a year. I assume that, until that happened which I am about to refer to, the trusts were administered in that way. D

The Charity Commissioners made a scheme in 1905 dealing with no less than fourteen charities in the parish of Rotherhithe. The only two charities which are important as being in point in the present case are Hannah Bayly's Charity and the Poor's Land, which was a charity created by a conveyance of 1659. The Poor's Land Charity is very much larger than Hannah Bayly's Charity. The other charities mentioned in this scheme are quite small, and some of them are, indeed, trivial in amount. The object of the scheme which was made by the Charity Commissioners was to consolidate these charities, vest the properties in the Official Trustees of Charitable Funds, and to provide for the administration of the consolidated charities by a body of trustees, partly representative and partly co-optative, in the usual way of schemes of this kind. The order states that the scheme is approved and established as a scheme for the regulation of the charities—that is to say, for the regulation, amongst others, of Hannah Bayly's Charity. It provides that the mode of application is to be as follows: Subject to the expenses of administration and management, the income of the whole property is to be E F

> "applied by the trustees in making payments, under one or both of the following heads, for the benefit either of the poor of the ancient parish of Rotherhithe generally or of such deserving and necessitous persons resident therein as the trustees shall select for this purpose, and in such way as they shall consider most advantageous to the recipients and most conducive to the formation of provident habits." G

They may provide an amount not exceeding £50 a year towards providing proper care and supervision for poor children requiring temporary change of air or special protection or treatment; for the supply of clothes, linen, bedding, fuel, tools, medical aid, and so on, an amount not exceeding £100 a year; and £30 yearly for the benefit of temporary relief in cases of urgent distress. Then the scheme provides : H I

> "Subject as aforesaid, the yearly income of the charities shall be applied by the trustees for the benefit of pensioners as hereinafter prescribed. The pensioners shall be poor persons of good character who are resident in the ancient parish of Rotherhithe, who are not at the date of application for appointment as pensioners in receipt of poor law relief, who from age, ill-health, accident, or infirmity are wholly or in part unable to maintain themselves by their own exertions, and (except in special cases to be approved by the Charity

A Commissioners) who have resided in the said ancient parish for not less than ten years next preceding the time of their appointment."

The pensions, which originally under the scheme made in 1814 were to be £5 a year only, are to be 6s. a week—that is to say, in round figures £15 a year. They cannot be less than that, and they may go up to 10s. a week.

It is said that under these circumstances—and the learned judge in the court B below has taken that view—this gift lapses and fails altogether. It is said that Hannah Bayly's Charity is extinct; there is no such thing; the gifts have entirely changed, and it has lapsed and gone. With great respect to the learned judge, I am unable to accept that view. Hannah Bayly's Charity is not extinct; it is not dead, and I go further and say it cannot die. Its objects may be changed not otherwise than in accordance with law. They may be changed either by the Court C of Chancery in its own jurisdiction over charities, or by schemes framed by the Charity Commissioners, to whom Parliament has intrusted that particular duty. Subject to that lawful alteration by competent authority of the objects, Hannah Bayly's Charity is not extinct. It exists just as much as it did when the testatrix died in 1756, as it did when there were changes made in 1814, and as it does today.

It must be remembered, as has been pointed out by KENNEDY, L.J., that this D legacy was not given simply to Mrs. Bailey's Charity for Widows. It was simply given to a charity which is identified by name, and if you find that, dealing as you do with an ancient endowed charity, I think a gift of that kind carries with it the application of it according to the law of the charity funds for the time being. Then it is said that the Charity Commissioners ought not to have neglected to E make a special provision for widows in this scheme. I agree. Counsel for the Attorney-General has not attempted to argue the contrary. I think that it was a slip. But it is not a case in which they are entirely excluded. They are simply put in the position that they are made members of a larger class. The funds applicable for the benefit of this larger class are very much larger than the income of Hannah Bayly's Charity. In point of fact, according to the evidence, the survivors F of Hannah Bayly's pensioners at the date of the scheme have got £15 a year instead of £5 down to the present time. We were told that the amount actually given to widows is certainly more than the total income of Hannah Bayly's fund. However that may be, and without prejudice to any application which may be made for an amendment of the scheme—an amendment which I may say I hope will be made and granted—without prejudice to that and treating matters just as they are now, G I think that there is no ground for saying that this gift of charity fails. I think that the decision of NEVILLE, J., was wrong, and that the Attorney-General is entitled to ask us to do that which he has done, viz., to reverse that and say that this charity has not failed and that the money ought to be paid to the trustees of the charity under the scheme.

H **FARWELL, L.J.**—I am of the same opinion. NEVILLE, J., has held that the Hannah Bayly Charity is no longer in existence. If that be so, I ask myself, how did it come to an end? The answer suggested is, by virtue of the scheme of the Charity Commissioners. The jurisdiction given to the Charity Commissioners is given by the Charitable Trusts Act, 1860. They have, amongst other authorities, the same power that the Court of Chancery has for the establishing of any scheme for the administration of any such charity. That administration may, under proper I circumstances, be cy-près. But the jurisdiction is for the establishment, encouragement, and continuance of a charity even going beyond the actual words of the will, if there be an impossibility of carrying out literally the trusts and a jurisdiction to administer cy-près. In the present case there is not even that jurisdiction to alter in order to carry out the trust by a cy-près execution. Nobody suggests that there has been a failure of poor widows in Rotherhithe. Unless and until that happy event happens, there will be no case for any cy-près administration. What is said is this: The commissioners have in fact destroyed this trust because in the scheme

which they have issued dealing with the amalgamation of the several charities, the objects are stated to be poor persons of good character, as I say, resident in Rotherhithe, not mentioning widows in particular, not, of course, excluding them, but not giving them that preference which I agree with COZENS-HARDY, M.R., in thinking ought to have been given. But to say that that has incidentally destroyed Hannah Bayly's trust because the poor widows are not specially provided for with the preference to which they are entitled—although they are provided for by being made part of the scheme—seems to me to be a very strained construction of the language and one that entirely fails. The Charity Commissioners had no jurisdiction whatever to destroy any charity. Suppose the Charity Commissioners or this court were to declare that a particular charitable trust was at an end, and they declared it extinct, in my opinion they would go beyond their jurisdiction in so doing. They could not take an existing charity and destroy it. They are obliged to administer it. To say that this, after all, very pardonable slip—I use the word with all respect to the draftsman—has the effect of destroying the charity, appears to me really to be extravagant. In all these cases one has to consider not so much the means to an end as the charitable end which is in view. And so long as that charitable end is well established, the means are only machinery, and no alteration of the machinery can destroy the charitable trust which overrides them all.

In my opinion it is quite impossible to say here that the poor widows are excluded, or, even if they were in terms excluded, that that would destroy the trust. It could only give grounds for an application to set right that which in any event could only be put in in injuriam if it really had the effect of destroying it, which I do not think it has. I agree, therefore, that the appeal must be allowed.

KENNEDY, L.J.—I shall not differ from the conclusion at which both COZENS-HARDY, M.R., and FARWELL, L.J., have come, though I confess that I have felt considerable doubt about this case, which is a peculiar one.

It strikes one as being somewhat strange that a testatrix should leave a sum of money to "Mrs. Bailey's Charity, Rotherhithe," and if you inquired for the locus in quo of such a charity, or the persons named as the charitable trustees, you would not find any such persons in Rotherhithe at all. The funds, of course, exist of Mrs. Bayly's Charity, metamorphosised as they have been under the scheme, so far as regards the actual character of the fund, in the sense of a fund distributable to widows only. The administration of those funds no doubt in this case exist. There are persons at Rotherhithe who under the scheme administer this and other moneys. But the question which I have felt some doubt about is if you ask for the continuance—that word has been used throughout—of a charity, what is the essential thing to constitute the continuance of that charity as the subject of a charitable gift in a will? As I say, it seems under the circumstances strange somewhat that it is a perfectly good bequest to persons who are administering a fund which they are not bound to give one penny of to a widow.

The terms of the will, no doubt, are important, because it is not "Mrs. Bailey's Charity, Rotherhithe, for Widows" which I should have felt, I confess, myself impossible to get over. But the persons who ask for it see a body created by a scheme of the Charity Commissioners, who have no obligation to consider the claims of any of them. There is, however, this to be considered: Undoubtedly no case or authority has been shown to me in which an endowed charity is treated as having, so to speak, lost its life by reason of the perfectly competent authority under Parliamentary sanction of the Charity Commissioners, or the equally competent authority of this court, under which it has applied those funds somewhat differently to the way in which those funds were applied where the original object has disappeared. In the absence of such authority, I am unable to say that, as the funds exist and as they are administered as the terms of the will require by the

charity which undoubtedly has, so to speak, become part of a larger institution of a charitable nature, the contention which has found favour with NEVILLE, J., ought to prevail.

I should therefore certainly be very slow to differ from COZENS-HARDY, M.R., and FARWELL, L.J., on this point, although where the limit is to go to I am not very clear, unless one can say, as a matter of law, that an endowed charity under some scheme is still existent so as to draw to it a sum of money by a gift in a will for presumably the same purpose on the part of the testatrix as the original charity. I accept that as being the view which is the true view, and as, of course, this charity continues to exist to which the bequest was made, there is, no doubt, a bequest to that charity without further stipulation as to the objects of it. Therefore, if that is right, the view which has been stated by COZENS-HARDY, M.R., and FARWELL, L.J., ought to prevail, and I shall concur in it.

Appeal allowed.

Solicitors: *Treasury Solicitor; Fairfoot, Rooke & Macdonald.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

SUN INSURANCE OFFICE *v.* CLARK

[HOUSE OF LORDS (Earl Loreburn, L.C., Viscount Haldane, Lord Alverstone and Lord Atkinson), January 23, March 7, 1912]

[Reported [1912] A.C. 443; 81 L.J.K.B. 488; 106 L.T. 438; 28 T.L.R. 303; 56 Sol. Jo. 378; 6 Tax Cas. 59]

Income Tax—Deduction in computing profits—Insurance—Fire insurance—Risks not expired at end of year—Allowance.

The proper method of estimating the annual profits or gains of a company carrying on the business of fire insurance is a question of fact. There is no rule of law that a deduction may not be taken from premiums of a percentage as an allowance for estimated risks not expired at the end of the year.

General Accident Fire and Life Assurance Corpn., Ltd. v. *McGowan* (1), [1908] A.C. 207, distinguished.

Notes. Considered: *London Cemetery Co.* v. *Barnes*, [1917] 2 K.B. 496; *Peter Merchant, Ltd.* v. *Stedeford* (1948), 30 Tax Cas. 496; *Patrick* v. *Broadstone Mills, Ltd.*, [1954] 1 All E.R. 163. Referred to: *Collins* v. *I.R. Comrs.* (1924), 12 Tax Cas. 773; *Minister of National Revenue* v. *Anaconda American Brass, Ltd.*, [1956] 1 All E.R. 20; *Southern Railway of Peru, Ltd.* v. *Owen*, [1956] 2 All E.R. 728.

As to unexpired fire risks, see 20 HALSBURY'S LAWS 211; and for cases, see 28 DIGEST (Repl.) 81 et seq.

Cases referred to:

(1) *General Accident Fire and Life Assurance Corpn., Ltd.* v. *McGowan*, [1908] A.C. 207; 77 L.J.P.C. 38; 98 L.T. 734; 24 T.L.R. 533; 52 Sol. Jo. 455; 5 Tax Cas. 308, H.L.; 28 Digest (Repl.) 81, *306.*

(2) *Imperial Fire Insurance Co.* v. *Wilson* (1876), 35 L.T. 271; 41 J.P. 9; 1 Tax Cas. 71; 28 Digest (Repl.) 81, *305.*

(3) *Scottish Union and National Insurance Co.* v. *Smiles* (*Surveyor of Taxes*), (1889), 2 Tax Cas. 551; 28 Digest (Repl.) 87, **235.*

(4) *Northern Assurance Co.* v. *Russell* (*Surveyor of Taxes*) (1889), 2 Tax Cas. 551; 28 Digest (Repl.) 39, **34.*

(5) *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1889), 16 R. (Ct. of Sess.) 461; 26 Sc.L.R. 330; 28 Digest (Repl.) 86, **218.*

(6) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 41 W.R. 270; 8 T.L.R. 618; 3 Tax Cas. 185, H.L.; 28 Digest (Repl.) 83, *315*.

Also referred to in argument:

Last v. *London Assurance Corpn.* (1884), 12 Q.B.D. 389; 53 L.J.Q.B. 325; 50 L.T. 534; 32 W.R. 702, D.C.; affirmed 14 Q.B.D. 239; 54 L.J.Q.B. 4; 52 L.T. 604; 49 J.P. 564; 33 W.R. 207; 1 T.L.R. 66, C.A.; on appeal (1885), 10 App. Cas. 438; 55 L.J.Q.B. 92; 53 L.T. 634; 50 J.P. 116; 34 W.R. 233; 1 T.L.R. 617; 2 Tax Cas. 100, H.L.; 28 Digest (Repl.) 81, *309*.

Farmer v. *Scottish American Trust, Ltd.*, [1912] A.C. 118; 81 L.J.P.C. 81; 105 L.T. 833; 28 T.L.R. 142; sub nom. *Scottish North American Trust, Ltd.* v. *Farmer*, 5 Tax Cas. 693, H.L.; 28 Digest (Repl.) 129, *490*.

Appeal from a judgment of the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), reported 104 L.T. 520, reversing a judgment of Bray, J., reported 102 L.T. 336, on a Case stated by income tax commissioners.

The appellants carried on the business of fire insurance at their head office in London, and had branches and agencies all over the world. Their annual income from premiums for the three years in question was—1902, £1,208,061; 1903, £1,222,266; 1904, £1,306,180. The question was the propriety of the practice of the appellants in carrying forward annually in their published accounts 40 per cent. of their yearly receipts from premiums as being unearned, and as a reserve or allowance in order to bring about the correct incidence as between year and year of the income from premiums which had to answer the accidental incidence of fire losses, and on the balance of which over or under the losses and charges for the year the profit or loss attaching to their business depended. The provision thus made of 40 per cent. on the income from premiums amounted, at Dec. 31, 1901, to £466,138 13s., and rose during the three years on which the assessment appealed against was based to £522,472. The increase in the reserve during the three years thus amounted to £56,334, and affected the return for the year of assessment by one-third, or £18,778.

It was contended on behalf of the respondent that the appellants were not entitled to deduct the estimated losses on risks unexpired at the end of the year.

The commissioners held the allowance to be reasonable and proper, and their decision was confirmed by Bray, J., but his decision was reversed by the Court of Appeal on the ground that the case was governed by the decision of the House of Lords in *General Accident Fire and Life Assurance Corpn., Ltd.* v. *McGowan* (1). The company appealed.

Danckwerts, *K.C.*, and *Bremner* for the appellants.

The Attorney-General (*Sir Rufus Isaacs*, *K.C.*), *the Solicitor-General* (*Sir John Simon*, *K.C.*), and *W. Finlay* for the Crown.

The House took time for consideration.

Mar. 7, 1912. The following opinions were read.

EARL LOREBURN, L.C.—In this case Bray, J., decided in favour of the Sun Insurance Co. in a very convincing judgment. The Court of Appeal, while thoroughly agreeing with him, reversed that judgment solely on the ground that they felt obliged to do so by the decision of this House in *General Accident Fire and Life Assurance Corpn., Ltd.* v. *McGowan* (1). I am very glad that this appeal has been brought, because no one could be more surprised than myself at the view taken of that decision by the Court of Appeal. Let me endeavour to explain my reason.

When a fire insurance company is to be assessed for income tax, the main point to be ascertained will be what has been the gain or the loss on the contracts of insurance which it has effected in each of the three years which are taken to make the average. If it were practicable, the accurate way, I suppose, would be to add

A together the premiums which the company became entitled to receive in each year, say 1903, on contracts made in that year, and then to add up the losses which the company became bound to pay upon those contracts made in 1903. The difference between these two sum totals would show precisely what was the gain of the company or their loss in respect of the contracts made in 1903. But this is impracticable, because contracts of fire insurance are made all through the year, B from Jan. 1 to Dec. 31, and most of them, or at all events, many of them, are made to cover fire risks for a year, some, we are told, for five or six or seven years, from the date of their making. The premium is paid in advance. So the result in the way of gain or loss could not be ascertained as a fact until after the period of time had elapsed. Thus it appears that you cannot base the assessment of income tax on the actual facts of the business done and the actual pecuniary results of C it in the case of fire insurance companies who take single premiums to cover risks for a year or for more years. This is such a company, and I believe that nearly all companies are in the same position. If that be so, it follows that in assessing such fire insurance companies you must proceed wholly or in part by estimate.

An estimate being necessary, and the arriving at it by in some way using averages D being a natural and probably inevitable expedient, the law, as it seems to me, cannot lay down any one way of doing this. It is a question of fact and of figures whether what is proposed in each case is fair both to the Crown and to the subject.

In *McGowan's Case* (1), to which reference is made, three methods of estimating these gains or profits were before the House. I place first, merely for convenience sake, and not for its importance or value, a faint suggestion which was made E in that case, and, as I understood it, was as follows: It was suggested that each contract of insurance made during a particular year should be considered separately. If it had expired, then the actual result should be taken, whether profit or loss. If it had not expired, then an estimate should be made, having regard to the period unexpired and the degree of risk, which might be different (in summer and winter, for example) during that period. I do not imagine that either the Crown or the F company would seriously desire such an inquiry. I do not know how many fire insurances are effected by a great company within a twelve-month, probably scores of thousands or even hundreds of thousands. Such a process, as to the unexpired contracts, would be minute and almost interminable. It was rejected because there was no evidence that it would be a reasonable way of ascertaining what was desired.

The second method suggested in that case was that of merely taking for each G year the sum total of the premiums received and the sum total of the losses paid and subtracting the one from the other, without regard to the fact that the premiums cover risks running on into subsequent years and the losses include losses arising out of contracts made in previous years. This method is, of course, not precise or scientific. It proceeds on the view that when this is done for the three consecutive years indicated by the statute and the figures thus reached are averaged, H a fair and reasonable conclusion is attained. This method was adopted long ago, and has more than once been the subject of consideration in courts of law. I can conceive it being unfair either in the case of a rapidly increasing or of a rapidly diminishing fire insurance business. It may prove unfair in other cases. But in *McGowan's Case* (1) it was not proved to be unfair. On the contrary, it closely correspond with the dividends actually distributed, and was, on the facts of that I case, clearly the most accurate and reasonable of the methods which alone were propounded for our consideration. Accordingly it was adopted. I think that it is in general a good working rule, but no one in this House has said that it ought to supersede the truth if the truth is in conflict with it in any case.

A third method, similar in principle to that advanced by the now appellants, was also considered by your Lordships in *McGowan's Case* (1). This method is to carry forward annually at the close of the year a percentage of the premium income in order to allow for unexpired risks. It has no pretensions to being precise. I

can easily imagine cases in which an actuary could show that it was misleading. But if it comes nearer to the truth than any other method in a particular case, I do not understand why it should not be adopted. This third method, however, in its application to that case, would have meant that the insurance company was to pay income tax on the footing of about £15,000 profits and gains in the three statutory years, whereas they had divided dividends of about £60,000 in those three years, and there was no evidence and no finding, nor could there honestly have been, that the third method worked fairly between the Crown and the subject. In those circumstances this House rejected the third method, and opted the second; but, so far from laying it down as a rule of law, it was expressly pointed out that the second method was of itself imperfect and, though a good working rule generally, would not be applicable if in any case it appeared upon the facts to involve hardship. The headnote in the LAW REPORTS is not accurate, and the view of BRAY, J., of what the House decided is accurate.

After this preface, tedious but necessary in the circumstances, I come to the merits of the present appeal. Here again there is a competition between two methods of estimate. That which I have called the second is propounded by the Crown. That which I have called the third is propounded by the company, who deduct 40 per cent. of the premiums at the end of each year. The relevant facts are here the reverse of what they were in *McGowan's Case* (1). The third method has been examined by the commissioners, and it is stated in the Special Case to be right in this case. It was in terms admitted by the surveyor of taxes before the commissioners that the fair and reasonable allowance for this company to make, if entitled to make any allowance, was 40 per cent. The surveyor's point was that no allowance or deduction at all ought to be made, because he said that the proper method according to law was the second method. He did not prove, nor try to prove, that it was fair in this case, so that all the evidence and the finding in the present appeal was in support of the appellants' contention. In these circumstances it seems to me quite obvious that the third, and not the second, method must be applied here for the plain reason that, on the materials before us, it is the fair and only way presented to us by which the truth can be approximately attained.

In the hope that it may help to prevent future misunderstanding, I will recapitulate my own opinion. There is no rule of law as to the proper way of making an estimate. There is no way of estimating which is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case. Experience seems to have satisfied courts of law for a considerable time that the method which I have described as the second is a useful working rule. But no one has said in this House that there is any constraint to accept it. It may be that the character or mode of carrying on this insurance business may alter or may have altered, and what was a good method once may become inaccurate or even obsolete. I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it they can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of—viz., that the true gains are to be ascertained as nearly as it can be done. I think that this appeal must be allowed.

VISCOUNT HALDANE.—Income tax is imposed by the Income Tax Acts on the profits or gains (calculated according to averages) arising from business, certain deductions being prohibited, especially by the rules of the cases in sched. D, none of which prohibitions affect the question which is raised on this appeal. It is, therefore, necessary to ascertain in the first instance whether the claim of the Crown in the

present proceedings is confined to the profits and gains which the statutes prescribe as its legitimate subject-matter.

The appellants carry on the business of fire insurance. It has been their practice to carry forward annually 40 per cent. of their yearly premium receipts in order to bring about the correct proportion, as between year and year, of the premium income which has to answer to the annual incidence of fire losses, on the balance of which income, over or under the losses or charges for the year, the profit or loss attaching to their business depends. If the premium income were stationary, this would make but little difference as regards income tax, for a uniform amount deducted would be carried forward to profit in the ensuing year. But the business of the appellants and their premium income are increasing, with the result that the amount escaping the tax in each year varies progressively. The commissioners for taxes in the City of London, after examining the case, were of opinion that the percentage carried forward in each year was a reasonable and proper allowance and did not form part of profits or gains for the year. The surveyor admitted that he was not in a position to contest that the percentage carried forward was accurately estimated, but contended that the appellants were liable in respect of the entire premium income, on the ground that the courts had laid down that no such deduction was permissible. A Case was stated for the opinion of the High Court of Justice, and BRAY, J., decided in favour of the appellants. The Court of Appeal reversed his judgment and decided in favour of the Crown, on the ground that they were bound by the decision of this House in *General Accident Fire and Life Assurance Corpn., Ltd.* v. *McGowan* (1).

It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when (as was not the case here) some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap. Such a presumption was made in the appeal referred to, where, as pointed out in the judgment delivered by the Lord Chancellor, it was not shown that the percentage deducted represented the real value of risks yet to run, and was therefore unearned, and it appeared further that the company had actually divided the entire amount without deduction among its shareholders as part of the profit of the year. In *McGowan's Case* (1) it was, therefore, in the absence of evidence to the contrary, presumed that the whole of the premium income received in the year represented income earned by bearing the risks of the year. It is difficult to see how, on the materials before the House, the decision could have been otherwise, but it seems to me equally clear that the reason of the decision has no application where, as here, it has been accurately ascertained that part of the premiums is not in the nature of profit earned. As BRAY, J., puts it, the case is analogous to one in which if goods are bought their value cannot be treated as profit without deducting the value of the liability to pay for them which the buyer has incurred. Such cases as *Imperial Fire Insurance Co.* v. *Wilson* (2), and *Scottish Union and National Insurance Co.* v. *Smiles* (3), and *Northern Assurance Co.* v. *Russell* (4) are not, when carefully examined in the light of what appears to be the true principle, to be relied on as authorities for a proposition which would run counter to the practice and good sense of the commercial community. The judges in the Court of Appeal appear to have thought themselves bound to hold that this House had laid down a rule of law so rigid that, although introduced for the purpose of supplying deficient evidence of fact, it must still apply even where there was no deficiency of proof. I have come to a different conclusion. I think that BRAY, J., has interpreted correctly the decision in question, when he says that if in the earlier case such facts had been before this House as have been established in the present case, it would, in his opinion, have decided against the Crown. The present appeal ought, in my judgment, to succeed.

LORD ALVERSTONE.—This is an appeal by the Sun Insurance Office against the decision of the Court of Appeal reversing a decision of BRAY, J. The question raised by the appeal is as to the right of the appellant company, in estimating the annual profits or gains for the purpose of the Income Tax Acts, to make a deduction in respect of premiums on policies still current at the end of the financial year. The facts are not in dispute. The appellants issue policies for periods of twelve months and possibly longer; the risks on these policies run not from a fixed date, but from the dates named in the policies, which may be any day in the year; in consequence, at the end of the financial year, there are invariably a considerable number of policies still running, in respect of which the appellants are still under liability to pay should any loss occur. The appellants alleged that, inasmuch as the premiums on such policies cover a period beyond the financial year, the total amount of premiums on such policies cannot be treated as ascertained profits, as the company may be called upon to pay losses under and by virtue of the contracts still existing. It is not disputed that, as a matter of principle, the claim of the appellants is well founded. Premiums are not profits or gains, they are receipts which must be brought into account, and out of which, after proper deduction for losses, profits will accrue. If the actual amount of the premiums received in any financial year was substantially constant the assessment of gains and profits after the second year would not be affected; but the business of the appellants was an increasing business, and for the three years 1902, 1903 and 1904 the total increase of premium income averaged £18,788. The only matter in dispute was the right of the appellants in estimating the profits or gains to make a deduction in respect of the outstanding premiums due to increased business during the three years under consideration. The matter was investigated by the commissioners of income tax, who, after hearing evidence, were of opinion that the company was entitled to carry forward a percentage of fire premiums in one year in respect of unearned premiums which did not form part of the profits of the year. It was not disputed by the surveyor of taxes that, if the company were legally entitled to such an allowance, he was not in this appeal in a position to contest that 40 per cent. was an accurate estimate to reserve, and the commissioners found as a fact that, in the case of the Sun Fire Insurance Office, 40 per cent. was a reasonable and proper allowance. It was not seriously contested by the Attorney-General that, on principle, the appellants were entitled to make some deduction, but he contended that, as a matter of law, no deduction was permissible in respect of unexpired risks, and he further contended that the decision of your Lordships' House in *General Accident Fire and Life Assurance Corpn., Ltd.* v. *McGowan* (1) had laid down as a principle of law that no such deduction could be permitted. With regard to the justification for such a deduction it is quite unnecessary to state any reasons. BRAY, J., and the members of the Court of Appeal have expressed in the strongest terms their opinion that some such deduction ought to be made. The only question, therefore, requiring consideration is whether there is any rule of law or any decision of your Lordships' House which prevents the appellants from being entitled to claim such a deduction.

The question of what are profits or gains within the meaning of the Income Tax Act is, prima facie, a question of fact, and if the cases from *Imperial Fire Assurance Co.* v. *Wilson* (2) in 1876 down to *McGowan's Case* (1) in 1908 be examined, it will be found that in every case the courts have treated the question as one of fact, and have merely decided whether, on the facts before them, the claim of the taxpayer to make a deduction in a particular way was justified. The Attorney-General contended that no estimate was permissible in arriving at the amount to be deducted, and he based this argument principally on the language of the judgment of the Court of Exchequer in *Imperial Fire Insurance Co.* v. *Wilson* (3) and the language of the Lord President in *Scottish Union and National Insurance Co.* v. *Inland Revenue* (5) cited in the judgment of COZENS-HARDY, M.R.; but in each case, if properly examined, it will be found that the court were dealing with a question of

fact, and were only approving that which in their judgment appeared to be the best solution of that question, the method which had been approved in *Imperial Fire Insurance Co.* v. *Wilson* (2).

Coming now to the case on which express reliance was placed, the respondents in their Case state that it is governed by the decision of your Lordships' House in *McGowan's Case* (1). In that case the mode of estimating the proper deduction put forward by the then appellants was rejected by your Lordships' House as being absolutely unjustified on the facts: (See the judgment of the Lord Chancellor, who decided that the particular correction sought by the appellants in that case was indefensible on the materials before the House, and that the method adopted by the commissioners was a good working rule in the then present instance and generally.) But he went on to say that, if in any particular case an insurance company could show that it worked hardship, the rule ought to be modified so that the real gains and profits might be ascertained as near as may be. It is said that LORD MACNAGHTEN in his judgment went further, but I have seen nothing to lead me to believe that he was purporting to lay down any rule of law; he was, in my opinion, only expressing very strongly his view on the facts then before your Lordships' House.

I adopt the reasoning in the judgment of BRAY, J., who considered that, properly understood, *McGowan's Case* (1) was a decision on the facts and not on law, and I am unable to agree with the decision of the Court of Appeal that your Lordships intended to lay down any binding rule that, as a matter of law, no such deduction could be allowed. For these reasons I am of opinion that the decision of the Court of Appeal should be reversed and the judgment of BRAY, J., restored.

LORD ATKINSON.—In this case the learned lords justices in the Court of Appeal apparently considered themselves coerced by some rule of the law supposed to have been laid down in your Lordships' House in *General Fire and Life Assurance Corpn., Ltd.* v. *McGowan* (1) to pronounce a decision repugnant to their own sense of right and justice. Speaking for myself, I feel bound to say, with all respect, that I find great difficulty in seeing how, if that case be examined in a fair and reasonable though critical spirit, it can be supposed that in it any rule of law was laid down, or anything decided as a matter of law. Two different practical methods for ascertaining the profits and gains of the appellants' business for the purposes of the Income Tax Acts were suggested and insisted on by the respective parties in the case. The method insisted on by the appellants led, on the facts, to grotesque results, while that insisted on by the respondents, which was the same as that contended for by the Crown in the present case, led to comparatively accurate and just results. This latter was proved to be the usual method, and was considered to be simple, practical, and easily applied. A third method was suggested which was not practical. Your Lordships had to choose between the two practical methods, and you chose that which led to the just results.

That, however, is a very different thing from deciding, as a matter of law, that the method so approved of was the only legal method which could be adopted in such cases, or that deductions were never to be made from the premiums received on fire policies in respect of risks unexpired at the time when the yearly accounts of the company were made up. A little consideration of one of the most illuminating authorities in the books on this question of the mode of ascertaining the taxable gains and profits of trading and commercial businesses, namely, *Gresham Life Assurance Society* v. *Styles* (6), will show conclusively that, consistently with that authority, no such rule could be laid down as a matter of law. The very nature of the thing forbids it. That case clearly decided that the receipts of a business are not in themselves profits and gains within the meaning of the Income Tax Acts, but that it is what remains of those receipts after there has been deducted from them the cost of earning them which constitutes the taxable profits and gains. Now, what

is the service which a fire insurance company renders to each insurer in consideration of the premium which it receives? It is only by rendering this service in each case that it earns these receipts. The service consists in indemnifying the insurer against loss by fire during the continuation of his policy. The company are entitled to deduct what it will cost them to perform that service. In any given case where a fire occurs the loss, and therefore the cost of the service by which the premium is earned, may and almost certainly will vastly exceed the premium, but in the aggregate of all their policies the aggregate cost will, of course, be much less than the aggregate premiums. The difficulty of the position consists in this, that, until the time for which a policy is to remain effective has expired, nobody can tell precisely how much the service will cost. Yet until that time has expired the service for which the company has been paid has not been completely performed. If the accounts of the company are to be rendered before the date of expiration, then some division of the premium must be made, and the portion to be appropriated to the service already rendered ascertained, the balance being appropriated to that portion of the service which is to be performed thereafter. I think that the description "unearned premium" which has been used to describe this latter portion is a very appropriate and accurate description.

It is obvious that the entire premium cannot in every case be divided in the same proportions as those into which the accounting period divides the entire duration of the policy, because the risk is not the same for each calendar month or each season. On the contrary, the risk is admittedly greater in the winter months than in the summer months because fires and artificial light are more used in the former than in the latter; for instance, if Dec. 31 be the accounting day, and the policy be effected on July 1, it might be quite right to divide the premium into two equal portions, one half being treated as earned in the year in which the policy was effected, and the other half as to be earned in the succeeding half-year, but if the policy were effected on Oct. 1 then it would, obviously, be unfair, on account of this greater risk to treat only one-quarter of the entire premium as having been earned in the three winter months of October, November, and December. Having regard, therefore, to the fact that companies carrying on business of this kind are, under the decision of your Lordships' House, clearly entitled to object to their receipts being treated per se as their profits and gains without the proper deduction having been made of the cost of earning those receipts, it is obvious that the amount of the taxable profits and gains can only be ascertained by some system of averages or estimation, or by some other practical rule of thumb based upon experience and the facts of different cases.

As I understand, FLETCHER MOULTON, L.J., is of opinion that some method might be adopted by which the problem could be solved with scientific accuracy. Unfortunately, he does not describe in detail what that method is. It may, for all that appears, involve such complicated calculations in reference to each particular policy as to be practicably unworkable, and certainly it does not appear to me that it is possible to adopt any method which does not involve recourse, at some stage of its processes, to estimates, averages, or such like things. If these matters be borne in mind, it does seem strange that it should have been supposed that it could ever have been laid down as a matter of law that one method, and one method alone, could legally be employed to solve the problem.

I now turn to a detailed examination of *McGowan's Case* (1). If any meaning is to be given to words, no ingenuity can find in the judgment of the Lord Chancellor anything equivalent to a statement that, as a matter of law, only one rule or method could be applied to reach the desired result. On the contrary, he is reported to have used these words [1908] A.C. at p. 212:

> "I think that the particular correction sought by the appellants in this case is indispensable upon the materials before us, and, further, that the method adopted by the commissioners is a good working rule in the present instance,

and generally. If, in any particular case, an insurance company can show that it works hardship, no doubt the rule ought to be modified so that the real gains and profits may be ascertained as near as may be. I am for dismissing the appeal."

That clearly means this, that the method adopted by the commissioners is not the only method which can be legally adopted, but is a good working method for general use, to be departed from where it is shown to work injustice. LORD ASHBOURNE said that he concurred with the Lord Chancellor. That may mean that he merely concurred in the conclusion at which the Lord Chancellor had arrived, or that, in addition, he adopted every word which the Lord Chancellor had said. I understand that, according to the practice of your Lordships' House, mere concurrence as LORD ASHBOURNE expressed it, conveys the former meaning, not the latter. LORD MACNAGHTEN then delivered judgment. It is contended that his judgment amounts to a decision that the rule adopted by the commissioners is the only rule which can legally be adopted in such cases to ascertain the amount of the taxable profits and gains.

I do not myself think that a fair and reasonable construction of his language leads to any such conclusion; but if I am mistaken in that view, then it cannot be disputed that the conclusion at which he arrived (quite unnecessary for the decision of the case) is the very contrary of that at which the Lord Chancellor arrived. The one noble Lord says in effect that the rule is not a rule of law at all, but is generally a good working rule, to be departed from when it is shown to work injustice, and the other lays it down that it is the only legal rule, is to be invariably applied, and can never be departed from whether it works injustice or not. No two statements could be more irreconcilable. LORD JAMES OF HEREFORD and LORD ROBERTSON and I myself then stated that we concurred; but concurred with what or in what? I know that their minds were too logical, and I hope that my own mind was too logical, to agree, at the same moment, with each of two contradictory and irreconcilable propositions. We must, therefore, either have considered that the two judgments must have meant the same thing, or our concurrence must have been limited to a mere concurrence in the result arrived at by both our colleagues without adopting the precise language of either. It is, I think, plain that LORD COLLINS, in his judgment delivered after our concurrence had been expressed, did not use any language from which it could be fairly or legitimately inferred that, in his view, the rule approved of by the Lord Chancellor was the only rule which can be legally applied in such cases.

I am, therefore, clearly of opinion that *McGowan's Case* (1) is no authority whatever for the proposition that the rule adopted so reluctantly by the Court of Appeal is the only legal rule which can be applied for the purpose indicated. If the Court of Appeal considered, as apparently they did consider, that the case was an authority for such a proposition binding upon them, they were, in my view, with all respect, entirely mistaken. It was, I think, quite open to them to approve of a different method of ascertaining which would lead to what they considered true and just results. In this particular case it is shown upon the evidence that the method contended for by the appellants is, in this instance, at all events, a better method, juster and more satisfactory in its application and results than that insisted upon by the commissioners. It should, therefore, I think, be approved of and applied in preference to the latter. I accordingly am of opinion that this appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Dawes & Sons; Solicitor of Inland Revenue.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

McNALLY *v.* FURNESS, WITHY & CO., LTD.

[Court of Appeal (Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), July 16, 1913]

[Reported [1913] 3 K.B. 605; 82 L.J.K.B. 1310; 109 L.T. 270; 29 T.L.R. 678; 6 B.W.C.C. 664] B

Workmen's Compensation—Compensation—Continuing incapacity due to accident —Supervening cause preventing workman from working—Imprisonment for criminal offence.

On July 31, 1912, the workman suffered an injury arising out of and in the course of his employment and was paid compensation by his employers until Jan. 18, 1913. On Jan. 8 the workman had been arrested for stealing from the person, and on Jan. 21 he was convicted of that offence and sentenced to 18 months' imprisonment with hard labour. In an arbitration requested by the employers to determine the amount of compensation, if any, payable to the workman, the employers contended that since Jan. 8 his incapacity to work and earn wages was due to his being kept in prison and not to the disability which, on the medical evidence, still continued. C D

Held: the test was not what wages the workman actually earned, but what, having regard to his physical capacity, he was capable of earning; and, as his disability still continued, he was not disentitled to compensation by reason of the supervening imprisonment.

Harwood v. *Wyken Colliery Co., Ltd.* (1), [1913] 2 K.B. 158, applied. E

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of s. 1 (1) of the Act of 1906. See also s. 7 of the Act of 1946. F

Applied: *Stowell* v. *Ellerman Lines* (1923), 128 L.T. 823. Considered: *Lewis* v. *Guest, Keen and Nettlefolds, Watkins* v. *Same, Tucker* v. *Same, Ingram* v. *Crawshay*, [1928] 1 K.B. 20; *North's Navigation Co. (1889), Ltd.* v. *Batten* (1933), 150 L.T. 186. Referred to: *Ling* v. *De Dion Bouton*, [1920] 1 K.B. 88; *McCann* v. *Scottish Co-operative Laundry Association, Ltd.*, [1936] 1 All E.R. 475; *Baggs* v. *London Graving Dock Co.*, [1945] 1 All E.R. 426. G

As to industrial accidents and diseases see 27 Halsbury's Laws (3rd Edn.) 802 et seq.; and for cases see 34 Digest 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 Halsbury's Statutes (2nd Edn.) 797.

Case referred to: H

(1) *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158; 82 L.J.K.B. 414; 108 L.T. 283; 29 T.L.R. 290; 57 Sol. Jo. 300; 6 B.W.C.C. 225, C.A.; 34 Digest 348, *2803*.

Also referred to in argument: I

Ball v. *William Hunt & Sons, Ltd.*, [1912] A.C. 496; 81 L.J.K.B. 782; 106 L.T. 911; 28 T.L.R. 428; 56 Sol. Jo. 550; 5 B.W.C.C. 459, H.L.; 34 Digest 395, *3228*.

Lysons v. *Andrew Knowles & Sons, Ltd.*, *Stuart* v. *Nixon and Bruce*, [1901] A.C. 79; 70 L.J.K.B. 170; 84 L.T. 65; 65 J.P. 388; 49 W.R. 636; 17 T.L.R. 156; 45 Sol. Jo. 150; 3 B.W.C.C. 1, H.L.; 34 Digest 423, *3433*.

McCallum v. *Quinn*, 1909 S.C. 227; 34 Digest 458, *k*.

Clayton and Shuttleworth, Ltd. v. *Dobbs* (1908), 2 B.W.C.C. 488; 34 Digest 352, *2838*.

Appeal by the employers from an award of the learned judge of the Whitechapel County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

On July 31, 1912, the workman, who was a stevedore employed by the respondent employers, was engaged on board a ship in the docks stowing cargo, when he fell between two cases of goods which had been left apart and sustained injuries to his left knee, ankle, and elbow, which resulted in stiffness with impaired mobility and weakness of the knee joint. The applicant was paid by the employers compensation at the rate of £1 per week until Jan. 18, 1913, when they stopped the compensation, the workman having, on Jan. 8, been arrested for stealing from the person. On Jan. 21 he was convicted and sentenced to eighteen months' hard labour and was imprisoned. The employers stated that the workmen's total or partial incapacity for work ceased on or about Jan. 18, and that since that date he had been capable of earning his usualy weekly amount, but had been prevented from doing so owing to his being detained in prison.

There was evidence by the medical officer of Wormwood Scrubs Prison that on Feb. 11, 1913, the workman was suffering from pain in the left knee with stiffness in the knee joint, and had a decided limp in walking with the joint slightly enlarged; that he was unfit for hard labour or any heavy occupation involving the use of his legs, or for stevedore's work; and that he was only fit for light work. On May 19, 1913, His Honour JUDGE GRANGER made an award in which he said that he could find nothing in the Act which said that the workman having once established his incapacity might be deprived of it by his misconduct afterwards. There was nothing about "during good behaviour" in the Act. There were many ways by which a workman in receipt of compensation might incapacitate himself quite apart from the results of an accident, and the results would be very mischievous. He, therefore, came to the conclusion that the workman was entitled to an award of 12s. per week during partial incapacity. The employers appealed on the ground that the learned county court judge was wrong in law in deciding that the workman was entitled to compensation under the Act on the findings of fact.

Sankey, K.C., and *I. H. Stranger* for the employers.

Charles Doughty and *J. R. F. Monier-Williams*, for the workman, were not called on to argue.

COZENS-HARDY, M.R.—This case has been very fully and ably argued by counsel for the employers, and I feel sure that every argument which could be adduced has been forcibly drawn to our attention. But, as those arguments have not left doubt in my mind, I do not think that any advantage will be attained by listening to the arguments of counsel for the workman.

It is a curious case, undoubtedly, the like of which has never previously been brought before this court. It is a case where there was an admitted accident to McNally, the workman, who was a stevedore. He was employed by Messrs. Furness, Withy & Co., and his wages were £2 a week. The accident happened on July 31, 1912. The employers admitted liability by paying him £1 a week from that date, and they continued that weekly payment until Jan. 18, 1913. The reason why they then discontinued it was that on Jan. 8 McNally was arrested for stealing from the person, and on Jan. 21 he was sentenced to eighteen months' imprisonment with hard labour and taken to Wormwood Scrubbs prison, where he is now. On Mar. 19 McNally, giving his address as "at present, in His Majesty's prison, Wormwood Scrubbs," applied under the Workmen's Compensation Act, 1906, for an award, and he seeks a continuance of the weekly payment. That his disability continues was established before the learned county court judge by the evidence of the prison doctor. The learned county court judge finds as a fact that the workman's partial disability still continues. But he does not award the sum of £1 a week; he only awards 12s.

That raises this question. Does the right of the workman to be paid compensation cease to exist—or, putting it rather more favourable to the employers, is it to be

suspended—because it is said, and said with some truth, that his disability to earn is now due to the fact that he is confined to prison for a year and a half from last January, notwithstanding that he is suffering from a partial disability which might have rendered the employers liable if there had not been this subsequent confinement to prison? Counsel for the employers took no less than four points, each of which he elaborated with force. He said that the incapacity to earn wages is not due to the accident. He said that the employers have no opportunity of giving light work to the applicant or any work. He said that the employers are precluded from examining the applicant by their own doctor as they ought to have the opportunity of doing. And finally he says that, supposing the applicant had got twenty years' penal servitude, are the employers to go on paying him full compensation all that time?

If this case had been brought before us twelve months ago I am bound to say that I should have listened to argument on the other side, and I feel sure that I should have thought it worthy of a considered judgment. But this year we had a case before us of *Harwood* v. *Wyken Colliery Co., Ltd.* (1), in which we did reserve judgment. That was a case, in my opinion, of very great importance; in it this court deliberately laid down a principle which I should be very sorry in any way to be supposed to be departing from. I will state what the facts were in that case to indicate where, if at all, they differ from those in the present case. The workman had admittedly met with an accident which disabled him from doing his own work as a collier. The nature of the accident is quite immaterial, but supervening on the accident came heart disease, not connected with, or caused by, the accident. The learned county court judge found that, if there had been no accident at all, the workman would still have been incapacitated for work as a miner or banksman, and he was of opinion that there was no work which since May 20, 1912, the accident had prevented him from doing which the heart disease would not also have prevented him from doing. Upon that ground the learned judge held that the workman was not entitled to compensation. From that decision there was an appeal, and after a most careful consideration of the case we held that the workman was not disentitled to compensation by reason of some supervening infirmity not due to the accident which had equally resulted in his incapacity. Counsel for the employers accepts that decision, as, of course, he is bound to do. But he says that that doctrine applies only where there are, as he said, two physical disabilities—two physical defects, and it has no operation where the second supervening defect is one not involving physical disability in the ordinary sense. I am bound to say that I can find no justification for that distinction. It seems to me that *Harwood* v. *Wyken Colliery Co., Ltd.* (1), which I am bound to assume in the present case at all events to be right, governs in principle the present case. And if you find as a fact, as the learned county court judge has found as a fact, that the workman, when examined in his present residence, which happens to be Wormwood Scrubs, is now suffering partial disability by reason of what happened when engaged on the employers' work, the employers' liability is not affected by reason of that which supervenes—namely, that the workman cannot get out of prison now to try to work.

The test is not what wages the workman actually earns, but what, having regard to his physical capacity, he is capable of earning. There was evidence upon which the learned county court judge found that, and I should be very sorry that any distinction should be drawn between a case of supervening heart disease and a case of supervening imprisonment which prevents the workman from getting out to do his work. That is the first and main point which counsel for the employers made.

The other points do not seem to me to be of any importance one way or the other. Counsel says that there is no opportunity of giving the workman light work. That only means that one of the tests which in many instances is available for ascertaining whether or not a workman is capable of doing work cannot be applied here. That is a fact. But the right to compensation cannot be said to depend upon

whether the employer is in a position to offer light work or not. Exactly the same point arises on the question of the right of medical examination. It is quite true that the Act contemplates that the employer should have the right to examine a workman, and to send his own doctor to examine him, at certain specified times which are laid down by rules. I see no reason to doubt that this examination could be made here. We have had our attention called to the prison regulations, and, although they do not in terms apply to this particular case, I do not think that the proper consent would not be given on any application on behalf of the employers to have the workman examined under proper supervision by the employers' doctor in Wormwood Scrubs. It was then asked, supposing the workman had got twenty years' penal servitude, must the employers still pay him compensation? The answer is: "Yes, they must." We know what hard cases are said to make. It may be that the legislature did not contemplate a case of this kind, but the legislature did not contemplate either a case of supervening lunacy. Yet it has been held that when a workman is shut up in an asylum where he is not allowed to go out to his work, and is only able to do a little gardening, the employer is still liable. I cannot draw any distinction between supervening lunacy not occasioned by a subsequent accident affecting the body, such as a blow on the head or supervening imbecility following on old age, and the man being detained in a lunatic asylum and a man sentenced by the law to be confined in Wormwood Scrubs. In my opinion, we should be departing from the principle laid down in *Harwood's Case* (1) if we gave effect to the argument which has been addressed to us on behalf of the employers, and therefore, in my opinion, this appeal must be dismissed.

KENNEDY, L.J.—I am of the same opinion. The learned county court judge, in dealing with the question of compensation to this workman, came to the conclusion that he was still partially incapacitated, "and that that incapacity existing is due to the accident, and I find further that the applicant is able to do light work." Therefore, whereas before he had been receiving from his employers in reference to the incapacity from an undoubted injury, by "accident arising out of and in the course of" his employment by them, £1 a week, that was reduced, in accordance with this finding, to 12s. a week.

What is contended for by the employers is that, while the statement of the workman's partial incapacity due to the accident is true and there was evidence to support it, which is not now challenged, yet no award of 12s. a week ought to be made because the man, owing to his having committed an offence, is now undergoing, and will continue for some months to undergo, imprisonment. Therefore, quite apart from the existing incapacity caused by the injury, he could not earn money, and in that sense he is incapacitated from another cause than the injury from earning money. Further, by way, as it were, of a strong reason for holding that in law no compensation ought to have been awarded, it is said that it is, by reason of the imprisonment, impossible for the employers to offer the workman either employment at the full rate of wages or employment at lighter work with such a payment that would naturally still further reduce the amount which would be awarded to him. With regard to the last question, I am still of opinion, as it occurred to me when I listened to the argument, that the highest it can be put is that there is a possible disadvantage with regard to the evidence which the employer in a case of this kind might adduce. But I entirely decline to consider that as a guide to our judgment in the present case, because the test of the right to compensation at the time this question had to be discussed before the arbitrator is aye or no was the workman at the time partially incapacitated for work? That is a matter which can be dealt with, and must be dealt with, quite apart from any offer of the employers to give work, either light work or work at the full rate of wages. The learned county court judge has come to a conclusion whether the workman is able to work, and that ability is a question which, in the present case apparently,

was left by the employers to be dealt with upon the evidence of the medical officer of the prison, who, of course, had the workman under supervision at the time. It is the incapacity for work which is the question, and the degree of that incapacity determines, according to the judicially exercised discretion of the arbitrator, the amount of compensation the workman is entitled to at the time, there being no doubt that at the time of this award the workman was partially incapacitated for work, and that that incapacity was an incapacity resulting still from the injury.

I agree with what was, I think, necessarily involved in the judgment in *Harwood* v. *Wyken Colliery Co., Ltd.* (1), and which is put—I only quote one passage, although there may be others to the like effect—in the judgment of HAMILTON, L.J., [1913] 2 K.B. at p. 169. It is that to say that incapacity of preventing the workman getting to work, which the prison imposes, or an incapacity which arises from a supervening accident or supervening disease, should interfere with the award of compensation resulting from partial incapacity, is really legislation because you are reading into the Act after the word "injury" the word "solely" which is not there. The principle, as the Master of the Rolls has just said, of *Harwood* v. *Wyken Colliery Co., Ltd.* (1), applies to the present case. It was there held that it is no answer to a claim for compensation to say, while admitting that there is still continuing incapacity, that the workman has also another incapacity caused by something for which the employer is not responsible as it did not arise out of the accident, and, therefore, as the workman would be incapacitated quite apart from the accident from working, or partially incapacitated from working, the employer has not to pay him any compensation, although he has at the same time to admit that the workman is also incapacitated by the injury for which the legislature has decreed that there should be compensation. I do not think that the matter can be put better than it is put in the judgment of LORD PEARSON, which was quoted by counsel in the argument in *Harwood's Case* (1), namely, that the employer has to prove that the supervening cause was not connected with the original injuries, and that the original injuries have ceased to operate as an effective cause of incapacity. The original injuries were found in the present case to continue to operate as the cause of incapacity, and, in accordance with the judgment in that case, the workman is entitled to compensation. For my part, I do not think that we ought to consider whether in this way or in that the supervening incapacity, not resulting from the accident, might produce some difficulties in the way of evidence, or put the workman in a better financial position than, if we had to legislate now, we should think right. That is a question which the legislature must deal with. We have only to deal with the law as it stands now. For the reasons which are given in the very carefully considered judgment in *Harwood* v. *Wyken Colliery Co., Ltd.* (1), on which I have based much of the reasoning that I have stated, I am of opinion that there is sufficient to justify us in dismissing this appeal.

SWINFEN EADY, L.J.—I am of the same opinion. The case is one of an injured workman suffering from partial incapacity directly resulting from injury by accident, so that the workman brings himself within the Act. It is a case in which in an employment "personal injury by accident, arising out of and in the course of the employment," has been caused to a workman, and the employers are liable to pay compensation as set out in the schedule to the Act. It is said the workman's incapacity to earn wages is now not due to the injury, but it is more accurate to say that he is partially incapable. His partial incapacity directly results from the injury, and his incapacity to earn any wages is also attributable to his imprisonment. I think that the language which was used in *Harwood* v. *Wyken Colliery Co., Ltd.* (1) is, in terms, exactly applicable to the present case, reading it in this way. The workman is incapacitated by both causes, each independent of the other, each operating as if the other did not exist. He was rendered incapable of doing any but light work owing to the accident and he is also incapable of doing any but light work in consequence of the imprisonment. It will be observed that

the scale upon which the employers have now to pay compensation is upon the footing that the workman has been rendered incapable of doing any but light work on account of the accident. That is why the award has been reduced from 20s. a week, which was voluntarily paid for a considerable time, and is now no longer being paid, to 12s. a week. In my opinion, this passage in HAMILTON, L.J.'s, judgment in *Harwood's Case* (1) which has been referred to is exactly applicable to the present case ([1913] 1 K.B. at p. 169):

> "It cannot be said of [the workman] that partial incapacity for work has not resulted, and is not still resulting, from the injury. All that can be said is that such partial incapacity is not still resulting 'solely' from the injury. To read the word 'solely' into the Act after the word 'injury' is not interpretation, but is legislation."

For these reasons I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis; Pattinson & Brewer.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

BARKER *v.* HERBERT

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.). May 25, 26, 29, 1911]

[Reported [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083]

Highway—Nuisance—Nuisance on premises adjoining highway—Danger to person using highway—Nuisance created by trespasser—Liability of owner of premises—Need to prove continuance of nuisance with permission for unreasonable time.

Where injury is caused to a person using the highway through the existence of a nuisance on premises adjoining the highway the owner in possession of the premises is not liable unless it be shown either that he created the danger which constitutes the nuisance, or that, having knowledge of it, he continued it, or that, with that knowledge, he abstained for an undue time from abating or remedying it. He has no absolute duty to abate the nuisance where those circumstances do not exist. Where the nuisance is created by the act of a trespasser it is done without the consent of the owner of the premises, and to render him liable for the consequences of the nuisance it must be proved that it was continued with his permission. The owner would be liable for a nuisance caused or continued by his servant even against his orders if the servant was acting within the scope of his authority.

The plaintiff, a boy aged three years, when playing on the highway, crept through a gap in the railings which fenced off the area of a house of which the defendant was owner in possession. After passing through the gap the child clambered along a ledge on the inside of the railings. When he was a short distance from the gap, he fell into the area and was injured. In an action claiming damages against the defendant the jury found that the area with the gap in the railing was a nuisance to persons using the highway, that the railing was broken by a trespasser, that the defendant did not know the railing was removed at the time of the accident, and that sufficient time had not elapsed for him to have known it if he had used reasonable care.

Held: the defendant, not having created the nuisance nor knowingly allowed it to continue for an unreasonable time, was not liable to the plaintiff, whose action, therefore, failed.

Notes. Considered: *Horridge* v. *Makinson* (1915), 84 L.J.K.B. 1294. Applied: *Noble* v. *Harrison*, [1926] All E.R. Rep. 284. Considered: *St. Anne's Well Brewery Co.* v. *Roberts*, [1928] All E.R. Rep. 28. Applied: *Wilkins* v. *Leighton*, [1932] All E.R. Rep. 55. Considered: *Wringe* v. *Cohen*, [1939] 4 All E.R. 241; *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349; *Spicer* v. *Smee*, [1946] 1 All E.R. 489. Referred to: *Latham* v. *R. Johnson and Nephew, Ltd.*, ante p. 117; *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341; *Ilford U.D.C.* v. *Beal*, [1925] All E.R. Rep. 361; *Smith* v. *Great Western Rail. Co.*, [1926] All E.R. Rep. 242; *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R. Rep. 222; *Hale* v. *Jenkins Bros.*, [1938] 1 All E.R. 579; *Barber* v. *Clarke & Co.* (1939), 83 Sol. Jo. 925; *Cushing* v. *Walker & Son* (*Warrington and Burton*), *Ltd.*, [1941] 2 All E.R. 693; *Slater* v. *Worthington's Cash Stores* (*1930*), *Ltd.*, [1941] 1 All E.R. 245; *Cunliffe* v. *Bankes*, [1945] 1 All E.R. 459; *Mint* v. *Good*, [1950] 2 All E.R. 1159; *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923.

As to nuisance on land adjoining a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 276–283, and for cases see 26 DIGEST (Repl.) 495–498.

Cases referred to:

(1) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

(2) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(3) *Jewson* v. *Gatti* (1886), 2 T.L.R. 381, 441, C.A.; 36 Digest (Repl.) 116, *582*.

(4) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(5) *Rich* v. *Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, *643*.

(6) *Bush* v. *Steinman* (1799), 1 Bos. & P. 404; 126 E.R. 978; 34 Digest 163, *1273*.

(7) *Burgess* v. *Gray* (1845), 1 C.B. 578; 14 L.J.C.P. 184; 4 L.T.O.S. 292; 135 E.R. 667; 34 Digest 163, *1269*.

(8) *Randleson* v. *Murray* (1838), 8 Ad. & El. 109; 3 Nev. & P.K.B. 239; 1 Will. Woll. & H. 149; 7 L.J.Q.B. 132; 2 Jur. 324; 112 E.R. 777; 34 Digest 161, *1261*.

(9) *Saxby* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1869), L.R. 4 C.P. 198; 38 L.J.C.P. 153; 19 L.T. 640; 17 W.R. 293; 36 Digest (Repl.) 315, *624*.

(10) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P. Jo. 164, C.A.

(11) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(12) *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702; 7 B. & S. 710; 35 L.J.Q.B. 251; 14 L.T. 593; 30 J.P. 822; 12 Jur. N.S. 961; 14 W.R. 859; 10 Cox, C.C. 340; 44 Digest 128, *1043*.

(13) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 26 Digest (Repl.) 495, *1793*.

(14) *Nichols* v. *Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421*.

A Also referred to in argument:

Barnes v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100.*

Lawrence v. *Jenkins* (1873), L.R. 8 Q.B. 274; 42 L.J.Q.B. 147; 37 J.P. 357; 21 W.R. 577; sub nom. *Laurence* v. *Jenkins*, 28 L.T. 406; 36 Digest (Repl.) 159, *846.*

B **Appeal** by the plaintiff from a decision of LUSH, J., on further consideration of an action tried by him with a jury.

The action was brought by the plaintiff, a boy between three and four years of age, through his next friend to recover damages for personal injuries sustained by him on May 12, 1909, through falling from the street into the area of a house of which the defendant was owner and occupier. The defendant denied liability.

C The questions left by the learned judge to the jury and their answers were as follows:

"1. Was the area a nuisance to persons using the highway on May 12, 1909? —Yes. 2. If yes, was it so (a) by the defendant's default, or (b) through a trespasser removing the railing?—(a) No. (b) Yes. 3. If you find (b), did the defendant know the railing was removed at the time of the accident?—No. 4. If he did not, did such time elapse after it was removed that he would have known it by the time of the accident, if he had used reasonable care?—No. 5. Was the plaintiff injured by falling through the gap or by clambering along the railings on the house side?—Clambering. 6. Should the defendant, if he had used reasonable care, have anticipated that a child might meet with the accident that the plaintiff met with if the railing was gone?—No. 7. Did the defendant use reasonable care to prevent the premises becoming dangerous to persons using the highway?—Yes.

D

E

After hearing argument of counsel as to the effect of the findings of the jury, LUSH, J., gave judgment in favour of the defendant. The plaintiff appealed.

Ganz for the plaintiff.

F *Morten, K.C.*, and *Beaumont Morice* for the defendant.

VAUGHAN WILLIAMS, L.J.—I think that the decision of LUSH, J., is right, and that the plaintiff is not entitled to succeed on any of the grounds which have been argued before us.

The facts of this case are shortly these. There was a house with an area, which was separated from the highway by a railing, and on Sunday, May 9, 1909, three days

G before the accident to the plaintiff, one of the rails had been broken by boys playing football in the street. The plaintiff, a child of about four years of age, who was allowed by his parents to be out in the street, came to the place where the railing, which was put up to protect persons using the highway from the danger of falling into the area, had been broken, and, after passing through the gap, crept on to a sort of parapet on the inside of the railings, and, while climbing along the parapet,

H fell into the area and was injured. The action is brought against the defendant, who is the owner in possession of the premises, to recover damages for the injuries sustained by the child. The jury answered certain questions which were put to them, and on their findings LUSH, J., gave judgment for the defendant.

In opening his case before us, counsel for the plaintiff took up the only position which it was possible for him to take on those findings. He said that where there

I is an owner in possession of property which includes an area adjoining a highway, and an accident such as has happened in the present case occurs, not by reason of the area not having originally been properly fenced, but by reason of the fact that some trespasser has removed a portion of the area railing, such owner is, nevertheless, liable because he has an absolute duty of such a character that, if it were expressed in the terms of a contract, he would be said to have warranted to the whole world that there should never be a nuisance on his property such as to cause danger to persons using the highway. It was contended that this goes to

such an extent that, even if the danger were caused by an act of trespass on the part of a stranger, not done for the benefit of the owner, but against his interest and against his will, still the owner is responsible and must pay damages if an accident occurs in consequence of there being a break in the protecting fence, though it was not caused by the owner or his servants. That, as I have said, is the only available argument open to counsel for the plaintiff; it is the only proposition wide enough to fix the defendant with liability in this case. In my judgment, no such responsibility rests upon a person who has property adjoining a highway, though a portion of that property may be an area which, if unprotected by a fence, would be a danger to members of the public using the highway. There is in such a case no liability on an owner in possession of property, unless it can be shown either that he created the danger which constitutes the nuisance, or that he continued it, or that, having knowledge of it, he abstained for an undue time from abating or remedying it. In my opinion, it is not good law to say that he has an absolute duty to abate the nuisance where he has neither created nor continued it, nor with knowledge of it suffered its continuance.

Cases have been cited to us in which the courts have discussed the question as to the liability of an owner of land towards children who are to his knowledge likely to frequent the highway, or other property adjoining his property. The decisions in these cases relate for the most part to actions of negligence and not to actions of nuisance. *Harrold* v. *Watney* (1) was an action brought on behalf of a child, and it was in form an action of nuisance. But all that was there said as to the accident having happened to a child was that, when you are considering the duty of an owner whose property adjoins a highway to maintain his fences so as not to cause a nuisance to persons using the highway, you must bear in mind that a highway is used by people of all classes and all ages, and that it would not be sufficient for the owner to say that, though the fence was inadequate to guard against mishaps to children, it was adequate to prevent mishaps to grown-up people if they acted with reasonable care. The decision was that, inasmuch as the defendant's fence was not so properly maintained as not to be dangerous to children using the highway, the defendant was liable. I will read the headnote ([1898] 2 Q.B. 320):

> "The defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, and it fell on and injured him. In an action for damages for the injuries so sustained, the jury found that the fence was very defective, but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over. *Held*, that the defective fence being a nuisance, and the cause of the injuries to the plaintiff, the defendant was liable."

It is not necessary for me to read at length the judgment of A. L. Smith, L.J. He decided the case partly on the authority of the judgment of Lord Denman, C.J., in *Lynch* v. *Nurdin* (2), and partly on the authority of *Jewson* v. *Gatti* (3).

I have said enough to indicate the substance of the decision in *Harrold* v. *Watney* (1), namely, that it was no defence for the defendant to say that a grown-up person, if he had taken reasonable care, would not have been hurt by the fence, and, therefore, the injury sustained by a child was not actionable, the answer being that the highway was for the use of children as well as grown-up persons, and that the fence was likely to cause injury to children using the highway. I will say nothing more with regard to the cases dealing with children, of which *Cooke* v. *Midland and Great Western Rail. Co. of Ireland* (4) is a recent example. These, being cases of negligence, raise quite different questions from that raised in this case. But I will cite one or two cases to show that the law as to the liability of an owner of land for nuisance arising on his property has been unchanged for many years. In *Rich* v. *Basterfield* (5) the marginal note is as follows (4 C.B. at p. 783):

A "Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession."

That points to a limitation of the liability of an owner of property to cases where the injury arises from an act done either by the owner himself or by his agents or B servants, who are upon his premises by his permission. The part of the decision which deals with the extension of the liability beyond the case of nuisances caused by his agents or servants appears in the judgment of CRESSWELL, J., where he says (ibid. at p. 800):

"On the other hand, it was contended that, inasmuch as the fires, which created C the smoke complained of, were made, not by the defendant or his servants, but by his tenants, he was not responsible, and that, although in some cases, e.g., *Bush* v. *Steinman* (6), *Burgess* v. *Gray* (7), and *Randleson* v. *Murray* (8), the owners of property were held liable for injuries arising from acts done upon that property by persons not strictly their agents or servants, yet such liability attached only upon persons in possession, and that the defendant in this case, D not being in possession at the time when the nuisance complained of was created, could not be made liable. And such is now the opinion of the court."

I cite that because it lays down the liability of an owner of property in cases of this kind.

In *Saxby* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (9) the headnote is this (L.R. 4 C.P. at p. 198):

E "The defendants were owners of the soil of a stream which supplied water to two print works. A., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff, becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A., afterwards, without any authority from the defendants, and against their will, replaced the weir. *Held*, that the defendants F were not responsible for the act of A., or for the continuance of the nuisance."

The words "against their will" indicate that the defendants knew of the replacing of the weir. This case, therefore, shows that owners of property may know that a nuisance has been committeed and yet not be responsible. The judge at nisi prius having nonsuited the plaintiff on the ground that there was no evidence of obstruction on the part of the defendants, the plaintiff obtained a rule nisi for a G new trial on the ground of misdirection. Counsel for the defendants, in showing cause, said this:

"No case is to be found where a party had been held liable for an act done by a trespasser on his land against his will."

MELLISH, Q.C., and BOWEN having argued to the contrary, BOVILL, C.J., in deliver- H ing judgment, said (ibid. at p. 203):

"I am of opinion that the ruling of my brother CHANNELL was right, and that there was no evidence which ought to have been left to the jury. The act complained of was not an act done by the defendants or by anyone authorised by them, nor was it an act done for their benefit, or adopted by them. On the contrary, we must assume from the correspondence that it was against their I will. It has, however, been contended that, the nuisance having been wrongfully created by a stranger, the defendants are responsible for its continuance. There might have been something for the jury, if it had been shown that the defendants had sanction or approved of the act of Welch, or had derived any benefit from it. But nothing of the kind appeared."

Part of the argument for the plaintiff was directed to show that the defendants had knowledge of the existence of the nuisance and ought to have stopped it. As to that, BOVILL, C.J., said (ibid. at pp. 203, 204):

"It is suggested that the nuisance being upon land in the possession of the defendants, they could have removed it, and are therefore responsible for its continuance. But the question is whether they were bound to risk the consequences of a personal conflict by doing that which the plaintiff (they assenting) might have done himself. I must confess I do not see why the plaintiff should cast upon the defendants, who have no interest whatever in the matter, a responsibility which he himself declines to incur. I cannot say there was any evidence which could have warranted a verdict for the plaintiff."

The judgments of BYLES, J., and KEATING, J., and MONTAGUE SMITH, J., were also to the effect that to impose liability in such a case there must be either the creation or a continuance of a nuisance by the defendant.

When once the argument is disposed of that there is this absolute duty on an owner of property, which would make him liable to pay damages for an accident occurring by reason of some danger existing on his property adjoining a highway, even although he has no knowledge of the danger, and has neither created it himself nor done anything which could give rise to an imputation that he has allowed it to continue, there is really nothing left which it is necessary to argue in this case. On the findings of the jury the defendant must be held to be relieved from liability. The finding that the child was injured, not by falling through the gap in the railings, but by clambering along on the inside, raises a point which I should have thought worth discussing if I were not of opinion that the case was disposed of by the considerations which I have just mentioned. It is sufficient to say that one of the defences to the action is that the accident was not caused by that which the jury say was a nuisance. Our attention was called to a passage in the judgment of LINDLEY, L.J., in *A.-G.* v. *Tod Heatley* (10) where he used the word "prevent." It was sought to apply that word to nuisances unknown to the defendant as well as to nuisances known to him. But it is to be observed that in the case with which the lord justice was dealing, and in which he said that it was the duty of the owner to prevent his land from being a public nuisance, the defendant had set up the defence that, though he knew of the nuisance, he had done all that was reasonably necessary to prevent it. RIGBY, L.J., said ([1897] 1 Ch. at p. 574):

"He has not tried to do anything really practicable to get rid of this nuisance. I cannot imagine that the flimsy sort of hoarding that he has put up, and allowed to be pulled down to any extent, is what you might call a serious attempt."

It is clear that the duty to prevent a nuisance must have reference to something which was within the knowledge of the defendant. I, therefore, think that the appeal must be dismissed.

FLETCHER MOULTON, L.J.—I am of the same opinion. The argument for the plaintiff is based on the assertion that the English law as to the liability of the owner of land adjoining a highway for nuisances affecting persons using the highway is of a very severe character. It is said that the owner is liable for such a nuisance existing on his land, even although it was caused by a trespasser and he himself had no knowledge of it. It is admitted that this contention would make the owner responsible if a burglar broke into his house and left the fence in such a defective state as to constitute a danger to persons using the highway, and damage resulted before even the owner knew of the danger.

VAUGHAN WILLIAMS, L.J., has referred to the authorities and has clearly demonstrated that that is not the law. I will express my opinion shortly, which is based on the cases, without referring to them expressly. We have not to deal here with anything analogous to the subject-matter of *Fletcher* v. *Rylands* (11), which determined the liability of a person who erects upon his land something which is of an unusual nature and is dangerous in itself. Here we have to do with a house with

an area and railings adjoining the highway. There is nothing unusual or exceptionally dangerous in that. The owner of such property is not allowed to cause it to be a nuisance to the highway, and in this respect he will be responsible for the acts of his servants and agents. But as occupier he may come under a wider responsibility; he may become responsible for the acts of those whom he allows to be on the premises, though they are not his servants or agents. Where a nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will. True, it is not caused by him, but the law recognises that he may have continued it. In such a case the gravaman is the continuance of the nuisance. And, as in the first case it must be proved, in order to fix him with responsibility, that the nuisance was his act or was caused by the act of someone for whom he was responsible, so here, where he is alleged to be responsible for the continuance of the nuisance, it must be proved that it was continued by his permission. He cannot be said to permit the continuance of that of which he has no knowledge, though, of course, if his servants have knowledge of the nuisance their knowledge must be attributed to him. But the findings of the jury put all such considerations out of the case here. The act which caused the nuisance in this case was done by a trespasser, and the continuance of the nuisance was not permitted by the defendant, because he had no knowledge of it, and the jury have found that the absence of knowledge and the want of repair were not due to any want of care on his part. The plaintiff's case, therefore, in my opinion, entirely fails.

The learned judge dismissed the action on another ground. The first finding of the jury was that the condition of the area with the defective railing was such as to constitute a nuisance. That finding was arrived at on a certain direction of the learned judge, and I think that that direction was a correct one. He said that if the condition of the railing made it possible for a child to fall through into the area, the jury were bound to find that there was a nuisance. I think that was right. A child is entitled to use a highway, and, in my opinion, it is not putting the responsibility of an owner of property too high to say that a gap in the railings of an area of such a size that a child could fall through it amounts to a nuisance. But here the accident did not arise from the child falling through the gap; the child used the gap to clamber through for the purpose of walking along a ledge on the other side. The duty of fencing imposed on the owner of land adjoining a highway is such that a person using the highway shall be kept from finding himself unintentionally in a position of danger on the owner's land, but there is no duty to make a fencing so impassable that persons intending to leave the highway shall be similarly protected. The duty is to refrain from causing accidents to persons using the highway, and it applies equally to user by children as well as adults. But where the condition of the fence is merely such that a person who desires to leave the highway can thereby get into danger, there is no liability on the ground of nuisance. It may be that with regard to children there is another liability based on duties having to do with the law of negligence, but no case of that kind arises on the findings of the jury. I am of opinion that the accident here did not arise from a person, while he was using the highway, getting into danger by reason of the existence of a nuisance, but from a person, who was intending to leave the highway, not being prevented from doing so by a fence adequate for that purpose. Therefore, on this ground also, that the accident was not due to the nuisance, which was the ground on which the learned judge decided the case, I think that the plaintiff's case fails.

FARWELL, L.J.—I am of the same opinion, and I entirely adopt what has been said by Vaughan Williams, L.J. The liability of the defendant in this case is alleged to arise at common law, and the common law is intended to be the crystallised common sense of the community; but if a proposition of law is put

forward which, to my mind, is contrary to common sense, I am rather inclined to doubt it.

The proposition suggested on behalf of the plaintiff here is that a man who owns land on which there is an excavation adjoining a highway owes the same duty to persons using the highway as the owner of a tiger would do. This entirely fails to take into consideration the distinction which is drawn between a normal user of land and a user which is abnormal. In London and other large towns there are thousands of houses which have areas fenced with railings. The proposition thus put forward would extend to this, that every owner in possession of such a house warrants in effect that the railings which fence off the area shall always be sufficiently maintained, and that such owner is liable in the event of any damage resulting from any defects in the railings, and that it is immaterial by whose default such defect has been caused. In my opinion, the owner of land is not liable for a nuisance which has neither been created by himself, unless it can be shown that he has allowed it to continue for an unreasonable time after it has or ought to have come to his knowledge. And I have no doubt that he is also liable under the law of principal and agent for a nuisance caused by his servant even against his orders if the servant was acting within the scope of his authority. An illustration of this principle in the case of an indictment for a nuisance is to be found in *R.* v. *Stephens* (12), where MELLOR, J., said this (L.R. 1 Q.B. at p. 709):

> "At the same time, it is perfectly clear that the defendant finds the capital and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or, at all events, by his agents. Under these circumstances, the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say that he is not liable on an indictment for a nuisance caused by the acts of his servants."

BLACKBURN, J., said (ibid. at p. 710):

> "All that it is necessary to say is this, that where a person maintains works by his capital and employs servants, and so carries on the works as in fact to cause a nuisance to a private right for which an action would lie if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment."

We were pressed with *Tarry* v. *Ashton* (13), in which the defendant was possessed of a house and of a lamp projecting from the same and overhanging a public highway, and reliance was laid on certain observations of LUSH, J., and QUAIN, J., which seemed to show that it was the duty of the defendant to repair the lamp and keep it in repair. But BLACKBURN, J., in that case did not use the same language; he based his judgment on the fact that the defendant had become aware that the lamp was going out of repair. With regard to that case, I think one may say that a heavy lamp overhanging a highway is not quite as normal as an area fenced with railings.

In *Nicholls* v. *Marsland* (14) BRAMWELL, B., when speaking of water stored between embankments on the defendant's land, said (L.R. 10 Exch. at p. 259):

> "But suppose a stranger had let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable.

A That cannot be. Then why is the defendant liable if some agent over whom she has no control lets the water out?"

After discussing the difference between a reservoir and a stack of chimneys, he proceeded (ibid. at pp. 259, 260):

"Could it be said that no one could have a stack of chimneys except on the
B terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? . . . This case differs wholly from *Fletcher* v. *Rylands* (11). . . . I am by no means sure that if a man kept a tiger, and lightning broke the chain and the tiger got loose and did mischief, the man who kept him would not be liable. But this case and the case I put of chimneys are not cases of keeping a dangerous beast for amusement, but of the reasonable
C use of property in a way beneficial to the community."

The method now adopted of building houses with areas fenced by railings has been found to be a convenience for the public, and such a mode of building must be held to be a use of property which is beneficial to the community. This consideration, to my mind, disposes of the case.

D With regard to *A.-G.* v. *Tod Heatley* (10), it is clear that the defendant knew of the existence of the nuisance, for he alleged that he had done all he could to abate it. The question there was merely whether the defendant should be restrained by an injunction from permitting the nuisance to continue or whether he was to be held liable only in damages. I am of opinion that that case in no way supports the contention put forward on behalf of the plaintiff.

E I think the present case may also be decided on the ground on which LUSH, J., decided it—namely, that the accident to the plaintiff was not the direct result of the nuisance, because the child did not fall through the hole in the railings, but crept through and clambered along the ledge on the other side. It might be said that that hole in the railings and the slate ledge beyond might possess an attraction, and that there was, therefore, a duty to prevent children being led into the danger.
F But whether that is so or not, the liability which has been held to exist in cases where children have been led into danger depends on negligence and knowledge of the danger. In this case there was neither negligence nor knowledge. On both grounds, therefore, I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Adams & Colvile; C. G. Algar.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LONDON GENERAL OMNIBUS CO., LTD. *v.* HOLLOWAY

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.JJ.), March 8, 11, 1912]

[Reported [1912] 2 K.B. 72; 81 L.J.K.B. 603; 106 L.T. 502]

Guarantee—Surety—Avoidance of bond—Concealment by creditor of material fact concerning debtor—Innocent concealment.

At the request of the plaintiffs and of a servant of the plaintiffs the defendant executed a bond for £200 as a guarantee to the plaintiffs for the fidelity of the servant. Before the request the servant, to the knowledge of the plaintiffs, while employed by them had misappropriated money of theirs, but that fact was not brought to the knowledge of the defendant before he gave the bond. It was found as a fact that this non-disclosure was not due to any fraud or intentional misrepresentation or concealment by the plaintiffs. After the bond had been given the servant misappropriated further money of the plaintiffs. In an action by the plaintiffs against the defendant on the bond,

Held: while the doctrine by which uberrima fides was required in insurance cases was not applicable in contracts of guarantee, a creditor must reveal to a surety every fact regarding the debtor whose debt he was guaranteeing which in the circumstances of the case the surety would expect not to exist and which it was material for him to know; if non-disclosure of such a fact was proved, the suretyship bond was avoided, even though the non-disclosure was innocent and not fraudulent; in the present case there had been concealment of a material fact of which the defendant should have been informed; and, therefore, the defendant's bond was void and the plaintiff's action failed.

Railton v. *Mathews* (1) (1844), 10 Cl. & Fin. 934, applied.

Hamilton v. *Watson* (2) (1845), 12 Cl. & Fin. 109 (guarantee of a bank account), distinguished.

Notes. Distinguished: *Cooper* v. *National Provincial Bank, Ltd.*, [1945] 2 All E.R. 641. Referred: *National Provincial Bank* v. *Glenusk*, post p. 810; *Trade Indemnity Co.* v. *Workington Harbour and Dock Board*, [1936] 1 All E.R. 454.

As to avoidance of guarantees, see 18 HALSBURY'S LAWS (3rd Edn.) 495–502, and for cases see 26 DIGEST (Repl.) 218 et seq.

Cases referred to:

(1) *Railton* v. *Mathews* (1844), 10 Cl. & Fin. 934; 8 E.R. 993, H.L.; 26 Digest (Repl.) 222, *1719*.

(2) *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109; 8 E.R. 1339, H.L.; 26 Digest (Repl.) 224, *1729*.

(3) *Lee* v. *Jones* (1864), 17 C.B.N.S. 482; 34 L.J.C.P. 131; 12 L.T. 122; 11 Jur. N.S. 81; 13 W.R. 318; 144 E.R. 194, Ex.Ch.; 26 Digest (Repl.) 223, *1727*.

(4) *North British Insurance Co.* v. *Lloyd* (1854), 10 Exch. 523; 3 C.L.R. 264; 24 L.J.Ex. 14; 24 L.T.O.S. 157; 1 Jur. N.S. 45; 156 E.R. 545; 26 Digest 220, *1700*.

(5) *Smith* v. *Bank of Scotland* (1813), 1 Dow. 272; 3 E.R. 697, H.L.; 26 Digest (Repl.) 222, *1718*.

(6) *Rees* v. *Berrington* (1795), 2 Ves. 540; 30 E.R. 765, L.C.; 26 Digest (Repl.) 184, *1369*.

(7) *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593; 33 L.T.O.S. 30; 5 Jur. N.S. 499; 7 W.R. 271; 44 E.R. 1397, L.C.; 26 Digest (Repl.) 109, *753*.

(8) *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q.B. 782; 68 L.J.Q.B. 631; 80 L.T. 579; 47 W.R. 487; 15 T.L.R. 297; 4 Com. Cas. 193, C.A.; on appeal, sub nom. *Seaton* v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.) 9, *1*.

(9) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469; 38 L.T. 478; 26 W.R. 794; sub nom. *London and Provincial Marine Insurance Co.* v. *Davies*, *Davies* v. *London and Provincial Marine Insurance Co.*, 47 L.J.Ch. 511; 26 Digest (Repl.) 226, *1756*.

(10) *Walker* v. *Symonds* (1818), 3 Swan. 1; 36 E.R. 751; 35 Digest 24, *145*.

Appeal by the plaintiffs from a decision of LORD ALVERSTONE, C.J., on further consideration of an action tried by him without a jury.

Clavell Salter, *K.C.*, and *E. W. Hansell* for the plaintiffs.

Lewis Thomas, *K.C.*, and *Ian Macpherson* for the defendant.

Cur. adv. vult.

Mar. 11, 1912. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—This is an appeal by the plaintiffs, the London General Omnibus Co., against the judgment of the Lord Chief Justice without a jury. The jury were in fact sworn, and heard all the evidence. The Lord Chief Justice then said to the counsel for the plaintiffs: "Are you going to ask the jury to disbelieve this gentleman?" The witness was the defendant Mr. Holloway, and he had sworn that when he signed the bond sued on he had no idea that there was any previous misconduct by the clerk in respect of whose fidelity the defendant as surety executed the bond. Counsel for the plaintiffs answered: "I am going to submit that there was no duty on the part of the company to disclose, and next I am going to submit that there was no evidence of overlooking any defalcation subsequently to the deed." The Chief Justice: "There is no evidence of any overlooking. I see nothing to be left to the jury." Counsel for the plaintiffs: "Then the question whether the bond stands, I submit, is a question for your Lordship. There was no disclosure. If there was a duty to disclose it [the defalcation of the clerk to the knowledge of the plaintiffs prior to the execution of the bond] then that duty was not discharged." The Chief Justice found distinctly that there was no fraud on the part of the plaintiffs.

It follows that the only question we have to decide is whether, in the absence of fraud on the part of the person taking the security, any, and if so what, non-disclosure by that person of a fact within his knowledge material to the surety to know will vitiate the bond. It was argued before us that, although it may be true that generally it is not good law, except in the case of policies of insurance, that non-disclosure of a fact within the knowledge of the person taking the security material for the surety to know will vitiate the security, yet it may be good law in a case where the non-disclosed fact is of such a character that the tribunal before which the question of the vitiation of the bonds comes is of opinion that the non-disclosure constitutes a misrepresentation by reason of the non-disclosed fact being inconsistent with a presumed basis of the contract of suretyship—e.g., that the clerk whose fidelity or honesty is the subject of the security has not to the knowledge of the person taking the guarantee been guilty of dishonesty in the performance of the duties of the very office or service, fidelity and honesty in which is guaranteed. If, for instance, the servant whose fidelity is the subject of the security is, as he was in this case, a clerk who has to collect and pay over money, it is assumed by both parties to an ordinary contract of suretyship that such a servant is not to the knowledge of the master a man who has been guilty of dishonest dealing with moneys collected by him. Not to disclose such dishonesty is a misrepresentation; it may be innocently made, but still is a misrepresentation because by non-disclosure the master must be assumed to be contracting on the assumption which I have just mentioned—that is, the assumption by both parties to a contract of suretyship

in respect of the services of such a servant that the suretyship relates to a servant whom the master does not at the time of taking the security know to have been guilty of dishonesty in such service—that is, to a presumably honest man not to a man known to be dishonest. I do not think that the importance of the non-disclosed fact in regard to the duties, the subject of the suretyship, is necessarily a mere question of law; it may be a question of fact to be decided by a jury or by a judge sitting alone. The question for judge or jury to put to himself or themselves seems to be: Would the surety have entered into this contract of suretyship if the non-disclosed fact had been disclosed to him?

BLACKBURN, J., in *Lee* v. *Jones* (3) (17 C.B.N.S. at p. 506) said:

> "I think it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury."

He goes on to deal with the question whether in that case there was evidence of fraud to go to the jury; but I do not regard this as a statement that non-disclosure and the misrepresentation to be inferred therefrom must be fraudulent to avoid or vitiate a contract of suretyship, for the only question to be dealt with in that case was in the leave reserved to enter a verdict for the plaintiff if there was no evidence to support the defendant's plea of fraud. In fact in many of the common law cases cited before us the only question was whether there was evidence to support a plea of fraud, and not whether misrepresentation inferred from non-disclosure would independently of fraud vitiate a contract of suretyship.

Again in *Hamilton* v. *Watson* (2) LORD CAMPBELL after dissenting from the proposition of the appellant's counsel that, when a bank takes a security from a person becoming surety for one of its customers, the managers of the bank are bound to communicate to the proposed surety every information which in relation to the suretyship it may be material for him to know, and if such information is not communicated the surety is released, says (12 Cl. & Fin. at p. 119):

> "Unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires."

LORD CAMPBELL, it is true, takes as his example of what might not be naturally expected an unusual contract between creditor and debtor whose debt the surety guarantees, but I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist; for the omission to mention that such a fact does exist is an implied representation that it does not. Such a concealment is frequently described as undue concealment.

I have dealt with these cases because they were much relied on by the plaintiffs, but the most important case on the subject seems to be the case in the House of Lords of *Railton* v. *Mathews* (1). In that case, which was tried in Scotland in the Scottish court, the presiding judge directed the jury that the concealment to be undue must be wilful and intentional with a view to the advantages the employers were thereby to gain; and the House of Lords held that the direction was wrong in point of law, and that mere non-communication of circumstances affecting the

A situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining the surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. LORD COTTENHAM says (10 Cl. & Fin. at p. 940):

> "It has not been contended, and it is impossible to contend, after what LORD ELDON lays down in *Smith* v. *Bank of Scotland* (5) that a case may not exist B in which a mere non-communication would invalidate a bond of suretyship. . . . In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive."

C Later I find LORD CAMPBELL saying (ibid. at p. 943):

> "If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety. . . . The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated D to him of the facts of the case, and not upon what was passing in the mind of the other party or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial."

E I see no reason to suppose that LORD CAMPBELL meant any different materiality from that which I have defined earlier in my judgment. The representation to be applied from the non-communication must relate to facts which the person giving the security had a right to suppose to exist.

I think it right to add that I find it difficult to understand what POLLOCK, C.B., means in *North British Insurance Co.* v. *Lloyd* (4) when he is dealing with *Railton* F v. *Mathews* (1) and *Smith* v. *Bank of Scotland* (5), and concludes his judgment with these words (10 Exch. at p. 535):

> "We think the doctrine laid down by LORD CAMPBELL perfectly correct and applicable to the guarantee in question. The non-disclosure of the circumstances of the change of the security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back; and G there was no ground to impute fraud in fact to the plaintiffs or their agents."

In my judgment the judgment of the Lord Chief Justice in the present case was quite right. I think that the non-disclosure by the plaintiffs of the fact that to their knowledge the clerk had been guilty of defalcations in their service before the bond was executed constituted a representation that he had not been guilty of such H dishonesty. The appeal, therefore, fails and must be dismissed.

FARWELL, L.J.—I am of the same opinion. Whatever may have been the necessity at common law to prove fraud in cases like the present, I express no opinion, because in equity I am quite clear that from early times it was quite unnecessary to prove fraud in the case of a material misrepresentation inducing the contract. I should add that now since the Judicature Act, if there be any I difference between the rules of common law and equity, the rule of equity prevails. Sureties have for many many years been favoured in the eyes of equity, and various relief has been given to them from time to time on what has been called the clearest and most evident equity. I think LORD ELDON calls it in one case "the faith of the contract," words which in those days meant more probably than they do now, arising out of which certain rules have been laid down applying to sureties which have been binding for years—for example, there is the case of the discharge of the surety by the creditor giving time, and the equitable doctrine in *Rees* v.

Berrington (6) of a plea to restrain the action at law brought by the executors of the creditor who obtained the security. There are many others which it is not worth while to go through because they are known to all students of law. That being so, we have to consider whether here there is anything to necessitate the relief in equity which could have been granted in the old days, and is now granted by the High Court. Of course, if there were fraud, fraud unravels all contracts, but here it is not necessary to enable the surety to get relief in equity. Innocent representation is sufficient to give relief, and, although the doctrine by which uberrima fides is required in insurance cases is not applicable to the same effect in suretyship cases, still the surety is entitled to be told matters which ought to be communicated—that is to say, whether the non-communication was wilful or not, or whether it was innocent.

I will not repeat again the passages my Lord has already read from LORD COTTENHAM and LORD CAMPBELL. The passage in the judgment of LORD ELDON in *Smith* v. *Bank of Scotland* (5), which was referred to, was this (1 Dow. at p. 292):

> "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances, he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so; then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent."

Whether the non-disclosure was due to fraud or forgetfulness, the injury to the surety is exactly the same in both cases. It is not like the case of a common law action for damages for deceit when the lie is the gist of the action, but of relief from a contract into which the surety was induced to enter under a misrepresentation induced by the assured wilfully or through forgetfulness. If the element of unfairness is wanted to give rise to the equity, it is found in the insistence on a contract so induced after the truth is known. The materiality of the fact concealed in this case is, to my mind, clear, and a surety may well be willing to guarantee an employer from defalcations by a servant believed to be honest; it is quite another matter if the servant has already been found guilty of defalcations. The surety believes that he is making himself answerable for an honest man, not a known thief, and this is the distinction between the present case and those cited of guarantees for overdrafts by bankers, cases such as *Hamilton* v. *Watson* (2) and *Wythes* v. *Labouchere* (7), with a distinction much the same as between insurances against accident and insurances against death. Dishonesty may occur and an accident may happen, but death is certain, and guarantees for overdraft are required for the purpose, not on the chance of being used. A man may be robbed by his servant in the course of his business, but it is perfectly legitimate and usual for a man to carry on his business on borrowed money, including money borrowed from his bankers by way of overdraft. There is nothing in such a case which the surety does not know as well as any other member of the community and nothing, therefore, to be disclosed to him. The surety may well complain: "I did not know your servant was a thief"; but the surety cannot be heard to say: "I did not know you had been overdrawing or what the nature of your business was." This, I take it, was what LORD CAMPBELL meant in *Hamilton* v. *Watson* (2), where he says this (12 Cl. & Fin. at pp. 118, 119):

> "Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now, the question is, what, upon entering into such a contract, ought to be disclosed? and I will venture to say, if your Lordships were to adopt the principles laid down, and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no

A bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept: whether the debtor was in the habit of overdrawing; whether he was punctual in his B dealings; whether he performed his promises in an honourable manner—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, C whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if D the surety would guard against particular perils, he must put the question, and he must gain the information which he requires."

It is plain that no surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in many instances is that he has been and wishes to do it again. That is a perfectly legitimate carrying on of business, and that is what he E is asked to guarantee.

The present case is very different. I think there is no question of necessity of proving fraud in a case like the present, and I am glad to assume that the company had forgotten all about, or it did not occure to them to reveal to the surety, the defalcations of the man assured. For all that, they cannot now enforce the bond F which the surety gave under that misapprehension, and I agree that the appeal should be dismissed.

KENNEDY, L.J.—In my opinion, the judgment of the Lord Chief Justice in favour of the defendant ought to be affirmed. It is unnecessary for me to refer to the facts in great detail. It is sufficient to say that the defendant, at the request of the plaintiffs and of a servant of the plaintiffs, executed a bond for £200 as a G security to the plaintiffs for the fidelity of the servant, who before the time of the request to the knowledge of the plaintiffs in whose employ he had been already for two years, but not to the knowledge of the defendant, had been guilty of misappropriating moneys of his employers. After the execution of the bond the servant again peculated, and the present action was brought upon the bond against the defendant as surety. The Lord Chief Justice, who, by the consent of the parties, H tried this case without a jury, "distinctly" (the word is his own) found that there was no fraud on the part of the plaintiffs, and that there was no intention on their part either to mislead the defendant or to conceal from him facts which they ought to have disclosed, and he proceeded:

I "If the argument of counsel for the plaintiffs is right, that the defendant can succeed in getting rid of his responsibility only if there was an intention to deceive, either express or implied, I think the defence would fail."

In his able and learned argument upon the hearing of the appeal in this court counsel has urged the same contention as he put before the Lord Chief Justice.

In my opinion, so far as judicial authority is concerned, the Lord Chief Justice could not have acceded to that contention without differing from the decision binding upon him and upon this court of the House of Lords (LORD COTTENHAM and LORD CAMPBELL) in *Railton* v. *Mathews* (1). That decision, as stated in the

headnote, was that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. In *Railton* v. *Mathews* (1) as in the present case, the obligees of the bond knew, when they took it, of dishonesty on the part of the person for whose fidelity the bond was taken, and did not disclose the fact to the surety.

The authority of that decision is in no degree impaired by the decision of the House of Lords in the following year (1845) in *Hamilton* v. *Watson* (2). The subject-matter of the action in that case was not, as in *Railton* v. *Mathews* (1) a fidelity guarantee. The surety who was sued had given to a banker an obligation to be responsible for a cash credit granted by the banker to one of his customers. At the time when the surety was asked to sign, and did sign, the bond, the customer was already indebted to the banker to the full amount of the credit and interest thereon, and payment had been requested by the banker. The surety, when he signed the bond, was not informed of the dealings between the banker and his customer. The House of Lords (the LORD CHANCELLOR, LORD BROUGHAM and LORD CAMPBELL) held that, neither fraud nor misrepresentation being even alleged, the mere non-disclosure to the surety of these dealings constituted no ground of defence to the action brought by the banker against the surety. The difference between this last cited case and *Railton* v. *Mathews* (1) is, I think, reasonably clear. There is apparent at the outset of the comparison, according to STORY'S useful discrimination (EQUITY JURISPRUDENCE, s. 210), the difference between intrinsic and extrinsic circumstances, the first forming the very ingredient of the contract, and the latter forming no part of it, but only accidentally connected with it, or rather bearing upon it, so as to enhance or diminish the price of the subject-matter, or to operate as a motive to make or decline the contract. In regard to such extrinsic circumstances, no class of case occurs, to my mind, in which our law regards mere non-disclosure as a ground for invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference to the plain exigencies of this particular and most important class of transaction. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and generally is, as to some of them, the only person who has the knowledge. The underwriter, whom he asks to take the risk, cannot as a rule know, and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are or may be most material to the formation of his judgment as to the acceptance or rejection of the risk and as to the premium which he ought to require. The existence of the distinction in regard to the duty of disclosure between the contract of insurance and the contract of suretyship and guarantee has been clearly insisted upon in the judgment of POLLOCK, C.B., in *North British Insurance Co.* v. *Lloyd* (4), and by BOWEN, L.J., in *Seaton* v. *Heath* (8). In regard to intrinsic circumstances, according to STORY'S classification (ss. 212, 213), our courts, both of law and equity, are even in regard to them, as he points out, more clear in insisting upon disclosure than was the civil law, and they generally relax the application of the rule which in the case of the contract of sale is expressed by the maxim caveat emptor, only where they find some fiduciary or other special and peculiar relation to exist between the contracting parties (see per FRY, L.J., in *Davies* v. *London Provincial Marine Insurance Co.* (9) (8 Ch.D. at p. 474)).

In *Railton* v. *Mathews* (1) and in the present case the honesty of the servant, which is the subject-matter of the suretyship bond, is plainly an intrinsic circumstance, and the decision of the House of Lords in *Railton* v. *Mathews* (1) has, if I may humbly add my own opinion, very reasonably established the proposition that the peculiar relation created by the guarantee between the surety, who gives, and the employer, who takes, the suretyship bond, justifies the importation into the contract, as a condition of the liability of the surety, of the disclosure by the employer to the surety of any previous dishonesty of the servant known to the

A employer. LORD ELDON in *Walker* v. *Symonds* (10) distinguishes between intentional concealment and actual concealment. The latter is sufficient to dissolve the contract of suretyship in the case of a fidelity guarantee. Or, as the same matter is put by STORY'S (EQUITY JURISPRUDENCE, s. 215):

> "If a party knowing himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner, and under such circumstances, as
B holds the clerk out to others as one whom he considers as a trustworthy person; and another person becomes his security, acting under the impression that the clerk is so considered by his employer; the contract of suretyship will be void; for the very silence, under such circumstances becomes expressive of a trust and confidence held out to the public, equivalent to an affirmation."

C On the other hand, in the case of the suretyship or guarantee for a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But in the language of SIR FREDERICK POLLOCK (PRINCIPLES OF THE LAW OF CONTRACT (8th Edn.) at p. 568):

D > "The creditor is not bound to volunteer information as to the general condition of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity."

The bank or other creditor cannot reasonably be taken as affirming by mere silence respecting earlier dealing the financial ability of the person whom the proposed E surety is asked to guarantee. I say "cannot reasonably be taken" because, as MR. ROWLATT in his work on PRINCIPAL AND SURETY, p. 155 (citing *Hamilton* v. *Watson* (2) and other cases) points out, the probable reason for requiring a guarantee is the dissatisfaction with the customer's credit. The law will rightly refuse to find in mere silence an implied representation to the surety in circumstances where the surety cannot reasonably contend that he inferred, in the absence of any statement to the contrary, that a particular state of facts existed different from that which did in fact exist. BLACKBURN, J., in the course of his judgment in the Exchequer Chamber in *Lee* v. *Jones* (3) (17 C.B.N.S. at p. 503) clearly held that there was no obligation on the creditor to disclose to the surety every circumstance within his knowledge material to the surety to know, and pointed out that in his opinion great mischief would ensue if the law imposed upon the creditor any such obligation.

For the reasons which I have given I am of opinion that the facts of this case bring it within the class to which the law as laid down by the House of Lords in *Railton* v. *Mathews* (1) applies; that the decisions in *Hamilton* v. *Watson* (2) and in the later cases where the guarantee was of a different description, are not in point; and that the fact of the non-disclosure by the plaintiffs in this action to the surety H whom they have sued of the previous misconduct of the servant whose honesty Mr. Holloway was invited to guarantee, avoided the contract contained in the suretyship bond, although such non-disclosure was not tainted by any fraudulent intent. The judgment, therefore, of the Lord Chief Justice was perfectly right, and this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Joynson-Hicks, Hunt, Moore & Cardew; Greenwell, Higham & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re SPOTTISWOODE, DIXON AND HUNTING, LTD.

[CHANCERY DIVISION (Neville, J.), January 30, 1912]

[Reported [1912] 1 Ch. 410; 81 L.J.Ch. 446; 106 L.T. 23; 28 T.L.R. 214; 56 Sol. Jo. 272; 19 Mans. 240]

Company — Winding-up — Dissolution — Avoidance of dissolution by "person interested"—Creditor—Company creditor in respect of unpaid calls on shares —Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 223.

The S. company was incorporated in 1898 by the amalgamation of two companies, one of which had a contract with the A. company by which it acted as sole advertising agent for the A. company and had been allotted 500 preference shares in that company which were not fully paid. In 1909 the S. company passed resolutions for its dissolution with a view to reconstruction and a new company was formed with the same name. This new company agreed to take over the assets and liabilities of the old company and to discharge its debts and liabilities. The final meeting of the old company was held in June, 1910, but no notice of the liquidation or reconstruction was received by the A. company, nor did they know of the creditors' meetings. In March, 1911, the A. company discovered the true position and in April, 1911, made a further call on the 500 preference shares originally held by the old company. The new company repudiated liability, and in December, 1911, the A. company gave notice of motion under s. 223 of the Companies (Consolidation) Act, 1908, for an order declaring the dissolution of the old company to be void.

Held: the A. company was a person "interested" within s. 223 of the Companies (Consolidation) Act, 1908; it had not been guilty of undue delay; and, therefore, it was entitled to an order declaring the dissolution of the old company to be void.

Notes. The Companies (Consolidation) Act, 1908, s. 223, has been replaced by Companies Act, 1948, s. 352.

As to power to declare dissolution void, see 6 HALSBURY'S LAWS (3rd Edn.) 732–733, and for cases see 10 DIGEST (Repl.) 1105–1106. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 451.

Cases referred to in argument:

Re Henderson's Nigel Co., Ltd. (1911), 105 L.T. 370; 10 Digest (Repl.) 1105, *7641.*

Pulsford v. *Devenish*, [1903] 2 Ch. 625; 73 L.J.Ch. 35; 52 W.R. 73; 19 T.L.R. 688; 11 Mans. 393; 10 Digest (Repl.) 1060, *7361.*

Motion on behalf of the applicants, Anturic Salts, Ltd., for an order declaring the dissolution of a company known as Spottiswoode, Dixon and Hunting, Ltd., to be void, and that they were entitled to prove in the estate of that company for the balance remaining due to them in respect of preference shares allotted to that company.

On April 20, 1906, Anturic Salts, Ltd. entered into an agreement with Dixon and Hunting and the Farringdon Press, Ltd. that for a period of five years the last-mentioned company should act as sole agents for Anturic Salts, Ltd. for all advertisements required by them, and should (if requested so to do by Anturic Salts, Ltd. within two calendar months from the date thereof) apply to Anturic Salts, Ltd. for the issue to them of 500 preference shares in Anturic Salts, Ltd. at an issue price of £1 per share. This contract was to be determinable at the end of the five years' period by six months' notice, and after that period on six months'

notice by either party. On April 27, 1906, Dixon and Hunting and the Farringdon Press, Ltd., in pursuance of a request from Anturic Salts, Ltd., applied for 500 preference shares in the last-mentioned company, and sent £100, being 4s. per share paid up, and agreed to pay the balance in respect of the shares as it might be called up. On the same day the 500 preference shares, 4s. per share paid up, were allotted. On Feb. 7, 1907, a call of 2s. was made on these shares which was paid by Dixon and Hunting and the Farringdon Press, Ltd. On Feb. 7, 1907, Dixon and Hunting and the Farringdon Press, Ltd. was amalgamated with the Spottiswoode Advertising Agency, Ltd., and the name of the company was changed to Spottiswoode, Dixon, and Hunting, Ltd. Notice of this amalgamation and change of name was given in the form of a circular to the firms and companies with whom Dixon and Hunting and the Farringdon Press, Ltd. did business, but no notice appeared to have been received by Anturic Salts, Ltd., and the 500 preference shares remained in the share register of Anturic Salts, Ltd., in the name of Dixon and Hunting and the Farringdon Press, Ltd. On April 20, 1907, a further call of 2s. per share was made on the 500 preference shares, which was paid by Spottiswoode, Dixon, and Hunting, Ltd., leaving a liability of 12s. on each of the shares. In March, 1909, Spottiswoode, Dixon, and Hunting, Ltd. passed resolutions for winding-up with a view to reconstruction and on Mar. 29, 1909, a new company also called Spottiswoode, Dixon, and Hunting, Ltd., hereinafter referred to as the new company, was registered.

The principal object of the new company, according to its memorandum of association, was to acquire and take over as a going concern and carry on the business of Spottiswoode, Dixon, and Hunting, Ltd. and all or any of its assets and liabilities and to enter into three agreements, the first being between Spottiswoode, Dixon, and Hunting, Ltd., and its liquidator and the new company. This agreement was dated Mar. 31, 1909, and provided (a) that the new company should take over all the assets and the undertaking, business, and goodwill of Spottiswoode, Dixon, and Hunting, Ltd. with the full benefit of all contracts and agreements and all securities in respect of things in action of Spottiswoode, Dixon, and Hunting, Ltd., subject as to the premises to the charges, liens, and incumbrances (if any) affecting the same, but sufficient assets were excepted from the sale to pay certain dividends to the preference and ordinary shareholders of Spottiswoode, Dixon, and Hunting, Ltd., it being left to the liquidator to select the particular assets for the purpose; (b) that the new company should undertake to pay, satisfy, and discharge all the debts liabilities, and obligations of Spottiswoode, Dixon, and Hunting, Ltd., and should indemnify Spottiswoode, Dixon, and Hunting, Ltd. and its liquidator in respect of the same. On April 2, 1909, the liquidator advertised the resolution for the winding-up of the company, and about the same date sent out a circular notice to the creditors of the company informing them of the liquidation. It appeared, however, that no such notice was received by Anturic Salts, Ltd., and the liquidator was unable to say definitely if such notice was in fact ever sent. On April 2 and 5, 1909, notice of the meeting of creditors of Spottiswoode, Dixon, and Hunting, Ltd. to be held on April 15 was advertised pursuant to s. 188 of the Companies (Consolidation) Act, 1908. On Mar. 25, 1910, a notice was advertised requiring all creditors of Spottiswoode, Dixon, and Hunting, Ltd. to send in their names and addresses and particulars of their debts or claims to the liquidator by a certain date, and stating that in default they would be excluded from any distribution made before such debts were proved. On May 17, 1910, notice was advertised that the general meeting of the shareholders of Spottiswoode, Dixon, and Hunting, Ltd. would be held on June 20, 1910, to receive the liquidator's report showing how the winding-up of the company had been conducted and its property disposed of. On June 20 the final meeting was held, and on June 24 notice of such meeting was filed with the Registrar of Joint Stock Companies and the company was dissolved under s. 195 (4) of the Companies (Consolidation) Act, 1908.

During the liquidation of Spottiswoode, Dixon, and Hunting, Ltd., the managing director of the new company informed the liquidator that the new company did

not desire to take a transfer of the 500 preference shares and the liquidator assented to their not doing so, and accordingly no transfer of the shares was made to the new company, so that they remained in the books of Anturic Salts, Ltd. in the name of Dixon and Hunting and the Farringdon Press, Ltd. No notice whatever of the liquidation or reconstruction was received by Anturic Salts, Ltd., nor were they aware of the advertisements issued by the liquidator, nor were they summoned to the meeting of creditors. Notwithstanding the reconstruction, the new company continued to act as sole advertising agents of Anturic Salts, Ltd. until the agreement of April 20, 1906, was terminated by notice from Anturic Salts, Ltd. dated Sept. 28, 1910, which was acknowledged by the new company. In March, 1911, Anturic Salts, Ltd., having discovered the reconstruction of Spottiswoode, Dixon, and Hunting, Ltd., wrote to the new company asking for confirmation of the position (in view of the reconstruction of the company) with regard to the 500 preference shares, to which they replied that the shares were not transferred to them and that they were not liable on them. On April 11, 1911, Anturic Salts, Ltd. made a call of 1s. per share on the 500 preference shares upon Dixon and Hunting and the Farringdon Press, Ltd. and on April 13 gave notice of the call to the new company and deducted from moneys then owing by them to the new company the sum of £25, being the amount of such call, but the new company refused to allow the deduction, and repudiated their liability for that or any sum in respect of the shares, on the ground that no transfer to them of such shares had been executed. On Nov. 10, 1911, Anturic Salts, Ltd. offered that if the new company would deliver up to them the original certificate for the shares or give an indemnity in respect of it they would treat the agreement of Mar. 31, 1909, as a transfer of the shares and issue a new certificate for them to the new company, but the new company declined to accept this offer. On Dec. 29, 1911, Anturic Salts, Ltd. served notice of motion on the new company, the liquidator, and Spottiswoode, Dixon, and Hunting, Ltd. in terms set out above.

Clauson, K.C., and *Compston* for the applicants.
Jenkins, K.C., and *Vernon* for the liquidator of the old company.

NEVILLE, J.—The amounts involved in the present case are small, and from that point of view the matter might be treated as of small importance, but the law which underlies it seems to me to be of considerable importance.

The facts shortly are these, and, having happened once, they are likely to happen many times in the future. A company goes into voluntary liquidation for the purposes of reconstruction and, by a contract between the new company and the old company, the new company agrees to purchase the whole of the assets of the old company, to discharge its liabilities, and to indemnify the old company against them. That, of course, is a contract of an exceedingly familiar kind, and, I may say, almost universal in cases of reconstruction. In this case, as in most others, some of the assets which the new company contracted to take over involved liabilities which the new company undertook to pay and agreed to indemnify the old company against, and, when the matter came to be carried out, by arrangement between the liquidator and the new company, the liquidator forebore to insist upon the new company taking over the assets in respect of which there was liability, and he thereupon sought to take advantage and did take advantage of s. 195 of the Companies (Consolidation) Act, 1908, treating the matter as though the affairs of the old company had been fully wound-up and making a return which upon the termination of the statutory time resulted in the dissolution of the old company and its freedom from any claim on the part of anybody. The result, of course, is that the liability of the old company never passed to the new company, and disappeared to the great advantage (as no doubt in many cases it would be to the great advantage of other reconstructed companies) in the present case of the new company, who thus were freed from an obligation which they had undertaken by their contract. Of course, if that is allowed by the law, and if the arm of the law is

so short that it cannot interfere with such a transaction, then, speaking from here, I have nothing to say about the action of the new company; they have discovered a way in which the liability can be got rid of by a solvent company without payment, and they are entitled to the benefit of their discovery if it be a real discovery. But s. 223 of the 1908 Act, which by s. 195 provides for the dissolution of the company under the circumstances that I have referred to, gives the court power upon the application of any persons interested to declare the dissolution to have been void. Terms may be inserted if necessary, but the order simply following the original words declaring the dissolution to have been void would put matters back into the position in which they were when the proceedings were taken by the liquidator which resulted in the statutory dissolution of the company.

The question is, ought I under those circumstances to make such an order? It is quite clear, I think, that the applicants are persons interested. I can understand circumstances under which, although persons who were interested applied, the court might refuse to give them the protection provided by the section; they might have taken such a course as would render it inequitable on the part of the court to put in operation the provisions of s. 223. Have they done so in the present case? It is said in the first instance that there was something which amounted to acquiescence in what had been done. I think the evidence does not come anywhere near that as a matter of fact. I think that no notice of the dissolution was ever received by the applicants at all, but, even if it had been, I think you could not have had acquiescence unless the whole of the facts were known, and I do not think it is suggested that it was known at that time that the liquidator and the new company were going to agree that the assets involving liability should not be taken over in accordance with the terms of the contract. Upon that, of course, largely depended the action of the creditor company, because, supposing the transaction had gone through in its entirety, they probably would have been just as well satisfied with the liability of the new company as they were with the liability of the old company, and would never have thought of endeavouring to enforce any liability against the old company.

Then it is said that, if there is not acquiescence, at all events there has been such delay as would disentitle the applicants to the relief for which they have asked. I have considered that, and have come to the conclusion that they are not disentitled. They discovered the position in March, 1911. The official communications between the companies I think put the dates somewhat later, about the middle of April, but as soon as the position was ascertained by the applicants they made their demand; they said they were entitled to come upon the new company. I think legally they were not right in that. They offered to transfer to the new company the shares in question, but the new company not unnaturally disclaimed any desire to take a transfer of them. Then they made a call of 1s. a share, and they sought to deduct the amount of the call from a debt that they owed the new company, but to this the new company would not consent, and correspondence continued for a considerable time and the matter was ultimately put in the hands of the solicitors, and I think about November of the same year proceedings were definitely threatened which were actually commenced at the beginning of the following year. Under these circumstances I am of opinion that there has been no such delay as to disentitle the applicants to ask the court to give effect to the provisions of s. 223, and it seems to me it would be a disastrous thing if it proved to be a new way of escaping liabilities. It would happen, I think, again and again, and it would be a long time before creditors of a company undergoing reconstruction would realise that the result of the simple refusal on the part of the purchasing company to take over assets which they had agreed to purchase because there was a liability attaching to them would in all probability be followed by a dissolution of the old company and the rights of the creditors would never have arisen against one and would have gone against the other. It seems to me this is a beneficial

section which prevents any such injustice as that resulting from the operation of s. 195. I think, therefore, that I ought to make the order declaring the dissolution to have been void, but I do not think it is a case in which any special directions ought to be given.

Solicitors: *Blundell, Gordon & Co.; Cardew Smith.*

[*Reported by* S. Raymond Sebastian, Esq., *Barrister-at-Law.*]

R. *v.* BEECH

[Court of Criminal Appeal (Darling, Channell and Pickford, JJ.), March 25, 1912]

[Reported 107 L.T. 461; 76 J.P. 287; 23 Cox, C.C. 181; 7 Cr. App. Rep. 197]

Criminal Law—Grievous bodily harm—Threat of injury to prosecutrix—Injuries received by her through jumping out of window to escape.

The appellant was convicted of inflicting grievous bodily harm upon the prosecutrix. The evidence was that he went to her bedroom door and threatened to burst it open if she did not unfasten it. Fearing that the door would give way and being frightened of the appellant, the prosecutrix jumped from the window to the ground, sustaining injuries. The jury were directed that, if they considered that the appellant's conduct amounted to a threat to cause injury, that the act of the prosecutrix in jumping was the natural consequence of that conduct, and that the grievous bodily harm was the result of that conduct, they should convict.

Held: the direction was correct, and the appellant was rightly convicted.

Notes. As to unlawful wounding, see 10 Halsbury's Laws (3rd Edn.) 735–737, and for cases see 15 Digest (Repl.) 985–986.

Cases referred to in argument:

R. v. *Donovan* (1850), 14 J.P. 578; 4 Cox, C.C. 401; 15 Digest (Repl.) 987, *9669*.

R. v. *Martin* (1881), 8 Q.B.D. 54; 51 L.J.M.C. 36; 45 L.T. 444; 46 J.P. 228; 30 W.R. 106; 14 Cox, C.C. 633; 14 Digest (Repl.) 501, *4834*.

R. v. *Halliday* (1889), 61 L.T. 701; 54 J.P. 312; 38 W.R. 256; 6 T.L.R. 109; 15 Digest (Repl.) 986, *9648*.

Appeal from a conviction before Lord Coleridge, J., sitting at Cheshire Assizes. The appellant was indicted before Lord Coleridge, J., at Cheshire Assizes for unlawfully and maliciously inflicting bodily harm upon the prosecutrix. He was found guilty and sentenced to twelve months' imprisonment. The prosecutrix was the village nurse and lived alone. At 11.45 p.m. on an evening in November the appellant came to her house when she was in bed. He entered the house by breaking a window, and went upstairs to the bedroom occupied by the prosecutrix. The door was locked and the appellant threatened to break it open if the prosecutrix would not let him in. She refused, and the appellant then tried to burst open the door. The prosecutrix called out that if he got in he would not find her in the room, and as the appellant continued his attack upon the door, the prosecutrix jumped out of the window, sustaining injuries. In giving evidence the prosecutrix stated that the appellant had attempted to interfere with her on a previous occasion when she had threatened to take poison if he touched her.

Bankes, K.C., and *Owen Roberts* for the appellant.

Abel Thomas, K.C., and *Artemus Jones*, for the Crown, were not called on to argue.

DARLING, J. [after stating the evidence for the prosecution].—It is complained that the learned judge did not put certain points to the jury, but we are unable to say that any material point was omitted or that anything was put incorrectly. Undoubtedly the tendency of the summing-up was unfavourable to the appellant, but when that occurs it is not necessarily the fault of the judge; the facts may be too strong for him. What the learned judge told the jury was this:

> "Will you consider whether the conduct of the prisoner amounted to a threat of causing injury to this young woman; was the act of jumping the natural consequence of the conduct of the prisoner; and was the grievous bodily harm the result of the conduct of the prisoner? If you answer these three questions in the affirmative, your verdict will be one of guilty. If you answer them, or any one of them, in the negative, your verdict will be one of not guilty."

We think that was a proper direction. The appeal must be dismissed.

Solicitors: *J. M. Voss*, for *J. P. Whittingham*, Nantwich; *Director of Public Prosecutions.*

[*Reported by* GERALD DODSON, ESQ., *Barrister-at-Law.*]

WOODBRIDGE & SONS *v.* BELLAMY

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), January 12, 1911]

[Reported [1911] 1 Ch. 326; 80 L.J.Ch. 265; 103 L.T. 852; 55 Sol. Jo. 204]

Solicitor—Covenant in restraint of freedom to carry on profession—"Profession" of solicitor—Covenant by solicitor's clerk not to "carry on profession of solicitor" within radius of five miles of the town in which employer's office situated—Letter written from outside prohibited area to client within it.

On April 4, 1902, the plaintiffs, a firm of solicitors, wrote engaging the services of the defendant as clerk for advocacy and conveyancing. By an undertaking signed on April 16 the defendant agreed, inter alia, that he would not at any time during his employment, or after its determination, "carry on . . . the profession of a solicitor" within a radius of five miles of the town hall of a town in which the plaintiffs had an office. In 1909 the defendant left the service of the plaintiffs and took an office outside the prohibited radius. Thence he wrote on behalf of a former client of the plaintiffs living within the radius to a person also living within the radius demanding payment of a debt, and he subsequently drew an assignment of the debt.

Held: the transaction did not amount to "carrying on the profession of a solicitor" and there had been no breach of the undertaking by the defendant. *Edmundson* v. *Render* (1), [1905] 2 Ch. 320, distinguished.

Notes. Applied: *Freeman* v. *Fox* (1911), 55 Sol. Jo. 650. Referred to: *Dayer-Smith* v. *Hadsley* (1913), 108 L.T. 897.

As to breach of agreement for restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 431 et seq., and for cases see 43 DIGEST 68 et seq.

Cases referred to:

(1) *Edmundson* v. *Render*, [1905] 2 Ch. 320; 74 L.J.Ch. 585; 93 L.T. 124; 53 W.R. 632; 49 Sol. Jo. 620; 43 Digest 70, *734*.

(2) *Turner* v. *Evans* (1852), 2 De G.M. & G. 740; 42 E.R. 1061, L.JJ.; 43 Digest 77, *814*.

Appeal from an order of EVE, J., on an interlocutory application restraining the defendant, a former clerk of the plaintiffs, from practising as a solicitor contrary to the terms of an alleged agreement between the parties.

The plaintiffs in this action, Messrs. Woodbridge & Sons, a firm of solicitors carrying on their profession at Brentford, in Middlesex, and in London, asked for an interim injunction to restrain the defendant, W. H. Bellamy, formerly in the plaintiffs' employment as a solicitors' clerk, from carrying on the profession of solicitor within a radius of five miles of Brentford, in breach of an undertaking of April 16, 1902, given by him. On Mar. 22, 1902, Messrs. Woodbridge & Sons advertised in the LAW TIMES that they

> "Wanted an admitted solicitor as clerk, required for advocacy in county court and magisterial cases at branch office ten miles from London, and to assist in conveyancing in both offices; must reside in neighbourhood of branch office."

The defendant, who was then practising as a solicitor at Axminster in Devonshire, wrote on the same day applying for the post. On Mar. 29 he had an interview with Mr. Frank Woodbridge, one of the partners in the plaintiffs' firm, who said his firm would be willing to engage the defendant's service if his references were satisfactory at a salary of £140 a year, with an allowance for a season ticket from Brentford to London, and that they desired the defendant to enter on his duties as soon as possible. The references proved satisfactory, and on April 4, 1902, the plaintiffs wrote the defendant a letter, in which they said:

> "We shall be glad to engage your services, and to have the benefit of them at the earliest moment. We understand from your letter of the 1st that you can be with us on the 17th. We shall be glad if you will be here on that date accordingly."

On April 16 the defendant came up to London and saw Mr. Frank Woodbridge, who, as he was at the moment engaged, gave the defendant some papers to peruse in a matter which he said he wanted him to take up at once. Shortly after this Mr. Frank Woodbridge placed before the defendant the undertaking of April 16, 1902, who then signed it. The undertaking was as follows:

> "April 16, 1902.—Dear Sirs,—In consideration of your agreeing to employ me in your business as solicitors at your offices, No. 5, Serjeants' Inn, Fleet Street, in the city of London, and No. 209, High Street, Brentford, Middlesex, in the capacity of conveyancing clerk at both offices, and representative advocate at Brentford at a salary of £140 per annum, I hereby undertake and agree that I will not at any time during my employment—or after the determination thereof —(i) divulge or disclose to any person or persons the secrets or information entrusted to me, or arising or coming to my knowledge in the course of my employment or otherwise, either in or relating to the business dealings and transactions of yourselves, or of any of your clients, or (ii) carry on within a radius of five miles of the townhall of Brentford aforesaid, the profession of a solicitor either in my own name or in the name of any other person or persons, and either directly or indirectly, and will not enter into the service of any other person or persons as assistant or otherwise in or in relation to the said profession within the limit aforesaid. And will not endeavour or attempt directly or indirectly to induce any person or persons to cease from employing you in the way of your profession or business."

The defendant remained with the plaintiffs' firm until March, 1909, when the plaintiffs determined his engagement, giving him three months' salary in lieu of notice, when he took an office outside the prohibited radius in the Strand. He resided in Brentford. On Oct. 25, 1910, the defendant wrote from his office in the Strand to a Mr. J. A. Evans, living at Ealing (within the prohibited radius), that he had been consulted by his client, Mr. Bradbury (who had been a client of the plaintiffs and who resided in Brentford), in the matter of a debt of £107 owing to

him by a Mr. Carlton (deceased), and demanding payment thereof on behalf of Mr. Bradbury. Mr. J. A. Evans was the husband of Mr. Carlton's executrix. The defendant subsequently drew an assignment of this debt from Bradbury to Evans, and charged therefor £1 11s. 6d. The plaintiffs, having recently ascertained these facts, accordingly commenced this action, and now moved to restrain the defendant from acting in breach of the undertaking of April 16. The defendant alleged that there was no consideration for the undertaking; that it was too wide; and that he had committed no breach of it. The motion was heard by EVE, J., who decided, inter alia, that the defendant's acts were a "carrying on of the profession of a solicitor" contrary to the terms of the agreement of April 16, 1902. The defendant appealed.

Clayton, *K.C.*, and *Bovill* for the defendant.

P. O. Lawrence, *K.C.*, *Grant*, *K.C.*, and *Ribton* for the plaintiffs.

COZENS-HARDY, M.R.—This is an appeal from an order made by EVE, J., on an interlocutory application restraining the defendant, who is a solicitor, and who had served as a clerk to the plaintiffs, from practising as a solicitor contrary, as is alleged, to the terms of an agreement he had entered into. Various points have been raised, or at least are capable of being raised, in this case, but in my judgment it is sufficient to dispose of this case on one ground. The defendant admittedly signed a letter in the shape of a stamped agreement on April 16, 1902. [HIS LORDSHIP read the letter.] The injunction was granted on the footing that there has been a breach of that agreement. What has happened? The defendant received salary in lieu of notice in 1909. He then did that which he was perfectly entitled to do, openly and avowedly took an office somewhere in the Strand, where in his own name he holds himself forth as a solicitor able to practise and entitled to practise. That, of course, is well outside the radius of five miles from the townhall, Brentford. What has it been proved that he has done? I take the statement of EVE, J., upon what, after all, is the only important case relied upon as constituting a breach of the agreement—namely, the case in which he acted for Mr. Bradbury and demanded payment of a debt from a Mr. Evans. [HIS LORDSHIP read the following passage from the judgment of EVE, J., ([1911] 1 Ch. at pp. 333, 334):

> "But, in the course of his business, he has been consulted,—I will assume in the Strand—by a gentleman resident within the radius, and, on behalf of that gentleman, he wrote to the person whom he thought was the legal personal representative of a deceased debtor of the gentleman in question. The person so written to also resided within the radius; he was not in fact the legal personal representative of the debtor but was the husband of one of the legal personal representatives, and the correspondence between him and the defendant resulted in this, that in order to settle the matter he ultimately agreed to buy the claim of the creditor against the deceased at a discount. In order to carry that agreement into effect the defendant, acting as solicitor both for the vendor and the purchaser of the debt, both, as I have said, living within the radius, prepared an assignment to the purchaser of the debt, got it executed by the creditor, stamped it, and was duly paid for his services. That is the breach upon which the plaintiffs rely. [Counsel for the defendant] contends that such conduct is not really carrying on the business of a solicitor within the radius. I cannot accede to that contention. A solicitor more or less carries his profession about with him. Wherever he does work of a professional nature for which he is paid, he is in my opinion practising and carrying on the profession of a solicitor. In carrying out for reward the transaction between two residents within the radius the defendant was in my opinion acting as a solicitor, that is, carrying on his profession within the radius, and I think the defendant has thereby committed a breach of the agreement."]

The facts were clearly stated by EVE, J., but, with great respect, I am entirely unable to follow the consequence which he deduces from those facts. I ask myself,

what is the meaning of a covenant by a solicitor that he will not within a given radius carry on the profession of a solicitor? It is important here to remember that the law recognises locality in the practice of a solicitor. Under the Stamp Act, 1870, [repealed] which applies to all solicitors, the certificate which a solicitor has to obtain depends upon this circumstance, whether he practices or carries on business within ten miles of the Post Office, or in England, Scotland, or Ireland, and beyond. Therefore the law recognises that there is a locality applicable to the carrying on of the business or profession of a solicitor which may not be applicable to all other professions and all other businesses. But, without relying excessively upon that statute, although I think it is a very relevant statute to refer to, I ask myself, is it possible to say that a solicitor is carrying on the profession of a solicitor in every part of England, Scotland, and Ireland, or the world, in which he has a client or in which for a client he writes a letter making a demand upon somebody else residing elsewhere? It does seem to me that that is a proposition so outrageous as not to bear or require much discussion. We have been invited to say that certain acts, which are not proved here, might or might not be carrying on the business or profession of a solicitor within a certain area. I have no intention of being seduced into discussing all those points. Of course it is quite plain that there may be a colourable evasion of the covenant such as there was found to be in *Turner* v. *Evans* (2), where a person, not a solicitor, but an ordinary shopkeeper, just outside the prohibited area, by himself and his agents, within the prohibited area delivered goods to customers solicited within that area by himself or by his agents. The court held (and I do not wonder at it) that that was, within the fair and natural meaning of such a covenant, carrying on business within the prohibited area. We have nothing like that here. We are really asked to say that a covenant of this kind amounts to this: "I will not do any business for any client living within the prohibited area." All I can say is that if a solicitor wants to impose any such obligation upon a clerk, he must use very different words to these; and thus express quite clearly and plainly what he means. He must not use language of this general nature and then seek to interpret it in a mode which, as I say, might affect the covenantor in his dealings with any client in any part of England, Ireland, or Scotland. If I had taken a different view of the covenant in this case, I think, as I intimated in the course of the argument, that I might have felt the greatest possible doubt—I will not say more at present—whether a covenant so interpreted ought not to be regarded as unreasonable and not entitled to the protection of the court. In my opinion the defendant is carrying on the profession of a solicitor in the Strand, and there is no evidence that he is carrying on the profession of a solicitor within the five mile area. I am dealing only with the facts as now proved; I say nothing as to what may be proved when the action comes on for trial, but I am clearly of opinion that the injunction granted by the learned judge cannot be sustained, and that the order must be discharged.

FLETCHER MOULTON, L.J.—I am of the same opinion. This is an interim order, and therefore I think it is our duty to confine ourselves to that which is before us upon the affidavits and the documents verified thereby in order to leave the ultimate question between the parties to be decided on the evidence called at the trial. I ask myself simply, is that which is brought before us sufficient to justify an interim injunction? It is for the purposes of this judgment necessary and sufficient that there should have been a breach of the undertaking of such a character that the court may infer the intention further to break it, and therefore the first thing to be ascertained is, has there been any breach of the undertaking at all? The undertaking is in very simple language. It is not to

> "carry on within a radius of five mils of the townhall, Brentford aforesaid, the profession of a solicitor either in my own name or in the name of any other person or persons and either directly or indirectly. . . ."

Therefore the only phrase we have to consider is "carry on the profession of a solicitor." I think that the phrase bears prima facie the same meaning that it does in the Stamp Act, 1870, [repealed] which relates to the certificate which a solicitor has to take out. I differ from the criticism that was put before us by the plaintiffs' counsel that the Act which prescribes the necessity for that certificate, or which prescribes the fee for that certificate, is a fiscal Act and therefore we ought to put it on one side in considering the meaning of the phrase. I think that the phrase is there used exactly in that close relation to the business of a solicitor, and the locality in which it is carried on, that gives to its use there great authority in our consideration of what the normal meaning of the phrase is, and, of course, it is obvious that, if the phrase here means what it does there, the suggestion that there has been a breach in the present case is preposterous. To say that a person who has not taken out a London certificate, but only taken out a country certificate, is exceeding his rights if he chooses to write to a debtor for one of his clients who happens to live in London and call upon him to pay his debt is ridiculous. But even if we put that on one side, what other interpretation can we put upon this phrase? If there is a well-known interpretation of ordinary language, that may have some claim to be adopted by the court. If I ask myself what the meaning of "carrying on the business of a solicitor" is in ordinary language, I am perfectly satisfied that it means where the solicitor has his place of business, solicits work, and does it. To say that a London solicitor carries on his business in the ordinary meaning of the phrase in Brentford because he writes to a man in Brentford and demands the payment of a debt is in my opinion quite out of the question. The learned judge has taken another point. He says, as soon as you find the defendant doing solicitor's work for which he is paid by persons within the radius, he is carrying on his profession within the radius. Where the learned judge gets that test from I do not know, but I am relieved from considering that because the respondents do not ask us to accept that test. In those circumstances I ask myself what it is that is here proved. It is proved that at the request of a client the defendant wrote to a man within the radius demanding payment of a debt. From that a correspondence took place in which the defendant acted entirely for the client who consulted him at his place of business outside the prescribed area, and that ultimately ended in the purchase of the debt. I ask myself, where is there any carrying on of his profession within the radius? I am satisfied there is none, and therefore I agree with the conclusion at which the Master of the Rolls has arrived.

BUCKLEY, L.J.—The proposition that the plaintiffs ask the court to affirm may, I think, be stated as follows, although I know they will disclaim the form in which I put it, because they will not accept the fact that the proposition is such as it seems to me to be. It is this: They say that a solicitor carries on the profession of a solicitor at every place at which he does as a solicitor any act whatsoever. If that proposition is true, of course it follows that if a solicitor in London writes to Toronto to demand payment of a debt from a gentleman at Toronto, he is at Toronto doing an act and making a demand as a solicitor, and therefore it follows that he is carrying on business at Toronto. It seems to me that that is extravagant and absurd. It is a question of degree to a very great extent at what point there does arise such an act or succession of acts as that you can say that a person carries on his profession at that particular place. It does not follow that because he does an act in a place he is carrying on his business there. He does an act as a solicitor there I agree, but he does not necessarily carry on his business there. I asked counsel for the plaintiffs to give us the best case he could to show that the defendant was carrying on his business within the prohibited area. He said his best case was this: There was a man named Bradbury, and Bradbury resided within the prohibited area. Bradbury came to the defendant in the Strand and asked the defendant to act for him and he did. The act which he did was to write to a man named Evans, who also resided in the prohibited area, calling upon Evans to pay a certain debt. Evans thereupon

entered into negotiations under which he (Evans) bought up the debt. The defendant acted for both Bradbury and Evans in the matter. He prepared the assignment, and it appears that he sent it to Bradbury and that Bradbury executed it, again within the area. From those facts I am quite unable to evolve any view that the defendant was carrying on the profession of a solicitor within the prohibited area. It seems to me that he was a solicitor in the Strand to do certain things, and that in the course of the discharge of his duty he wrote, no doubt, to a man within the district in question, and that the client who consulted him came from the district in question; but it does not follow the least in the world that he was carrying on his business or profession there because the client came from there. Out of those facts I can evolve nothing at all.

Great reliance has been placed on a decision of my own in *Edmundson* v. *Render* (1), which, it is said, has some bearing on this case. To my mind it has absolutely no bearing at all. In order to determine whether the defendant was right or wrong in *Edmundson* v. *Render* (1), you had only to ask yourself this question: "Had the defendant done within the district an act usually done by a solicitor?" Answer: "Yes, he had. He had written to a person within the district and demanded payment of a debt." Was that act done within the district? To that I held the answer was "Yes, it was done within the district, because to write a letter to a man who is within the district is just as if you went to see him within the district, and therefore the defendant in that case had within the district demanded payment of a person who was a debtor there, and that is the sort of act which is generally done by a solicitor." Those being the facts, the defendant had covenanted that he would not do any act usually done by solicitors within the district, and he had done such an act within the district and therefore he was enjoined. I fail to see how that has any bearing on this case. I agree that some consolation might be got from certain language of mine on which counsel for the plaintiffs relied. I used the words, "He has acted as a solicitor within the district." I think that my meaning would have been more accurately expressed thus: "He has within the district done an act usually done by a solicitor." With that qualification it seems to me that *Edmundson* v. *Render* (1), which, if I may say so, was perfectly rightly decided, does not govern this case.

Solicitors: *W. H. Dale; W. H. Bellamy.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

LYONS, SONS & CO. *v.* GULLIVER

[Court of Appeal (Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), November 10, 11, 12, 1913]

[Reported [1914] 1 Ch. 631; 83 L.J.Ch. 281; 110 L.T. 284; 78 J.P. 98; 30 T.L.R. 75; 58 Sol. Jo. 97; 12 L.G.R. 194]

B

Nuisance—Highway—Theatre—Crowd awaiting admission—Obstruction of access to neighbouring premises.

The occupier of premises may be liable for a nuisance if, as a probable consequence of his action, he attracts, even by something lawfully done on his premises, a crowd in the street adjoining his premises so that access to his C neighbour's premises are obstructed and the neighbour suffers damage. Whether the facts in each individual case constitute a nuisance depends on the degree of annoyance and obstruction which is caused. It is no defence for the person causing the nuisance that the police have a duty to keep order in the street.

Accordingly, where persons waiting for admission to the defendants' theatre D formed a queue outside the plaintiffs' premises, obstructing and preventing the access of the plaintiffs' customers thereto,

Held (by Cozens-Hardy, M.R., and Swinfen Eady, L.J., Phillimore, L.J., dissenting): the defendants were liable to the plaintiffs for the nuisance so caused.

E **Notes.** Applied: *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1929] All E.R. Rep. 296. Considered: *Dwyer* v. *Mansfield*, [1946] 2 All E.R. 247.

As to nuisances on highways, see 19 Halsbury's Laws (3rd Edn.) 270 et seq., and for cases see 26 Digest (Repl.) 466 et seq.

Cases referred to:

(1) *Barber* v. *Penley*, [1893] 2 Ch. 447; 62 L.J.Ch. 623; 68 L.T. 662; 9 T.L.R. F 359; 37 Sol. Jo. 355; 3 R. 489; 26 Digest (Repl.) 489, *1743*.

(2) *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388; 20 L.T. 259; 33 J.P. 484; 17 W.R. 459, L.JJ.; 36 Digest (Repl.) 280, *308*.

(3) *R.* v. *Carlile* (1834), 6 C. & P. 636; 26 Digest 489, *1747*.

(4) *Wagstaff* v. *Edison Bell Phonograph Corpn., Ltd.* (1893), 10 T.L.R. 80; 26 Digest 489, *1748*.

G (5) *R.* v. *Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 26 Digest (Repl.) 489, *1746*.

(6) *Betterton's Case* (1695), Holt, K.B. 538; 90 E.R. 1196; sub nom. *R.* v. *Betterton*, 5 Mod. Rep. 142; Skin. 625; 26 Digest (Repl.) 489, *1742*.

(7) *Walker* v. *Brewster* (1867), L.R. 5 Eq. 25; 37 L.J.Ch. 33; 17 L.T. 135; 32 J.P. 87; 16 W.R. 59; 26 Digest (Repl.) 489, *1749*.

H Also referred to in argument:

R. v. *Cross* (1812), 3 Camp. 224, N.P.; 26 Digest (Repl.) 485, *1707*.

Bellamy v. *Wells* (1890), 60 L.J.Ch. 156; 63 L.T. 635; 39 W.R. 158; 7 T.L.R. 135; 26 Digest (Repl.) 490, *1751*.

Benjamin v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 26 Digest 484, *1703*.

I *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321, 735; 42 L.T. 225, 677; 28 W.R. 459, 722; 24 Sol. Jo. 366; 26 Digest (Repl.) 353, *676*.

A.-G. v. *Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811; 21 L.T.O.S. 49; 17 Jur. 677; 1 W.R. 185; 43 E.R. 119; sub nom. *Sheffield United Gas Consumers Co.*, 7 Ry. & Can. Cas. 650, L.C. & L.JJ.; 26 Digest (Repl.) 518, *1953*.

A.-G. v. *W. H. Smith & Sons* (1910), 103 L.T. 96; 74 J.P. 313; 26 T.L.R. 482; 8 L.G.R. 679; 26 Digest (Repl.) 485, *1705*.

Winterbottom v. *Lord Derby* (1867), L.R. 2 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 31 J.P. 566; 16 W.R. 15; 26 Digest (Repl.) 302, *226*. A

Appeal by the defendants from a decision of JOYCE, J.

Cunliffe, *K.C.* (*Dighton Pollock* with him), for the defendants.
Hughes, *K.C.*, and *C. J. Farwell* (*Stuart M. Green* with them), for the plaintiffs.

COZENS-HARDY, M.R.—This is an appeal from a decision of JOYCE, J., who has held that the plaintiffs are entitled to relief against the defendants, who are carrying on performances at the Palladium Theatre, in respect of a nuisance caused by people going to the theatre and extending in a queue for a considerable period of time opposite the plaintiffs' place of business. In this case, as in every other, the court has to consider the particular circumstances thereof, and must apply what is believed to be the legal principle to the facts of the case so found. I disclaim absolutely and entirely any intention or right of saying that a theatre queue, under all circumstances and in all conditions, must be an actionable nuisance. I decline absolutely to treat our judgment in this case as deciding any such proposition as that. The only question which we have to decide is whether the queue at the Palladium Theatre, under the circumstances which I will shortly mention, is or is not a special nuisance to Messrs. Lyons, Sons & Co., the plaintiffs, who are the occupiers of a place of business within a very few yards of the Palladium Theatre. I forget the precise number of yards, but I think that there are two intervening shops between the entrance to the Palladium Theatre and the plaintiffs' shop.

What is it that the defendants have done? They do not have, as most theatres have, a morning performance only on two or possibly three days in the week; but they have every day a morning performance. Not only so, but they have every day an afternoon performance, as distinct from an evening performance. The only matters which are complained of, and to which the learned judge in the court below paid attention, are the morning and the afternoon performances, because when the evening performance takes place it is so late that the plaintiffs are not really prejudiced by what then takes place. What is the state of things, or what was before this action was brought, the state of things with reference to—I will take—the morning performance? The Palladium Theatre was, and I have no doubt is, a very popular place of entertainment. The queue in question is formed by people who desire to get places in the sixpenny upper circle. On the evidence, as the learned judge in the court below has found—and I think we must accept it quite plainly—there has been such an unreasonable use and obstruction of the highway, and such obstruction and annoyance as amounts in law to a public nuisance, by which the plaintiffs have been specially, and in particular, injuriously affected. In his judgment the learned judge said:

> "On the evidence I come to the conclusion that the crowd collected on the south side of the entrance to the upper circle, and the stationary queue, have obstructed access to and egress from the plaintiffs' premises, and further, that such obstruction has been calculated to deter, and has in fact deterred, to a very slight extent at all events, if no more, customers from resorting to the plaintiffs as they might otherwise have done."

The evidence leaves no doubt in my own mind at all that the finding of the learned judge, who saw the witnesses, is absolutely right on that point. The precise dimensions of the queue will vary from day to day possibly, and certainly according to the programme at the theatre. The more attractive the performance is, the greater are the crowds which come. But the substance of the grievance from which the plaintiffs say that they suffer is that the theatre doors are not opened until either, I think, about a quarter of an hour, or sometimes about half an hour, before the performance commences; that there is a queue extending sometimes beyond the plaintiffs' premises right down to Argyll Place, and frequently right in front of the plaintiffs' premises; and that that is a queue some three, four, five, or on

occasions, six deep. That queue remains there for a very considerable portion of time, until, indeed, the doors of the theatre are opened, when, of course, those who can get in to fill the place do get in, and those who cannot get in, I suppose, go away. Another peculiarity of the present case is that the queue which is formed is not to any appreciable extent in front of the Palladium Theatre premises at all. The defendants keep their own front clear, and leave the queue to stretch down to and in front of the plaintiffs' property. Then there is this to be mentioned, which seems to me not to be unimportant. The queue is sometimes on the foot-path and sometimes on the roadway itself, and it is said that anybody who wants to come to the plaintiffs' premises can make his or her way through the queue. The plaintiffs' customers can elbow their way though the crowd, or politely ask them to make way, or invite the able assistance of the policeman who may happen to be there.

I cannot bring myself to doubt that this is a serious nuisance and annoyance, by which the plaintiffs are specially affected, and that it is not a case in which it is at all necessary for them to say that they can prove that they have lost £1, £2, or £3, by reason of the defendants' acts. There is evidence of the plaintiffs' customers themselves that they avoided going to the plaintiffs' shop because of the inconvenience and trouble caused by this long queue twice a day right in front of the plaintiffs' premises. I think that, on that part of the case, the evidence speaks for itself. One must take one's own common knowledge of the world in a thing of this kind, and I say deliberately that I think that it is quite obvious that a queue more or less permanent, lasting, not for a few minutes, but for sometimes more than an hour, in front of the plaintiffs' premises must be calculated to deter their customers from coming to the shop. I should have come to that conclusion, I think, even in default of any evidence. But there is evidence of the plaintiffs' customers, and there is evidence by the plaintiffs' managers and representatives that many complaints have been made to them by customers. But then it is said that the defendants are not responsible for what goes on in the streets; that it is the duty of the police to keep the streets clear; and that, if the police do no do that, the plaintiffs' remedy is to make a complaint to the police, and not to attack the defendants for collecting this crowd. The defendants, it is said, do not want the queue there; they only invite the audience to come in at the time when the doors of the theatre are open, and that it is altogether unreasonable that the defendants should be attacked because a large number of people choose, without any invitation from the defendants, permanently to obstruct the roadway and the pathway, one or other or both, for a considerable period of time.

Is that the law? In my view, it is not. I have no intention of going through the ancient authorities, which were so fully discussed by NORTH, J., in *Barber* v. *Penley* (1). I am quite content to do no more than take what LORD CAIRNS laid down in *Inchbald* v. *Robinson* (2). He said (4 Ch. App. at p. 390):

> "There were authorities to show that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act."

That observation is quite irrespective of anything improperly done by the defendant to an action in the sense of a matter which is indecent or anything of that kind. But it applies absolutely to a case where persons are carrying on their own lawful business, but doing it in such a way as they must know will, in all probability, in the natural course of events, lead to the obstruction of the street. There are authorities to which our attention has been called again and again where indictments have been brought and maintained against, not the people who were actually obstructing the street by their physical presence, but against the people whose attractions caused the crowd to come there. As I say, this matter was so fully

discussed in *Barber* v. *Penley* (1) that I am not willing to waste any more words upon it. But I cannot feel any doubt that we should be not merely overruling *Barber* v. *Penley* (1), but going very much further back if we allowed any hesitation in our expression of the law on that point. The charge of PARK, J., with whom BOLLAND, B., was sitting, in *R.* v. *Carlile* (3) seems to me to be a clear and emphatic statement of the doctrine. It is the same doctrine which LORD CAIRNS, in *Inchbald* v. *Robinson* (2), treated as the plain law, which was adopted by the Court of Appeal when the same matter came before them on appeal from the trial of the action, and which was cited again, not merely in *Barber* v. *Penley* (1), but also by STIRLING, J., in *Wagstaff* v. *Edison Bell Phonograph Corpn., Ltd.* (4). I think, therefore, that we must start with this as a proposition of law, that a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises.

But then it is said that all that is immaterial now, because those decisions were pronounced at a time when there were no police whose duty it was to maintain order in the streets. I think, however, that police were in full force in 1869, when LORD CAIRNS said what he did in *Inchbald* v. *Robinson* (2), and the police were in force, although perhaps not with all their present powers, in 1834 when in *R.* v. *Carlile* (3), PARK, J., said what he did. And certainly the police were in full force when NORTH, J., and STIRLING, J., gave the decisions which they did, to which I have already referred. Then there is an argument which I have entirely failed to appreciate. It is said that *Barber* v. *Penley* (1) is an authority in favour of the defendants in the present case because the learned judge there (NORTH, J.) said that, the police having done their duty, he would not grant an injunction. Just consider what that case was. It was a case of a theatre in Wych Street. The plaintiff, who was an occupier of adjoining premises, complained that by reason of the performance of "Charley's Aunt" there was such a crowd which collected in the street that her lodgers and customers could not, without very great inconvenience, come into the house, and she was specially damnified thereby. The learned judge went into a very elaborate and careful review of the authorities, and he held that it was an actionable nuisance in respect of which, if nothing more had happened, there would have been an injunction granted. But the plaintiff herself, by her affidavit in reply, stated that since the action commenced the police had intervened and the nuisance had ceased, and NORTH, J., then in effect said that, as the plaintiff herself admitted that the nuisance had by matters subsequent—namely, by a matter pending the action itself—ceased, he did not, of course, grant an injunction. But, in order to show his view upon the matter, the plaintiff was held to be entitled to the costs of the action. That was a plain assertion that the plaintiff was right in complaining of what she did. NORTH, J., simply followed the ordinary practice. Where an actionable wrong has been committed and has been removed during the course of the action before decree, the court in the ordinary course does not grant an injunction, because the defendant does not threaten and intend to continue it; but the court simply says that the plaintiff was right in bringing his action, that his action has had the effect of inducing steps to be taken to abate the nuisance, and that, therefore, the court gives the plaintiff the costs of the action.

I confess that I am unable to appreciate how the defendants in the present case can escape from that which, in my view, is according to the settled law a wrong—namely, by collecting crowds and in that sense inviting them—by saying that it is the duty of the police to do what is necessary. In my opinion, on the facts of the present case, and on the facts of the present case alone, there was at the date when this action commenced an actionable wrong in respect of which the plaintiff was entitled to relief, and would have been entitled to an injunction unless something had happened. What has happened here? In the court below JOYCE, J., suggested, I think, at an early stage—probably in some interlocutory application, but I am not sure how that was—that the doors of the theatre should be opened

at a certain time before the hours of the morning and afternoon performances. That, no doubt, involved some extra expense upon the defendants. But the effect of that, coupled with the exertions which have been made by the plaintiffs to induce the police to be a little more energetic than they have been, has in fact been so satisfactory that for a period now of six, seven, or eight months matters have gone on in such a way that the plaintiffs do not say that they have now any right to complain. Of course, if there was no actionable wrong at all at first, the learned judge in the court below had no right to bring any pressure to bear on the defendants to give an undertaking. I do not treat it as a voluntary undertaking. And, of course, the defendants are entitled to say that they ought not to have had any such undertaking imposed upon them. But they preferred that to an absolute injunction. The learned judge in the court below accepted the defendants' undertaking in that sense, and in that sense only. In my opinion, that was an undertaking which would not interfere with the reasonable enjoyment by the proprietors of the Palladium Theatre of such rights as they possess, and will at the same time protect the plaintiffs from that which, in my opinion, was a distinct actionable wrong in respect of which they were entitled to relief at the commencement of the action. This in substance is the view which JOYCE, J., took of the case. I agree with that view, and I think, therefore, that this appeal must be dismissed.

SWINFEN EADY, L.J.—I am of the same opinion. I disclaim altogether any notion that in this case the court is called upon to decide whether a theatre queue is at all times, in all places, and under all circumstances necessarily a nuisance. The question which arises in the present case is whether the plaintiffs have established that this queue is a nuisance to them in respect of which they are entitled to maintain the action.

JOYCE, J., stated in his judgment that he found as fact that the persons intending to enter the theatre assembled before the doors were open, and then they were

> "marshalled by the police . . . into a queue so as to form really a stationary crowd standing on the pavement or in the road by the kerbstone in front of the plaintiffs' premises, sometimes as many as five deep [occasionally it went to six or seven deep, according to the evidence] and sometimes reaching a long way past the plaintiffs' premises—in fact, down to the corner at the south end of Argyll Street."

Pausing there, we were told that that distance was something like twenty yards, and that, if a person wished to approach the plaintiffs' premises, all that he had to do was to go down to the end of the queue, twenty yards, and walk back inside the queue, another twenty yards, and he would ultimately arrive at the plaintiffs' premises. The learned judge goes on thus:

> "Consequently, pedestrians going from or to the plaintiffs' premises had at the time when the queue was there to make their way through the crowd forming the queue or go round by the end, so as to get inside the queue; and vehicles were prevented, and necessarily prevented, or hindered, from access to the side of the payment immediately in front of the plaintiffs' premises."

He also finds that it is the fact that certain customers have not been able to approach the plaintiffs' premises—that is to say, not without difficulty. That difficulty they did not desire to encounter, and so they went elsewhere rather than either request the crowd to make way for them, or elbow their way through the crowd, or walk to the end of the queue and then walk back inside it. Rather than be subjected to these nuisances they took their custom elsewhere. The defendants said that the plaintiffs have not produced their books so as to show a falling off of custom. That observation is really irrelevant. Their books would certainly not show any entries in respect of custom which went elsewhere. With regard to any falling off, of course that is quite indefinite. It may be that the business was considerably increasing and remained stationary in consequence of this. The books

would certainly show no sufficient indication of customers from time to time not going to the shop or taking their custom elsewhere.

Then it was urged that all the defendants were doing was done lawfully on their own premises. That begs the question. No one complains of the way in which the theatrical performances are conducted. It is a lawful occupation that music-halls are engaged in, properly conducted. The real point is whether what the defendants have done did not occasion crowds to assemble so as to cause a nuisance to the plaintiffs. It was said that the police should move the crowds on. Why? The very purpose for which they stand there is that they should not move on. The police, I am satisfied from the evidence, do their best to minimise the obstruction. They marshal the crowds. They make them stand in order a certain number deep in order to minimise the obstruction so far as is possible. But it is not for the police to make the crowds go away, because the whole object of their being there is to preserve their places and to get into the theatre, and if there were to be a forcible attempt to move the persons away from the theatre and to send them elsewhere, one could quite appreciate that there might be some disturbance. But no one complains that the police do not do their utmost to minimise the obstruction which is caused and to arrange the crowds in such a way that, persons having been invited to the theatre and waiting until the doors are opened at the commencement of the performance, occasion as little annoyance as may be. Then I am pressed with this. Since the matter was before the judge, in consequence of an undertaking which was given by the defendants, the doors of the theatre have been opened substantially earlier than they were before, and the plaintiffs have said that since that alteration has been made there is nothing of which they complain. It was urged that the defendants could not really prevent the obstruction. They did not ask the people to come earlier than the doors were opened, and they really could not prevent the nuisance. But the short answer to that is to show how readily they have prevented it by opening the doors earlier, and in that way removing the cause of obstruction.

In my opinion, there can be no question about the law applicable to the present case. Collecting together a crowd of people to the annoyance of one's neighbours may be a nuisance. I think that the authorities to which reference has been made clearly establish this. If the natural and probable consequence of what the defendant is doing is to collect a crowd so as to obstruct the highway, that may be an indictable nuisance, and if damage is occasioned to an individual, he may have a right of action in respect of it. I need not go further than *R.* v. *Moore* (5). That was decided in 1832. It is, therefore, upwards of eighty years old. That was a case of a party pigeon shooting. But the third and fourth counts of the indictment had no reference to pigeon shooting. The defendant was found guilty on those counts. LORD TENTERDEN put it in this way (3 B. & Ad. at p. 188): "The defendant asks us to allow him to make a profit to the annoyance of all his neighbours." That is substantially what the defendants are asking us to do here—that is to say, to allow them to make a profit to the annoyance of all their neighbours. The learned judge proceeded thus:

> "If not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle."

LITTLEDALE, J., gave judgment to the same effect. His Lordship said (ibid.):

> "It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position, because if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead anyone to expect the result, he will be answerable for it."

A It is manifest here that if there is a popular performance at the Palladium and the opening of the doors takes place but a short time before the performance commences, the inevitable result will be that persons desirous of securing good positions will attend some time before the doors are opened and so create an obstruction.

TAUNTON, J., in *R.* v. *Moore* (5) refers with approbation to a passage which has B been cited and commented upon in the case now before us. He refers to it in HAWKINS' PLEAS OF THE CROWN. It was taken originally from the statement of HOLT, C.J., in *Betterton's Case* (6), and he cites that passage, as I have just remarked, with approval:

> " 'Also it hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches, or people, &c., as prove generally C inconvenient to the places adjacent.' The present is a very similar case."

That was law, I repeat, in 1832 following the older cases.

In 1834 there was *R.* v. *Carlile* (3). In that case Carlile was indicted for a nuisance. He had exhibited some effigies in his window. PARK, J., BOLLAND, B., sitting with him, in summing-up the question to the jury, put it in this way D (6 C. & P. at p. 647):

> "The gravamen of a charge like this is not whether those effigies were libellous, but whether the defendant, by the exhibition of them at his windows, caused the footway of Fleet Street to be obstructed, so that the public could not pass as they ought to do; and the main question is, whether His Majesty's subjects have been annoyed in this respect."

E That was an indictment. There was referred to in that case the case of a person of the name of Tregear, who had been tried a few years before—that is to say, a few years before 1834 (ibid. at p. 645):

> "A few years ago a person named Tregear was tried for a nuisance. He kept a caricature shop in Cheapside, at the corner of Wood Street; and he, by placing caricatures in the windows of his shop, caused an obstruction in the footway by F the people standing to look at them."

That is to say, he exposed his goods in the way of his trade, and made his windows as attractive as he could. The passage continued thus:

> "He was convicted at the London Sessions, but the recorder afterwards considered that it was not an indictable offence, and no sentence was ever passed on the defendant."

G That was a mistake, because PARK, J., said with regard to that that the defendant, in alleging what he did, had completely misinformed the court, and that that statement was totally unfounded. He said (ibid. at p. 649):

> "I have seen the learned recorder, and he desired that I would relieve him from the imputation of the bad law that is ascribed to him. He says that he H never had any doubt about the law of the case, or the perfect propriety of the conviction; but that, as the defendant submitted and abated the nuisance, no sentence was passed."

The next case was a civil proceeding, *Walker* v. *Brewster* (7). That was an action for an injunction, and it was a case of collecting a crowd of noisy and disorderly people to the annoyance of the neighbourhood. It first came on on an I interlocutory application for an injunction, and in that case PAGE-WOOD, V.-C., said:

> "It appears to me, therefore, that a clear case of nuisance is established in the collecting of the crowd alone."

He cited the earlier cases—that is to say, *R.* v. *Carlile* (3) and *R.* v. *Moore* (5)—and referred to the nuisance as assuming a much worse form, as persons could not reach their houses without having to force their way through the crowd, and then

he held: "That a clear case of nuisance is established in the collecting of the crowd alone." That was in 1867, and was followed in 1869 by a case which is important because it contains a statement of the law by LORD CAIRNS, sitting first as a lord justice to hear an interlocutory appeal and that statement was approved by the Court of Appeal at a subsequent stage of the same action. It is *Inchbald* v. *Robinson* (2); that was a case about a circus. LORD CAIRNS thought that there was not sufficient evidence for an interim injunction, and he dissolved it, but he stated the law. He said (4 Ch. App. at p. 390):

> "There were authorities to show that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act."

The case was tried, and, on appeal, SELWYN, L.J., said (ibid. at pp. 394, 395):

> "A number of cases have been referred to, but the law applicable to the statement is now well settled, and has been clearly laid down by LORD CAIRNS in the present case."

That is an adoption by the Court of Appeal of LORD CAIRNS' statement of the law. That action was followed in 1893 by *Barber* v. *Penley* (1). I will not refer to that again, as the Master of the Rolls has dealt with it in detail. Again, a little later in the same year, STIRLING, J., had before him *Wagstaff* v. *Edison Bell Phonograph Corpn., Ltd.* (4).

In my judgment, there can be no question really about the law. Whether the facts in each individual case constitute a nuisance depends upon the degree of annoyance and obstruction which is caused. In the present case I am quite satisfied that the plaintiffs have established an intolerable nuisance, an actionable nuisance, and one which the defendants are and have been able to obviate by a slight alteration in their arrangements. One would have thought that the comfort of persons attending the theatre would be much greater if they were admitted an hour, or half an hour, earlier, instead of having to stand in the wet and in the mud in the gutter. The new arrangements, so far as the plaintiffs can see, appear to have worked well. There is nothing now of which they can complain. I am quite satisfied that when the action was brought there was an actionable nuisance in respect of which the plaintiffs would have been entitled to an injunction, but the order made at the trial was an excellent substitute for the injunction. For these reasons I think that the judgment of Joyce, J., was right, and that this appeal fails.

PHILLIMORE, L.J.—I have the misfortune to differ from JOYCE, J., and from the other members of this court, and I express my opinion with very considerable diffidence. But having, after much reflection, formed an opinion on the subject, I think it my duty to express it.

[HIS LORDSHIP stated the facts and continued:] Counsel for the plaintiff has said that he is prepared to contend that if a queue extends beyond the front of a theatre and in front of either a private house or a shop, and is sufficiently often there, it is an actionable nuisance, and will entitle the aggrieved person to obtain an injunction. After that I think it is idle to say that we are deciding this case on the special circumstances of the case. The special circumstances of the case are that this is very nearly as inoffensive a queue as can be seen. At least, that is my view. Therefore, I think that the decision in the present case is one of considerable importance. It is suggested that it is very easy for the defendants to cure the mischief. I do not know that we have any right to impose upon one of the King's subjects that he shall do something in the conduct of his business which he does not wish to do, on the ground that it does him very little hurt and will save his neighbour from a great deal, unless the neighbour has a right of action. I confess that I appreciate the observations of counsel

for the defendants that we do not really know that what the undertaking involves is a cure. It is not that the plaintiffs admit that it is a cure. It is that the plaintiffs assert that it is a cure. I am not sure that they are right. In the summer months it may well be that opening these doors half an hour earlier may save mischief. It may be so if the performance is not very attractive. But one's experience of the world is that if a thing is sufficiently inviting people will come sufficiently early, and if the doors are opened half an hour earlier it may only throw the starting of the queue back half an hour before then. That is all really that I think it necessary to say upon the facts. I think it comes to this, that we have got to decide whether such a queue as is formed in the present case is an actionable nuisance.

I am afraid that I must travel through a few of the authorities, and I must frankly say that, with the exception of *Inchbald* v. *Robinson* (2)—which I think, upon reflection, supports the defendants' contention—the cases require to be distinguished. *Prima facie* they are all in favour of the plaintiffs. But, nevertheless, I think they ought to be distinguished. And I think that the proposition for which the plaintiffs contend is a very mischievous proposition, and very calculated to interefere with trade and business. I will deal with the cases in order of date.

As to *Betterton's Case* (6) I need say very little, except that it has been relied upon in other cases, and I do not think that it is any authority at all. There are no less than three reports, or notes, of *Betterton's Case* (6). There is one in SKINNER'S reports, there is one in HOLT'S reports, and there is one in the MODERN REPORTS. It appears that *Betterton's Case* (6) began in this way: What one may call a prerogative writ of prohibition, not in an action was issued by the court to prevent the opening of the New Playhouse, as I think it was called. SKINNER was himself one of the people who applied for the writ, and he says in this account of it, that at a later stage they came to him for advice, and he did not really like taking up the matter, as he was himself, nominally at any rate, one of the people who had applied for the prohibition, or is recited to have applied for the prohibition. Whether the prohibition issued, as prohibitions in those days very often did issue, entirely ex parte and without motion to the court is not clear. That was an evil much complained of by the judges of the ecclesiastical courts, and as to which anybody will see a great deal of interesting discussion in LORD COKE'S reports. Whether the prohibition issued on a mere suggestion, and then, equally on a mere suggestion, an attachment was moved for on the ground that the prohibition had not been obeyed, and then the suffering persons came to move to dissolve the attachment, or whether, before the attachment, in some way they made an application to stay proceedings, I have not yet, in the time at my disposal, been able to discover. At any rate, what the court said was that the parties were not aggrieved by the prohibition going. They were not aggrieved by the attachment going, because they could plead to it. It was something which they could traverse, and then the very truth of the matter would be tried. But SIR BARTHOLOMEW SHOWER, who was one of the advocates, would not have even that. He said that they were aggrieved, and then the court adjourned the matter for further consideration, and apparently it dropped. Certain observations were made about playhouses and how far they might be considered as nuisances. With regard to that, again, I have not had time to look into the matter. But I think that it will be found that in those days the courts exercised a kind of executive control in assizes and quarter sessions, and probably in London by the court in Banc, over all places of public amusement, and probably over alehouses, until the Licensing Acts grew up. I will merely mention one illustration which I have found in MR. WEBSTER'S book on ENGLISH LOCAL GOVERNMENT vol. 3, p. 172, where it appears that, on a complaint of the inhabitants, the magistrates summarily closed all the theatres and dismissed the players out of the town. I think that is the origin of the writ of prohibition which went in *Betterton's Case* (6). I observe that it is pointed out by the court that the complaint really was that of the patentees of a rival theatre, and not any

inhabitant who suffered by a nuisance. I have said, therefore, all that is necessary, and perhaps more than necessary, about *Betterton's Case* (6).

I come to *R.* v. *Moore* (5). That, I think, wants a little careful consideration. I think SELWYN, L.J., points out one very important matter in regard to *R.* v. *Moore* (5) in his judgment in *Inchbald* v. *Robinson* (2), to which I am coming in a moment. There were four counts in the indictment. The first and second (3 B. & Ad. at p. 184) were that the defendant kept

> " Certain inclosed lands, grounds, and premises near to the King's highway, and to private dwelling-houses, for the purpose of persons frequenting such grounds and meeting therein to practise rifle shooting, and to shoot at pigeons with guns, and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose; and did unlawfully and injuriously permit and suffer and cause and occasion a great number of idle and disorderly persons, armed with guns and firearms, to meet and assemble in the streets, highways, and other places near and about the said inclosed premises of him (defendant), discharging firearms and making a great noise, disturbance, and riot, by means whereof the King's subjects were disturbed and put in peril."

Those seem to be the two counts slightly summarised; it is a little difficult to see where one count ends and the other begins. According to the report (ibid.):

> " The third and fourth counts were for keeping a ground for rifle shooting at a target, and causing persons to assemble and shoot there, by means whereof, &c. (as before)."

I will supply that: " By means whereof the King's subjects were disturbed and put in peril." The defendant pleaded not guilty. It was proved that he was a gun-maker; that he had taken some land and converted it into a shooting ground where persons came to practise with rifles at a target and to shoot at pigeons. Separately they shot at a target and at pigeons. The report proceeds thus (ibid. at p. 185):

> " It was also proved that, as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds and in the neighbouring fields to shoot at the birds as they strayed; these persons were called scouts; and there was some evidence to show that the defendant employed people to keep them off his own grounds. Some injuries were said to have been received from the bullets and shot used in these grounds; but, as the defendant contended, they arose entirely from the scouts, for whose acts, he urged, he could not be responsible. LORD TENTERDEN, however, thought otherwise, and directed the jury to find him guilty on the first four counts [that is, all the four mentioned] but reserved leave for him to move to enter a verdict of not guilty on the first two."

Therefore the third and fourth counts for keeping a ground for rifle shooting, by means whereof the King's subjects were disturbed and put in peril, were held good counts, and there can be no doubt that they were perfectly good counts, and if there were some stray shots from those acts which did some mischief, there would be no reason for giving the defendant leave to move with regard to the other two. But he moved with regard to the other two, and he failed, and, in my opinion, he failed because what he did was the act of dispersing pigeons over the ground, and thereby inducing people to come and shoot them. I think he was responsible, on the same sort of principle as anybody who sends any animal which is under his control out of his control, either on the highway or on his neighbour's grounds. LORD TENTERDEN said (ibid. at p. 188):

> " Here the defendant invites persons on his own ground to shoot pigeons. The effect of that is that idle people collect near the spot."

A Why? Not to witness the entertainment; nobody suggested that, but to shoot.

> "They tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance."

LITTLEDALE, J., follows that up by saying that of course the defendant does not want the idle people there, but that that is the probable consequence of what he has done, and thereupon he is convicted. In my view, that case—as I think I shall B show in a moment SELWYN, L.J., thought—turns, as regards those two counts, on the fact that he dispersed the pigeons about the land.

R. v. *Carlile* (3) is no doubt in many respects a very strong case for the present plaintiffs, and it must be agreed that, in the course of his summing-up, PARK, J., —who, no doubt spoke with the approval of the other judges who were on the C Bench, BOLLAND, B., and SIR JOHN CROSS—did refer to and explain what the recorder had done in the case of the person named Tregear. Mr. Carlile, who was conducting his own defence, did what almost every defendant in person does, that is to say, he introduced a quantity of irrelevant matter, being sometimes ill-informed as to the facts; and he said: "What a shame to prosecute me when Mr. Tregear was let off, as, although the jury found him guilty, the recorder on further con- D sideration thought there was no legal offence." The recorder disclaimed that with great emphasis, and PARK, J., Mr. Carlile having told the jury this, thought it right to correct the mistake which Mr. Carlile had made. I do not know that he means to say that he approves of the recorder's law. But if he does there is a distinction between that case and *R.* v. *Carlile* (3), because PARK, J., says this (6 C. & P. at p. 649):

E

> "In the present case, one question is, whether this act of the defendant was at all necessary for the bona fide carrying on of his trade; for if it was, and he did not take up more time in the doing of it than was necessary, the law would do what is could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us today, that he considers his trade to be injured by it."

F The decision in *R.* v. *Carlile* (3) is to the effect that a man is responsible for collecting a crowd in front of his shop, by putting up some representation which is intended to make the crowd stop, and which will make the crowd stop, unless he has done it for the lawful purpose of carrying on his trade, and in the reasonable exercise of it. The summing-up goes as far as that, but, in my opinion, it goes no further.

Walker v. *Brewster* (7) is, I think, a distinct authority against the defendant G here. There were three distinct grounds of complaint in *Walker* v. *Brewster* (7), and, no doubt, PAGE-WOOD, V.-C., whose authority is enormous, laid the greatest weight upon that which, in my humble opinion—and I must speak my opinion—was the weakest ground. He, no doubt, put to the forefront the collection of disorderly people whom the defendant did not wish to come there, but for whose coming he said he was responsible. To my mind, it is a most extraordinary proposi- H tion that a man should be responsible for bringing people whom he does not want to bring, but no doubt PAGE-WOOD, V.-C., did decide the case on that ground; and all that can be said about it is that there were ample grounds connected with the other points made in the case why the injunction must stand, and why nobody could have safely appealed from it. But it is otherwise a decision which does not bind us here, although it is, no doubt, a bold decision of a very eminent judge.

I *Inchbald* v. *Robinson* (2), to my mind, has been misconceived by counsel for the plaintiffs here. There was a case of *Inchbald* v. *Robinson* (2) and a case of *Inchbald* v. *Barrington* (2). *Inchbald* v. *Barrington* (2) succeeded on the ground of noise; *Inchbald* v. *Robinson* (2) failed on the ground that there was no noise proved, and no nuisance from the crowd such as the court would restrain. It came first of all before CAIRNS, L.J., on appeal from MALINS, V.-C., on a motion. His Lordship dissolved the injunction; that was his decision. In the course of dissolving it he said that he was far from satisfied that any case of nuisance, as that term

was understood at law, could be maintained by the plaintiff. He then proceeded, rather obiter, to say that which, however, again I do not think anybody could criticise (4 Ch. App. at p. 390):

> "There were, no doubt, many authorities to the effect that noise in the immediate proximity of a residence might become a nuisance, and might be abated as such; there were authorities to show that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act."

So it might be if the collection is done in certain ways and for certain purposes. His Lordship, however, said that the evidence, which might be very different at the hearing, failed entirely to satisfy him, as it stood, that the noise of the performance was such that it would occasion a nuisance to a house so far off as that of the plaintiff, or that there was any collection of crowds to such an extent as to block up the thoroughfare or occasion a nuisance to the plaintiff. Assuming the plaintiff's law was right, and certainly not at the moment thinking of questioning it, the lord justice thought that the facts of the case did not bring it up to that law. When the case came to the Court of Appeal I think that the first sentence of SELWYN, L.J.'s, judgment should not be read without the second or third (ibid. at p. 394):

> "We can now dispose of both these appeals which stand on very different grounds. A number of cases have been referred to, but the law applicable to the subject is now well settled, and has been clearly laid down by LORD CAIRNS in the present case."

What was the law which SELWYN, L.J., thought LORD CAIRNS had laid down? It follows in the next sentence:

> "The court cannot enter into such a question as whether a circus at a particular distance from a house must be a nuisance, nor, when a circus has been erected, is the court bound to have it tried at law whether it is a nuisance. The court may, if it thinks fit, send the question of nuisance to be tried by a jury, but it is not bound to do so, and if the evidence is clear, the duty of the court is to dispose of the case at once."

That appears to have been the law as laid down by LORD CAIRNS of which SELWYN, L.J., approved. Then he comes to deal with some of the authorities (ibid. at pp. 395, 396):

> "The case of *R.* v. *Moore* (5) was pressed upon us, but the circumstances there were completely different; this is a case of an indoor performance, that was a case where pigeon shooting took place in the open air, and crowds of people assembled outside the inclosure to shoot at stray pigeons."

Then he refers to *Walker* v. *Brewster* (7) (ibid. at p. 396):

> "*Walker* v. *Brewster* (7), which was much relied on, was also a case of outdoor performance, where people would assemble outside the ground, since the fireworks could be seen and the band heard almost as well outside the ground as within it."

I agree that he does not seem to dispute the law as laid down in *Walker* v. *Brewster* (7); he distinguishes it. As regard GIFFARD, L.J., he says this (ibid. at p. 397):

> "The whole of the case made by the bill is, that the circus will draw together a great crowd of disorderly persons. The evidence in support of this allegation is insufficient, and if an injunction in such a case were to be granted and upheld, it would prevent the setting up near a dwelling-house any exhibition likely to be attended by a large number of people."

That sentence seems to me to be a sentence of some importance.

Now comes *Barber* v. *Penley* (1), and that case is certainly a case in point. I am afraid I must say that I disagree with *Barber* v. *Penley* (1), and I do not agree with some of the observations which counsel have made. I think that NORTH, J., intended to say, and did say, that in his opinion what was done in that case by the proprietors of the Globe Theatre was an actionable nuisance and would support an injunction. I think that he was to a considerable extent induced by a not sufficiently accurate examination (if I may say so) of the old cases, such as *R.* v. *Moore* (5) and *Betterton's Case* (6), all of which he seems to refer to without very much analysis. But there is one thing to be said about *Barber* v. *Penley* (1). NORTH, J., hardly had the courage of his opinions. I know he says that it is not necessary now to grant an injunction, and I know he says, and puts it in his order, that the plaintiff admitted that there was no nuisance. But I do not think that one should forget why there was no nuisance. NORTH, J., says ([1893] 2 Ch. at p. 460):

> "In the first place, I do not think it necessary; no injunction is wanted now, because, as the plaintiff's own affidavit, to which I have just referred, says, the nuisance has been put a stop to. The police have taken the matter in hand, and there is no reason whatever to anticipate that they will not duly perform their duties and prevent any nuisance arising."

Apparently the police can in these cases prevent a nuisance; and, as that is so, is not the real remedy to go to the police to prevent a nuisance?

Wagstaff v. *Edison Bell Phonograph Corpn., Ltd.* (4) is another very strong decision, and amounts to this, that one trader may not make his shop window—which is, after all, the most important element in the business of a shopkeeper in the metropolis—so attractive as to bring crowds round it in such a way as to interfere with the people having the easiest and most direct and commodious access to the next shop. I am sorry to say that I entirely disagree with that principle. I believe that every trader has a right to make his shop window as attractive as possible, and that he is not responsible for crowds assembling to gaze at that shop window, and that it is for the police to regulate the traffic and to make those persons, when they stand longer than they have a right to stand on the highway, move on. If that be the case with regard to attractions which require people at the moment to stop, it is à fortiori the case when the attraction is in the future, when people are not invited to be there and stop at all, but are only invited to come at a particular hour, and, in order that they may themselves be certain to get access at that hour, come beforehand and loiter about. In my opinion—I am sorry to have expressed it at considerable length, but in my view this is a serious case and there is much to travel over—there was no actionable nuisance in this case at all, and the defendants ought not to have been put upon any undertaking, and ought not to have been made to pay the costs of the action, and this appeal ought to have succeeded. But as the majority of the court are of the opposite opinion, it will be dismissed with costs.

Appeal dismissed.

Solicitors: *Beaumont, Son & Rigden*, for *Maples & McCraith*, Nottingham; *Chamberlain, Johnson & Levy.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS AND OTHERS

[HOUSE OF LORDS (Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw, Lord Mersey and Lord Robson), October 26, 27, 1911, February 26, 1912]

[Reported [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342]

Trade Union—Action against union—Competency—Claim by personal representative for unpaid benefit accruing due before deceased member's death—Unlawful purposes of union—Form of action—Common law action—Union sued in registered name—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 4 (3) (*a*).

The widow of a deceased member of a trade union claimed from the union, as the deceased member's personal representative, sums in respect of sick and superannuation benefit which had become due to the deceased from the union before his death, but had not been paid to him, and, alternatively, the return of money paid by the deceased to the union during his life as contributions. Some of the rules of the union, which were not severable from the other rules, were held to be unlawful as being in restraint of trade.

Held: the action had been instituted with the object of directly enforcing an agreement for the application of the funds of the union to provide benefits to members within s. 4 (3) (a) of the Trade Union Act, 1871, and, therefore, the court could not entertain it; nor could the action be maintained at common law since some of the purposes of the union, as expressed in the rules, were unlawful.

Per LORD ATKINSON: A trade union cannot be sued in a common law action in its registered name.

Notes. Applied: *Thomas* v. *Portsmouth "A" Branch of Ship Constructive, etc. Association* (1912), 28 T.L.R. 372. Followed: *Miller* v. *Amalgamated Engineering Union*, [1938] 2 All E.R. 517. Referred to: *Baker* v. *Ingall*, post p. 727; *Kelly* v. *Natsopa*, [1914–15] All E.R. Rep. 576; *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; *Pratt* v. *British Medical Association*, [1918–19] All E.R. Rep. 104; *National Union of General and Municipal Workers* v. *Gillian*, [1945] 2 All E.R. 593.

As to actions against trade unions to enforce agreements, see 32 HALSBURY'S LAWS (2nd Edn.) 473 et seq., and for cases see 43 DIGEST 96, 97.

Cases referred to:

(1) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1900), [1901] A.C. 426; 70 L.J.K.B. 905, n.; 83 L.T. 474; 50 W.R. 44; 44 Sol. Jo. 714; reversed [1901] 1 K.B. 170; 70 L.J.K.B. 219; 83 L.T. 474; 64 J.P. 788; 49 W.R. 101; 17 T.L.R. 68, C.A.; reversed [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 92, *957*.

(2) *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H.L. Cas. 712; 2 L.T. 707; 6 Jur. N.S. 985; 11 E.R. 608, H.L.; 9 Digest (Repl.) 713, *4727*.

(3) *Russell* v. *Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474; 44 L.J.Ch. 496; 32 L.T. 685; 23 W.R. 887; 43 Digest 660, *935*.

(4) *Hilton* v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur. N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex.Ch.; 43 Digest 10, *50*.

(5) *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153; 8 B. & S. 175; 36 L.J.M.C. 43; 15 L.T. 563; 31 J.P. 148; 15 W.R. 336; 10 Cox, C.C. 393; 43 Digest 109, *1150*.

A Also referred to in argument:

Chesman v. *Nainby* (1727), 2 Stra. 739; 2 Ld. Raym. 1456; 93 E.R. 819; affirmed 1 Bro. Parl. Cas. 234, H.L.; 43 Digest 28, *206*.

M'Allen v. *Churchill* (1826), 11 Moore, C.P. 483; 4 L.J.O.S.C.P. 183; 43 Digest 67, *707*.

Mallan v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 B Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

Green v. *Price* (1845), 13 M. & W. 695; 9 Jur. 857; 153 E.R. 291; affirmed sub nom. *Price* v. *Green* (1847), 16 M. & W. 346, Ex.Ch.; 43 Digest 19, *122*.

Hill v. *Levey* (1858), 3 H. & N. 702; 28 L.J.Ex. 80; 23 J.P. 36; sub nom. *Levey* v. *Hill*, 4 Jur. N.S. 589; 6 W.R. 691, Ex.Ch.; 37 Digest 539, *15*.

Collins v. *Blantern* (1767), 2 Wils. K.B. 342; 95 E.R. 847; 1 Digest (Repl.) 47, C *353*.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL and KENNEDY, L.JJ.), affirming a decision of PHILLIMORE, J., on points of law raised on the pleadings: see [1910] 1 K.B. 506.

The appellant, Jane Elizabeth Kate Russell, was the widow of James Russell, deceased, and the respondents were a trade union registered under the Trade Union D Acts, 1871 and 1876, and the trustees of the union. By her statement of claim the appellant alleged that James Russell was a full member of the defendant society and had paid his contributions regularly, and that she was entitled as his personal representative to sick and superannuation benefit which had become due to him from the society before his death, and, alternatively, to a return of the money paid by him to the society. The respondents pleaded (inter alia) that the court E had no jurisdiction to entertain the action by reason of the provisions of the Trade Unions Acts, 1871 and 1876, and the Trades Disputes Act, 1906, and that any contracts subsisting between James Russell and the respondents were in restraint of trade and unenforceable. On Mar. 29, 1910, an order was made by MASTER ARCHIBALD that the points of law raised by the respondents in the defence should be set down for hearing and disposed of forthwith and before the trial of the action. F The points of law were heard before PHILLIMORE, J., on April 29, 1909, and he gave judgment to the effect that the action would not lie against the respondents and ordered that judgment should be entered for the respondents with costs. An appeal by the appellant was dismissed by the Court of Appeal, and she now appealed to the House of Lords.

G *Chalmers Hunt* and *C. P. Hawkes* for the appellant.

Sir R. Finlay, K.C., and *Clement Edwards* for the respondents.

Their Lordships took time for consideration.

Feb. 26, 1912. The following judgments were read.

EARL LOREBURN, L.C.—This is in effect a demurrer, and we know nothing H of the real merits of the dispute. All that we have to settle is the law as raised upon the pleadings. The question argued before PHILLIMORE, J., has not been raised either in the Court of Appeal or in this House, and the question argued and decided in the Court of Appeal is not that on which I think that the case should now be determined. It was held by the Court of Appeal that some of the rules were illegal, being in restraint of trade in the sense that they are oppressive and I against public policy, and that they are so associated with the rules upon which this action is founded as to make the latter unenforceable. I should desire this point to be argued before expressing my opinion on it, but I do not think that it is necessary to enter upon it at all for the decision of this case. It is undesirable to decide such a point in this case, where counsel on both sides unite in condemnation of the rules, and in adverse interpretation of their effect. Counsel on both sides laboured to show that the rules were oppressively in restraint of trade. I am of opinion that this appeal should be dismissed for the following reason: The action

is against a trade union directly to enforce or recover damages for breach of an agreement to provide benefits for members.

LORD MACNAGHTEN.—The respondents are a registered trade union and certain officers of the union. The appellant is the widow of a deceased member of the society. As representative of her late husband she claims a sum of money to which he appears to have been entitled at the time of his death under the terms and conditions of his agreement with the society contained in its certified rules. The defence, and the only defence which we have to consider at this stage of the proceedings, is that the society was and is at common law an unlawful association by reason of its purposes being in restraint of trade, and that, although those purposes are, according to the Trade Union Act, 1871, not unlawful so as to avoid the agreement and trust in respect of which she is now suing, the court is prohibited or prevented by s. 4 of the Act from entertaining her application. If the respondents can make good the position on which their defence is founded, they are undoubtedly entitled to the protection of the statute, and so the action must fail.

A trade union is merely an unincorporated society of individuals. The designation itself does not import illegality. There have been many and probably there may still be some trade unions lawful in every point of view, and not depending for their legality on the Act of 1871. This proposition is recognised plainly in the definition of a trade union contained in the Act of 1876. In the case of a trade union not dependent on the Trade Union Acts for its legality or immunity, the law is open to members of the society just as it is in the case of other voluntary societies for the purpose of enforcing contractual rights and trusts against the association. The only question, therefore, seems to be this: Is this trade union, apart from the Act of 1871, a lawful association? The answer must depend on a consideration of its purposes, as manifested in its rules. It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful; and I cannot help agreeing with the learned judges of the Court of Appeal that such is the character of some of the rules of this society, and, further, that, having regard to the constitution of the society, the powers vested in its executive officers, and the blending of its funds for all purposes, it is impossible to separate what is legal from what is not legal. I am, therefore, of opinion that the appeal fails, and must be dismissed with costs. **LORD MERSEY** desires me to say that he has read this opinion, and entirely agrees with it.

LORD ATKINSON.—The trade union in this case is sued in its registered name. It is true that in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (1) it was held that a trade union might be sued in its trade name for wrongs committed by its agents, but when the judgments delivered in that case are examined, and especially the judgment of FARWELL, J., which was unanimously approved of and adopted in this House, it will be seen that the decision was based entirely on the provisions of the Trade Union Act, 1871, as amended by the Act of 1876. The conclusion which, as it appears to me, must be necessarily drawn from these judgments is this—that if the Act of 1871 had contained a provision to the effect that nothing in it should enable any court to entertain any legal proceedings founded upon any tort committed by a trade union through its agents, the decision of this House in that case would have been precisely the opposite of what it was, and that it would have been held that the trade union could not, in that case, have been sued eo nomine. But the provisions of s. 4 as regards the present action are in effect similar to the hypothetical provision above mentioned in its relation to such torts. All the reasoning based upon those provisions of the Act of 1871 upon which those judgments were founded is, therefore, inapplicable to this action. This is an action based upon an agreement "to provide benefits to members," and is instituted directly to enforce that agreement, or to recover damages for the breach of it. The statute gives no support to such an action. Whether it can be

instituted in its present form or not must depend upon the common law. It is not a representative action such as is frequently instituted in a court of equity. It is a common law action, and I am clearly of opinion that the defendant society cannot be sued in such an action in its registered name; neither can the trustees be sued in it in their character of trustees. Partners may, no doubt, be sued in the name of their firm, but that is under legislation by the rules and orders of 1883. For these reasons I think that the action must fail. I do not think that *Simpson* v. *Westminster Palace Hotel Co.* (2) and *Russell* v. *Wakefield Waterworks Co.* (3) apply on this point. This is, no doubt, a somewhat technical point, but I fully concur with the Lord Chancellor in thinking that it is most undesirable, having regard to the way in which the case was presented by counsel to your Lordships, to decide the important issues, raised, as I understand, for the first time in the Court of Appeal. I, accordingly, express no opinion on them. The appeal should, I think, be dismissed with costs, but I base my judgment on the point which I have already indicated.

LORD SHAW.—This is an action by the widow of James Russell, a former member of the Amalgamated Society of Carpenters and Joiners. This society is a duly registered trade union. Russell had been a full member, having paid his contributions regularly for about forty years. In the later years of his life he fell into ill-health, and was paid sick benefit until his removal by the guardians of the poor to St. Pancras Infirmary, and thence to a lunatic asylum. He remained in the latter confinement until his death. The object of the action is to obtain payment of "a sum of money representing accumulated superannuation benefit" alleged to be due to Russell during the period of his incapacity. There are other conclusions in the claim—for declarations, an injunction, and alternatives, but these need not be referred to; they do not add to nor in substance vary what is the real object of the action as above described, except the alternative claim for the repayment of all Russell's contributions to the society during his lifetime. They were not referred to in argument, and they are met by the same defence.

The main defence is that a court of law has no jurisdiction to entertain the claims by reason of the provisions of the Trade Union Acts, 1871 and 1876. The reference is substantially to s. 4 of the Act of 1871, under which it is provided:

> "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of . . . (3) Any agreement for the application of the funds of a trade union—(a) to provide benefits to members."

Neither party has entered upon the question whether the points in dispute are excluded from determination by a court of law in consequence of their having been contractually remitted for final settlement within the association and by its officers. But both parties have apparently determined to base their case on the other and broader ground—namely, of what their rights are at common law and by statute. By s. 3 of the Act of 1871:

> "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or avoidable any agreement or trust."

Were it not for the elaboration of the appellant's argument, it would be unnecessary to say that if the purposes of this association be in restraint of trade, the union is treated by the statute as one which would be unlawful at common law. Then the Act (s. 3) steps in to declare that it shall not for that reason by unlawful, but (s. 4) that nothing in the Act shall enable a court of law to entertain legal proceedings to enforce the agreements which it cites. Quoad, these things remain as they were. That is to say, if the association be illegal on account of its purposes being in restraint of trade, it remains the case, as it was before, that the law cannot be invoked to support it, to regulate it, or to control it in the particular matters set out in s. 4 of the Act, these matters including the present claim. Accordingly, the

argument stated to the House was very simple—namely, if the association's purposes were in restraint of trade, then the action is excluded by the statute, just as, but for the statute, it would have been excluded by the common law. The whole of this argument appears to me to be unassailable.

So the real question would appear to be one determinable by a survey and construction of the rules of this society—namely, whether under these rules its purposes are in restraint of trade. This is how the case was treated, and, in my opinion, most appropriately treated, in the Court of Appeal. Upon this question I regret that we were not favoured with two sides of an argument. Counsel on both sides concurred in presenting one side of the case, and both agreed in expounding their views upon the footing that some of these rules were in restraint of trade. Such a state of the discussion causes a certain uneasiness as to whether all the materials for the determination of the case have been made fully available. The learned judges of the Court of Appeal have made a most careful analysis of the rules. In view of the importance of the question, and out of respect for those learned judges, I have thought it right to make an independent examination of the rules on my own behalf. Having done so, I cannot say that I feel any surprise that the counsel for the society should have admitted frankly that they were in restraint of trade, and should have grounded upon that his argument for the exclusion of this action from cognisance or determination of a court of law. The rules contain careful provisions for the internal government of the society, and there are conferred upon the managing committee, the united trade committee, and the branch committees, powers of command, control, and government which are of the most far-reaching and effective character. Under r. 36, where members, at a summoned meeting of the branch, consider it to be to their best interest that members should refuse to work with non-union men, they—the members—"shall be entitled to trade privileges." The meaning of that, as interpreted by other sections of the rule, is that, for instance, where members have been six months in the society, and leave their employment "under circumstances satisfactory to the branch, branch committee, managing committee," &c., they shall be entitled to the sum of 15s. a week; and under a further section of the same rule provision is made for the case of

> "any member or members who may be withdrawn from their employment on the instruction of the managing committee, united trade committee, or branch committee."

Under various rules provision is made for expulsion from the society, and frequent reference is made to r. 48, r. 4, for instance, providing for fine, suspension, or expulsion "upon satisfactory proof being given that such member has acted contrary to the provisions of r. 48, cl. 1." By r. 27, which affects the duties and powers of officers conducting trade movements, power is given to those committees to fine, suspend, or expel any member who has refused to comply with the committee's decision, or has violated any conditions of the same rule—that is, r. 48. The last-mentioned rule provides in most comprehensive terms for fine, suspension, or expulsion of any member upon satisfactory proof being given that such member has refused to comply with the decision of a managing committee, branch committee, or branch. Under the organisation, accordingly, it is apparent that the workman, considered as a free disposer of his own labour, is thus confronted with a situation of great seriousness should his freedom conflict with the decisions of any of the committees referred to. He is further exposed to liability to fine, suspension, or expulsion if he has "wilfully violated the recognised trade rules of the district in which he is working," or takes "a sub-contract or piecework," or is working for certain classes of employers, or fixes, uses, or finishes work made under unfair conditions either at home or abroad, the judgment upon this subject being, apparently, the judgment of the governing bodies referred to. So far as the individual liberty of the worker is concerned, it is accordingly fairly plain that trade in respect of him is restrained, but that would not be sufficient to satisfy the

A conditions of unlawfulness unless there were also restrictions such as to affect trade in general or the public at large. Upon this subject it appears, however, that provisions are made for granting assistance to other trades, and for levies of 3d. per week per member "in the event of any great struggle between capital and labour in our own or any other trade."

I have only indicated these points from the rules for the purpose of saying that B the course adopted by the counsel for the society was the perfectly natural and proper course of a frank admission that these rules are in fact in restraint of trade. They mean, and appear, to provide the materials and machinery under which, according to the decision and at the direction of the officials of the association, a particular trade may not merely be restrained, but, by concerted action with other branches of industry, that trade, and the trade of the country at large, may be C actually paralysed. The contest in argument was, however, as I understood it, that while some of the rules might be, and were, in restraint of trade, these were separable from the others, all of which were legitimate, and that the objects of the association were, upon a correct survey of the rules as a whole, not tainted by unlawfulness. It must be admitted that many of the objects of the association are of a purely friendly society character, and that the highly valued provisions for D sick, unemployed, accident, superannuation, and funeral benefits are familiar, and entirely within the law. Nor can it be denied, in the general case, that the occurrence here and there of certain passages in the rules of such societies, which would point to action outside the law, would not be of itself sufficient, so to speak, to taint the objects of the society as a whole. Further, the reference to the occurrence of strikes in the rules, or the provisions for the support of members E during a strike, does not, per se, make the society illegal. Strikes may be perfectly legal, or they may be illegal. It depends upon the nature and mode of the concerted cessation of labour. If the concerted cessation is in breach of contract, then it cannot be said to be within the law, any more than can a breach of contract by a single workman. If, on the other hand, a strike be a cessation of labour on the expiration of a contract, there is no necessary illegality there, any more than F in the case of an individual workman completing his current bargain, and then choosing to remain idle. But, of course, in this latter case the concert for the cessation of labour may be for the sole, or deliberate, or obvious purpose of restraining trade, in which case different legal consequences might ensue, and to this I have referred. All these principles, excluding the exceptional case last mentioned, are now well settled by authority, and they are no longer questioned.

G But the two outstanding obstacles to the separability of the objects of this society appear to be those of finance, on the one hand, and of coercive discipline and expulsion, on the other. The massing of funds has been considered by trade unions to be of vital importance in conducing to their effectiveness in action, and to be justified by sound general policy. Such massing occurs here, and the segregation of funds into those for the promotion, on the one hand, of objects which are within, H and, on the other, of objects which are outside, the law is thereby prevented. In the next place the power of fine, suspension, and expulsion from the society is of a character so effective and drastic as to take no account of distinctions between one object of the society and another, and to have a cumulative and complete effect with regard to the contributions of a member as a whole. If expulsion takes place by reason of a workman pursuing his avocations alongside of a non-union man, it is I equally effective with expulsion which takes place by reason of his having failed for a stipulated period to make his contributions to the society; or if, again, the judgment of the individual workman, or even of a body of workmen, should differ from the decision of the committee with reference to a dispute in another industry with which it is averred that his own trade has no sympathy, or is not concerned, then equally he forfeits by expulsion all his contributions made to the society, including the provisions for sickness, accident, or unemployment, for which the rules provide. In these circumstances, and upon the construction of the rules

as they have been presented, I cannot see my way to give effect to the separability contended for. I think, upon this point, that the arguments presented on behalf of the society are also sound, and that its objects, thus taken together and as a whole, stand open to the objection of being in restraint of trade and to the plea founded thereon. I am of opinion that the plea should be sustained, and that this appeal fails.

LORD ROBSON.—The argument in support of the appellant's claim appears to have been based on different grounds in the various tribunals to which it has been submitted, and there is still some obscurity as to what precisely are the propositions of law which her counsel invites your Lordships to affirm. Before PHILLIMORE, J., the main contention was that, although the appellant's deceased husband could not have maintained this claim, yet she, as his nominee or representative under s. 10 of the Trade Union Act 1871 Amendment Act, 1876, and s. 7 of the Provident Nominations and Small Intestacies Act, 1883, was entitled to do so. That hopeless contention was not raised in the Court of Appeal. There the appellant's counsel contended that the first question was whether the objects of this society were so much in restraint of trade as to be illegal at common law, and so affect the rules of the society as a whole that they are not capable of being severed for the purpose of enforcement in a court of law. Before your Lordships he went a little farther, and admitted explicity that at least one important rule—No. 48—was in unreasonable restraint of trade. He could scarcely do otherwise. His argument was then narrowed to the point that though some of the objects of the society were illegal, yet they were distinct and severable from the other objects, such as sickness and superannuation benefits, and, therefore, as the contract between the appellant's deceased husband and the society related to those latter objects only, it was enforceable at law. Of course the appellant could get no help from the trade union statutes, for while, on the one hand, modifying the doctrine of restraint of trade in favour of trade unions, those statutes were careful, on the other hand, to enact that their provisions should not be used in the enforcement of contracts between trade unions and their members like that now in question.

A question has arisen, or was incidentally mentioned during the course of the arguments, as to whether the action has been properly framed. The appellant has sued the respondent society in its registered name, together with its trustees, who are sued as "trustees and representatives of the said society." It does not appear whether the trustees are or are not "representative" of the society in the sense which would make them proper to be defendants in a representative action. We do not even know if they are members of the society or not, and I think that it must be taken that the action as framed is bad, unless it can be shown that such an action may be properly brought against an association like the respondent society in its registered name. That point was discussed in the *Taff Vale Case* (1), where it was decided by your Lordships' House that the action, which was one of tort, was properly brought against the trade union in its registered name. But the ground of that decision, as stated by FARWELL, J., in the court of first instance, and by some of your Lordships on appeal, was that the trade union had been made liable to such an action by the operation of the Trade Union Act, 1871, which admittedly excluded from its scope a contract of the kind now sued on. LORD MACNAGHTEN adopted a broader ground, and thought that a trade union might be sued in its own name, apart altogether from the Trade Union Acts. LORD LINDLEY appears to have agreed with him, though he was content to affirm the liability of the union to be sued, apart from the Act, in a representative action, while the other noble and learned Lords at least said nothing directly inconsistent with LORD MACNAGHTEN'S view. No objection, however, was taken to the form of the present action by the defendants' counsel, so the point has not been argued before your Lordships, and, as there may be some doubt about it, perhaps it is desirable that the substance of the case should be dealt with.

The first question which is raised is whether the agreement between the respondents and the appellant's husband, as embodied in the rules of the respondent society, is in contravention of the common law doctrine as to unlawful restraint of trade. If so, then the agreement is void, unless what is legal in it can be treated as wholly independent of its illegal objects. For the purpose of dealing with this question it is enough to refer to r. 48. That rule constrains a member by fine, or suspension and threat of expulsion, to comply with the decision of the executive committee as to strikes, and to obey the recognised trade union rules of the district, whatever they may be, as to the conditions of his work. It also prohibits him from

> "taking a sub-contract or piecework, or working for either of those classes of employers (sub-contractor or piece-worker being defined as a person taking the labour of a job only and not supplying the material) or fixing, using, or finishing work which has been made under unfair conditions, either in the United Kingdom or abroad, or contrary to the recognised trade rules of the district in which it has been prepared."

There can be no doubt that before the Trade Union Act, 1871, provisions of this sort were held to be in restraint of trade. *Hilton* v. *Eckersley* (4) and *Hornby* v. *Close* (5), without mentioning others to the same effect, are conclusive in support of that proposition. Indeed, had the law been otherwise, the Trade Union Act, 1871, would have been unnecessary. It was passed after the two decisions which I have just referred to. *Hilton* v. *Eckersley* (4) was decided in 1856 with reference to a trade combination of employers. The facts in that case were that certain mill-owners in Lancashire had bound themselves

> "to carry on or wholly or partially to suspend the carrying on of their works in conformity with the will of the majority . . . present at a meeting."

This was held to be in restraint of trade, because, in the language of Alderson, B., who delivered the judgment of the Exchequer Chamber,

> "the bond was framed to enforce a contract by which the obligors agree to carry on this trade, not freely, as they ought to do, but in conformity with the will of others, and this, not being for a good consideration, is contrary to public policy."

Hornby v. *Close* (5) was decided in 1867, and applied the same principle to similar contracts between workmen. These decisions have never, so far as I know, been disapproved or doubted by the courts, and they may be said, indeed, to have been acted on by the legislature, for it is obvious that the Trade Union Act, 1871, was passed in order to protect trade unions from some of the consequences of the law as declared in those and similar cases. It is, therefore, rather late in the day to contest their authority. The primary object of the Act of 1871 was to protect the right of industrial combination, whether for the purpose of improving the wages and conditions of labour or of increasing the profits of capital. It was framed explicitly on the assumption that, as the law then stood, trade unions were very generally (though perhaps not universally) acting in restraint of trade. This is clear from the definition clause of the Act itself. This definition gave rise to the anomalous situation that, before a trade union could take advantage of the benefits of the Act with regard to registration, &c., it had to prove that its rules were in restraint of trade, for it was only to such combinations that the Act applied. This was remedied by the amending Act passed in 1876, whereby the definition was made to include trade unions whether they were in restraint of trade or not, but this amendment does not substantially detract from the force of the foregoing observations as to the assumed state of the law prior to the passing of the principal Act.

It is to be observed that the Act did not go the length of abrogating or altering the general law against restraint of trade. It grafted an exception on it in favour of certain classes of persons, but by s. 4 it maintained the principle of the old law even against those persons, to the extent of refusing the assistance of the courts

in the direct enforcement of contracts between members of a trade union, when the purposes of the union were in restraint of trade. Had it gone further, and altogether excluded the application of the common law doctrine in this connection, the courts would have been compelled to give full effect by decree, or injunction, to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their immediate necessities might be. Such contracts would then be as legal as any other by which a man limits his freedom of action for a definite time or purpose, and the prospect of the burden which would thus be cast upon the executive, of actively enforcing great numbers of such contracts in periods of industrial hardship or disturbance, was one from which Parliament might well shrink. But the operation of s. 4 of the Act of 1871 is not confined merely to contracts in restraint of trade. Prima facie, the agreements thus excluded from the benefits of the Act are legal and meritorious, and their exclusion can only be due to the fact that they rest, in some degree, upon a consideration involving a restraint of trade which the law tolerates, but will not directly assist. This circumstance has a significant and important bearing on the appellant's contention that claims for sickness and superannuation benefits are unaffected by the character of the general purposes of the union, because those benefits are separable from the rest of the agreement and rest upon an independent consideration. That was not the view of the framers of the statute. They put trade union agreements for what one may call friendly society benefits on the same footing as any other trade union agreements which were in restraint of trade. The reasons for this are obvious. Trade unions generally (including this defendant society) make no separation or distinction of funds between the two classes of benefit. The contributions which a members has to make under r. 8 of the respondent society cover all benefits. There is nothing to show what proportion should be, or in fact is, allocated to sickness and superannuation benefits, and how much to what one may call the militant purposes of the society. In face of the rules it could not be suggested that the respondent society would, or could, in the course of its ordinary working allow such a severance of the different parts of the agreement as is here demanded. The solidarity of its objects is shown by the fact that under r. 48 a member who commits a breach of the trade regulations of the society, or refuses to comply with any decision of the executive committee, however much it is in restraint of trade, may be expelled and thereby forfeit the sickness and superannuation benefits to which he may have contributed for a lifetime. Obedience to the provisions of this rule, which is admittedly obnoxious to the common law doctrine in restraint of trade, is therefore, in the case of this union, an essential part of the consideration for sickness and superannuation benefits, and the contention that those benefits rest upon a distinct and severable part of the consideration for the whole agreement cannot be sustained. I am, therefore, of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Osborne C. Kent; Corbin, Greener & Cook.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re SANDBROOK. NOEL *v.* SANDBROOK

[CHANCERY DIVISION (Parker, J.), July 3, 4, 1912]

[Reported [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 Sol. Jo. 721]

Will—Condition—Defeasance on happening of event of interest already given—Avoidance of condition—Public policy—Uncertainty—Gift to grandchildren provided they shall not "live with, be or continue under the custody, guardianship or control of their father"—Uncertainty as to in what event forfeiture would occur.

By her will the testatrix gave three-fourths of her residuary estate to trustees on trust to pay the income to her two grandchildren until Dec. 31, 1927, and thereafter to divide the capital between them. If either grandchild died before Dec. 31, 1927, without issue there was a gift over. The will contained a clause providing that if at any time before Dec. 31, 1927, either grandchild "shall live with or be or continue under the custody, guardianship or control of their father . . . or be in any way directly under his control" they should forfeit all benefits, profits and income given to them under the will and that "it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under [the] will that he or she or both of them shall separately and individually continue to live free from [their father's] direct influence or control." On forfeiture of the interest of either grandchild under the foregoing condition there was a gift over as if the grandchild had died before Dec. 31, 1927, without issue. Until the testatrix's death, on Dec. 7, 1911, the grandchildren lived with her; afterwards they lived with the testatrix's daughter. The father was a medical officer in the Malay States, and he came on leave to England for six months every two years, on which occasions he wished the children to live with him during their holidays.

Held: the clause was a condition in defeasance of an interest already given, as distinct from a limitation, and was invalid because (i) it was contrary to public policy as deterring the father from performing his parental duties of controlling and educating his children and it also interfered with the jurisdiction of the court over custody and maintenance of its wards, and (ii) it was void for uncertainty as it was impossible to say what degree of permanence was implied in the expression "live with their father" or what degree of interference by the father would amount to exercising custody, guardianship or control over the children within the meaning of the clause.

Notes. Considered: *Re May, Eggar* v. *May*, [1931] All E.R. Rep. 558; *Re Borwick, Borwick* v. *Borwick*, [1933] All E.R. Rep. 737; *Sifton* v. *Sifton*, [1938] All E.R. 435. Referred to: *Re Lanyon, Lanyon* v. *Lanyon*, [1927] All E.R. Rep. 61; *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval*, [1940] 1 All E.R. 632; *Re Evans, Hewitt* v. *Edwards*, [1940] Ch. 629; *Re Donn, Donn* v. *Moses*, [1943] 2 All E.R. 564; *Bromley* v. *Tryon*, [1951] 2 All E.R. 1058; *Re Gape's Will Trusts, Verey* v. *Gape*, [1952] 2 All E.R. 579; *Re Brace, Gurton* v. *Clements*, [1954] 2 All E.R. 354.

As to void conditions, see 34 HALSBURY'S LAWS (2nd Edn.) 105 et seq. For cases on the validity of conditions in wills see 44 DIGEST 440 et seq.

Cases referred to:

(1) *Clavering* v. *Ellison* (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282, H.L.; 44 Digest 440, *2667*.

(2) *Re Viscount Exmouth, Viscount Exmouth* v. *Praed* (1883), 23 Ch.D. 158; 52 L.J.Ch. 420; 48 L.T. 422; 31 W.R. 545; 44 Digest 441, *2668*.

Also referred to in argument:

Humphrys v. *Polak*, [1901] 2 K.B. 385; 70 L.J.K.B. 752; 85 L.T. 103; 49 W.R. 612, C.A.; 3 Digest (Repl.) 434, *287*.

Re Agar-Ellis, Agar-Ellis v. *Lascelles* (1878), 10 Ch.D. 49; 48 L.J.Ch. 1; 39 L.T. 380; 43 J.P. 36; 27 W.R. 117, C.A.; 28 Digest (Repl.) 642, *1362.* A

R. v. *Barnardo* (1889), 23 Q.B.D. 305; 58 L.J.Q.B. 553; 61 L.T. 547; 54 J.P. 132; 37 W.R. 789; 5 T.L.R. 673, C.A.; 28 Digest (Repl.) 625, *1274.*

Summons to determine the true construction of a will. By her will dated Dec. 3, 1911, the testatrix, Harriet Pearson Sandbrook, gave three-fourths of her residuary estate to trustees on trust to pay the income thereof to her two grandchildren, B William Francis Reginald Ashley Cooper and Molly Vera Ashley Cooper, up to Dec. 31, 1927, in equal shares, and after that date to divide the capital equally between the two grandchildren. In the event of either grandchild dying before Dec. 31, 1927, without lawful issue surviving the testatrix the three-fourths share of the residue was directed to be held on certain trusts declared in the will, but if there were issue surviving the grandchildren the residue was to be held in trust for C such issue if the grandchildren or either of them died before Dec. 31, 1927. The will continued:

"And I declare that if at any time on or before the 31st day of Dec. 1927 either one or both of my grandchildren shall live with or be or continue under the custody, guardianship, or control of their father Dr. T. G. D. Cooper, or be in D any way directly under his control, all benefits, profits, and income provided to be given under this my will to both or either of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit, or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and E control."

In case of forfeiture of the interest of either grandchild under the foregoing condition the forfeited share was to be held on the trusts declared in the event of the grandchild dying before Dec. 31, 1927, without lawful issue.

The testatrix died on Dec. 7, 1911. After their mother's death the two grandchildren had lived with the testatrix, and at the date of this summons were living F with the testatrix's daughter. At the date of the summons, the father, Dr. Cooper, who was chief medical officer at Perak in the Malay States, was at home in England on leave (he returned on leave to England every two years for six months) and wished his children to live with him during part of their holidays. The trustees took out the summons to determine whether on the true construction of the condition in the will the gift over on the grandchildren living, being or continuing under the G custody, guardianship, or control of their father was already effective or would become effective if the father insisted on his children living with him.

C. J. Mathew for the trustees.
T. J. C. Tomlin for the two grandchildren.
Harold Burrows for the defendant Harriet Sandbrook.
Potts for the ultimate remaindermen. H

PARKER, J., read the clause in question, and continued: The first point that arises on the construction of that clause is this: Is it a condition in defeasance of what has been already given, or can I construe the will as a whole as creating a limitation in favour of these children until the arrival of the date mentioned or until the happening of some earlier event? In my opinion, it is framed entirely I as a condition defeating the interest already given, and it would be, in my opinion, a violent construction to put upon the instrument as a whole to say that it is anything else than a condition in defeasance of what has been already given, and to construe it as creating a limitation until a certain thing has happened.

If it is a condition in defeasance of what has already been given, the question arises whether it is a valid condition to which I can give effect. I have come to the conclusion that the argument of counsel for the grandchildren is right in every

respect. It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependant on his abstaining from doing what it is certainly his duty to do—namely, to bring his influence to bear, and not give up his right to the custody, the control, and education of his children, and it seems to me it is also a direct consequence of a condition of this sort that the discretion of the court with regard to the custody of and maintenance of its wards is equally interfered with. If, for example, I myself, these children being now wards, thought it was for their benefit to direct that they should spend the next year or so with their father, who is a medical officer on furlough from the Malay States, in his company at the seaside and under his direct control, I should be fettered in exercising the discretion vested in me from the knowledge that if I exercised it in a certain way I might endanger the worldly welfare of these children by their forfeiting what has been given them under the will. It appears to me, therefore, that the condition is directly within the principle as laid down in SHEPPARD'S TOUCHSTONE (8th Edn.) at p. 132, that a condition is bad which operates to restrain or forbid a man from doing his duty.

I am also of opinion that with regard to the condition itself it is bad for another reason. It appears to me to be bad on the ground of uncertainty, for, as has been laid down by the House of Lords in *Clavering* v. *Ellison* (1), conditions subsequent in order to defeat vested estates or forfeiture must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur. In the present case the forfeiture is to occur in several events, the first of them being if either or both of these grandchildren shall live with their father. It appears to me that that expression "live with their father" is exceedingly vague, and it is difficult for me to put upon it a definite meaning, or to arrive with certainty at any conception of the event which would cause the forfeiture. It seems to imply a certain degree of permanence of residence. Take, for instance, what I said just now. Suppose I were to direct the children to live with their father at the seaside during his furlough, say, for a couple of years or one year. I should hesitate to say that was living with the father within the meaning of this will. Suppose the father got an extension of leave, and during the extension of leave I sanctioned the living with him again. Would that make any difference? Ultimately the father might be sick and unable to go back, and they might stay on and nurse their father. Would that be living with him? It would be impossible to say at what point the living with their father became living of such a permanent nature that the forfeiture as contemplated by this will occurred. That, I think, brings the case within the precise circumstance which was dealt with in *Clavering* v. *Ellison* (1), where the condition was that the children should be educated in England, and the question was what amount of residence abroad and what tuition abroad would prevent their being educated in England within the meaning of that condition. At any rate, one of the noble lords responsible for that decision came to the conclusion that that being so it was too vague to be enforced as a condition, and I gather FRY, J., in *Re Viscount Exmouth, Viscount Exmouth* v. *Praed* (2), took the same view, and considered that the condition which LORD CRANWORTH had considered bad in the House of Lords, must, having regard to the subsequent cases that had fallen to be decided, be a condition too vague to be enforced by the court. The condition in the present case is that the forfeiture is to occur if the children, or one of them, be or continue under the custody, guardianship, or control of their father. As a matter of law the children always have been in the custody, control, and guardianship of their father, although he himself, having been absent abroad, has delegated the duty he owed towards them at first to the grandmother, the testatrix in this case, and subsequently to Miss Sandbrook, who under the will of the grandmother is the person designated as the person with whom the grandmother would wish them to live. I can only say that within the meaning of these words, in the events which

have happened, it is difficult to say that the degree of interference by the father has caused the forfeiture to happen, and in a similar way it is very difficult to interpret within any reasonable certainty what is meant by the words, the children being directly under his control. That becomes the more difficult to ascertain from the fact that it is to be an essential condition that the children are to live free from the father's direct influence and control. Is it to be said that if a father writes to his child he is not exercising direct influence over him? It appears to me the father would be influencing the child directly by corresponding with him as well as by living with him. It appears to me almost impossible for a father who sees his child at all not to exercise direct personal influence.

Having regard to all those circumstances, it appears to me this condition is open to about every objection it could be open to. It is open to the objection of being void as being contrary to public policy, and it is also open to the objection of being void because it is so vague. I am prepared to declare, according to the true construction of the will, the condition is altogether bad.

Declaration accordingly.

Solicitors: *Davenport, Cunliffe & Blake*, for *Yorath & Jones*, Cardiff.

[*Reported by* T. Beresford, Esq., *Barrister-at-Law.*]

McCLELLAND *v.* MANCHESTER CORPORATION

[King's Bench Division (Lush, J.), October 19, 25, 1911]

[Reported [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209]

Highway—Negligence—New road—Failure of authority to have due regard to safety of public—Misfeasance—Ravine at end of road left unfenced.

The plaintiff, while being driven in a motor car along a street which ended in a steep natural ravine, was injured when the car fell into the ravine. The street had some years previously been dedicated to the public by the owner, but it was not then made up. About 1904 the defendants, acting under a local Improvement Act, made up the street as a new street close to the ravine and lit it with gas lamps, the last lamp being near the ravine. Across the ravine and in the same line was another road in which there was a lamp, the effect of the lighting being that a person would think that the two streets formed a continuous street with no obstacle between. The ravine was and always had been unfenced, and neither the plaintiff nor the driver of the car knew of its existence. In an action by the plaintiff for damages for his injuries, the jury found that the road as made and constructed was a danger to persons using it, that the unfenced ravine was a hidden trap, and that the defendants, in opening the road after making it up and in maintaining it, did not take all proper care to warn the public of the danger. On further consideration of the action,

Held: the omission by the defendants to do something which they ought to have done to finish the work was precisely the same in its legal consequence as the commission by them of something that ought not to have been done, and so they were guilty of misfeasance and not merely of non-feasance; while it was true that when a road was dedicated as a highway the public, or the

highway authority, if they accepted it, took it with all its defects, if a highway authority made it up and opened it to the public as a made-up street, whether they were bound by statute to make it up or had an option whether or not to do so, they were bound to exercise proper and reasonable care in the performance of the work and have due regard to the safety of those who would use the road; the defendants had permissive powers under their local Act to make up any street within their district in the way they thought fit, but they were bound to act reasonably in the exercise of their powers; the jury had found that they had acted negligently and not with proper care or reasonably; and, therefore, the plaintiff was entitled to succeed.

Notes. So far as highway authorities are concerned the defence previously open to them that the dangerous condition of a highway was due to nonfeasance and not to misfeasance was abrogated by the Highways (Miscellaneous Provisions) Act, 1961: see 41 HALSBURY'S STATUTES (2nd Edn.) 775.

Considered: *Baldwin's, Ltd.* v. *Halifax Corpn.* (1916), 85 L.J.K.B. 1769. Approved: *Papworth* v. *Battersea Corpn. (No. 2)*, [1916] 1 K.B. 583. Explained: *Moul* v. *Croydon Corpn.*, [1918–19] All E.R. Rep. 971. Distinguished: *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K.B. 195. Considered: *Sheppard* v. *Glossop Corpn.*, [1921] All E.R. Rep. 61. Distinguished: *Burton* v. *West Suffolk County Council*, [1960] 2 All E.R. 26. Referred to: *Thompson* v. *Bradford Corpn.*, [1914–15] All E.R. Rep. 976; *Skilton* v. *Epsom and Ewell Urban District Council*, [1936] 2 All E.R. 50; *Newsome* v. *Darton Urban District Council*, [1938] 1 All E.R. 79; *Kent and Porter* v. *East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207; *Knight* v. *Sheffield Corpn.*, [1942] 2 All E.R. 411; *Drake* v. *Bedfordshire County Council*, [1944] 1 All E.R. 633; *Wilson* v. *Kingston-upon-Thames Corpn.*, [1948] 2 All E.R. 780; *Baxter* v. *Stockton-on-Tees Corpn.*, [1958] 2 All E.R. 675.

As to liability for non-repair and injury by repair of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 149–153, and for cases see 26 DIGEST (Repl.) 418 et seq.

Cases referred to:

(1) *Shoreditch Corpn.* v. *Bull* (1904), 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254; 2 L.G. 756, H.L.; 26 Digest (Repl.) 477, *1643*.

(2) *Dawson* v. *Bingley Urban District Council*, post p. 596; [1911] 2 K.B. 149; 80 L.J.K.B. 842; 104 L.T. 659; 75 J.P. 289; 27 T.L.R. 308; 55 Sol. Jo. 346; 9 L.G.R. 502, C.A.; 26 Digest (Repl.) 431, *1331*.

(3) *London, Brighton, and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, *690*.

(4) *Gilbert* v. *Trinity House Corpn.* (1886), 17 Q.B.D. 795; 56 L.J.Q.B. 85; 35 W.R. 30; 2 T.L.R. 708; 38 Digest (Repl.) 31, *157*.

(5) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, *64*.

(6) *Hurst* v. *Taylor* (1885) 14 Q.B.D. 918; 49 J.P. 359; 33 W.R. 582; 1 T.L.R. 386; sub nom. *Hirst* v. *Taylor*, 54 L.J.Q.B. 310, D.C.; 26 Digest (Repl.) 371, *813*.

(7) *Young* v. *St. Mary's, Islington, Vestry* (1896), 60 J.P. 821, D.C.; 26 Digest (Repl.) 460, *1533*.

(8) *Lamley* v. *East Retford Corpn.* (1891), 55 J.P. 133, C.A.; 26 Digest (Repl.) 283, *105*.

(9) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest (Repl.) 35, *178*.

(10) *Mersey Docks Trustees* v. *Gibbs*, *Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur. N.S. 571; 14 W.R. 872; 2 Mar. L.C. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, *111*.

Also referred to in argument:

Cowley v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45; H.L.; 26 Digest (Repl.) 419, *1290*.

Sydney Municipal Council v. *Bourke*, [1895] A.C. 433; 64 L.J.P.C. 140; 72 L.T. 605; 59 J.P. 659; 11 T.L.R. 403; 11 R. 482, P.C.; 26 Digest (Repl.) 419, *1290*.

Canadian Pacific Rail Co. v. *Roy*, [1902] A.C. 200; 71 L.J.P.C. 51; 86 L.T. 127; 50 W.R. 415; 18 T.L.R. 200; P.C.; 38 Digest (Repl.) 17, *69*.

Thompson v. *Brighton Corpn.*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q.B. 332; 63 L.J.Q.B. 181; 70 L.T. 206; 58 J.P. 297; 42 W.R. 161; 10 T.L.R. 98; 38 Sol. Jo. 97; 9 R. 111, C.A.; 26 Digest (Repl.) 420, *1292*.

Cox v. *Paddington Vestry* (1891), 64 L.T. 566, N.P.; 26 Digest (Repl.) 531, *2070*.

Cornwell v. *Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; 3 C.L.R. 417; 19 J.P. 313; sub nom. *Cornwell* v. *Metropolitan Sewers Comrs.*, *Jauncey* v. *Metropolitan Sewers Comrs.*, 24 L.T.O.S. 244; 41 Digest 52, *377*.

Wilson v. *Halifax Corpn.* (1868), L.R. 3 Exch. 114; 37 L.J.Ex. 44; 17 L.T. 660; 32 J.P. 230; 16 W.R. 707; 38 Digest (Repl.) 25, *129*.

Goldberg & Son, Ltd. v. *Liverpool Corpn.* (1900), 82 L.T. 362; 16 T.L.R. 320, C.A.; 26 Digest (Repl.) 534, *2087*.

Harris v. *Baker* (1815), 4 M. & S. 27; 105 E.R. 745; 26 Digest (Repl.) 456, *1513*.

Mellor v. *Heywood Corpn.* (1884), 48 J.P. Jo. 148; 26 Digest (Repl.) 456, *1514*.

Maguire v. *Liverpool Corpn.*, [1905] 1 K.B. 45; 74 L.J.Q.B. 369; 92 L.T. 374; 69 J.P. 153; 53 W.R. 449; 21 T.L.R. 278; 49 Sol. Jo. 296; 3 L.G.R. 485, C.A.; 26 Digest (Repl.) 420, *1294*.

Whyler v. *Bingham Rural District Council*, [1901] 1 K.B. 45; 70 L.J.Q.B. 207; 83 L.T. 652; 64 J.P. 771; 17 T.L.R. 23, C.A.; 26 Digest (Repl.) 463, *1550*.

Jordeson v. *Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; 67 L.J.Ch. 666; 79 L.T. 478; 63 J.P. 137; 47 W.R. 222; 14 T.L.R. 567; 42 Sol. Jo. 715; on appeal, [1899] 2 Ch. 217; 68 L.J.Ch. 457; 80 L.T. 815; 63 J.P. 692; 15 T.L.R. 374, C.A.; 38 Digest (Repl.) 23, *105*.

Hill v. *Metropolitan Asylum District Managers* (1879), 49 L.J.Q.B. 228; 42 L.T. 212; affirmed sub nom. *Metropolitan Asylum District Managers* v. *Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 36 Digest (Repl.) 346, *868*.

R. v. *Pease* (1832),) 4 B. & Ald. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 40, *205*.

Further Consideration by LUSH, J., of an action tried before him with a jury at Manchester in July, 1911.

The action was brought by the plaintiff against the corporation of Manchester for injuries sustained by him through the alleged negligence of the defendants. Subject to the question of liability, the damages were agreed at £250.

E. Sutton and *Cyril Atkinson* for the defendants.

Langdon, K.C., and *Gordon Hewart* for the plaintiff.

Cur. adv. vult.

Oct. 25, 1911. **LUSH, J.**, read the following judgment.—This is an action brought by Mr. James McClelland against the corporation of Manchester to recover damages for alleged negligence and misfeasance on the part of the defendants in connection with the making up of a street in Manchester, called Sunderland Street, and for alleged negligence in improperly leaving the street, which ended in a steep ravine or declivity, insufficiently lighted and fenced. The damages in the event of the plaintiff recovering judgment were agreed at £250.

The action came on for trial before me at Manchester with a special jury. The jury answered certain questions which I left to them in favour of the plaintiff, and

the case then stood over for further consideration, counsel for the defendants contending that, notwithstanding the findings, the defendants were not liable in law. At the close of the arguments I postponed delivering my judgment until I had considered the numerous authorities that were cited to me by the learned counsel on both sides.

The facts were shortly as follows. The street in question, Sunderland Street, in one of the suburbs of Manchester, was dedicated to the public by the then owner about fourteen years ago. A few houses were built, the first about 1897, but the street was not paved or kerbed or made up until the defendants made it up in 1904. No evidence was placed before the jury as to when it was first lighted, but it was admitted by the defendants that the particular lamps in the street at the time of the accident were placed there after the street was opened. The case was conducted at the trial, as I understood, upon the footing that the street was first lighted by the defendants about the time when they made it up, though their counsel stated that it was lighted some time before. I do not think that the date is of any real importance in the case. Some time before August, 1904, the defendants, acting under the powers conferred upon them by their Improvement Act, 1851 (which were similar to those conferred on local authorities generally by the Public Health Act, 1875), served notices on the frontagers to make up the street. The defendants, in serving the notices, had to give directions as to the manner in which the work was to be done by the frontagers (see s. 15), the way in which, and the extent to which, the street was to be made up being matters under the exclusive control of the defendants. The frontagers not carrying out the work, the defendants did it themselves. It was carried out in the following way. The street was paved, kerbed, and sewered, and side footpaths were made. As it was originally laid out it led up to the brink of a deep and precipitous ravine. The ravine had never been fenced. Before the street was made up by the defendants it was used to some extent by persons having occasion to go to and from the houses, but, it not being made up and completed as a street, there would not, presumably, be any serious risk, as it was obviously not a street frequented to any extent by the public. The defendants paved, flagged, and kerbed it, as I have said, and generally made it up as a new street, and they made it up almost close up to the brink of the ravine. They left a very small space on one side of the street and made up a small triangular plot, which, apparently, was left as it was, owing to its declivity towards the ravine. They lighted it by means of ordinary gas lamps, at a considerable distance apart, the last lamp in the street being placed near to the edge of the ravine. Across the ravine, and in the same line and on the same level as Sunderland Street, there was another street called Windsor Road, also under the defendants' control. There was a lamp in that road, approximately the same distance from the nearest lamp in Sunderland Street as that lamp was from the next lamp further up Sunderland Street. There was evidence that the effect of this system of lighting to anyone passing down Sunderland Street was that that street and Windsor Road appeared to be one continuous lighted street, and there was nothing to indicate that the two streets were separated by a ravine. The Windsor Road lamp was not there until about two years after the road was made up. The defendants had been warned by their own officials some time before the accident to the plaintiff (the facts as to which I will state in a moment) that the street was dangerous owing to the unfenced ravine. Reports with regard to it, and as to the steps then sought to be taken for the safety of the public, were made to the corporation, but nothing was done either by way of fencing or additional lighting, or otherwise.

One evening in December, 1910, while an election was proceeding, the plaintiff was being driven down Sunderland Street in a motor-car, at a moderate pace—eight miles an hour one of the witnesses said—to fetch a voter to take him to the poll. It was a dark night, neither the plaintiff nor the driver of the car knew the road or knew of the existence of the ravine, and while proceeding carefully along Sunderland Street (the jury negatived contributory negligence, which was not seriously pressed)

the driver, having no warning either by sufficient light or otherwise, of the danger, drove over the brink; the car fell down the ravine, and fell over, the plaintiff suffering serious injuries through the fall. There was some conflict of evidence as to the insufficiency of the light near the edge of the ravine. The driver of the car thought that the lamp at the end of the street was lighted, but said that the light was insufficient to indicate the existence of the ravine. A witness, Lane, called after the others, said that the mantle of the lamp had been broken and left unrepaired for a week or so before the accident, so that on the night in question the lamp gave practically no light at all. He also stated, however, that when it was lit a man driving a quick vehicle like a motor-car could not see the ravine in time to pull up. The place, he said, was a death-trap. The defendants' witnesses, on the other hand, dealing with the adequacy of the lights generally, stated that the lighting was efficient and adequate. They admitted that if the lamp by the ravine was not lighted it was dangerous to persons driving down the road. No evidence was called by the defendants as to the state of the lamp in fact on the night in question.

At the close of the evidence I left the following questions to the jury. I append their answers to the questions:

> "(i) Was the road as made up and constructed a danger to persons lawfully using it?—Yes. (ii) Was the ravine, which was unfenced, a hidden trap to persons using the road?—Yes. (iii) Did the defendants, in opening the road to the public after making it up and in maintaining it, take all proper care to warn the public of the existence of the danger?—No. (iv) Were the public invited by what the defendants had done to pass along the whole of the road as being a proper highway?—Yes. (v) Were the plaintiff and/or the driver of the car guilty of contributory negligence?—No."

I wish to say a word with regard to these questions and the answers of the jury. The defendants complained that no question had been left to the jury as to their having been guilty of negligence in making up and opening the street. I do not agree with this view. In the first place, I think that the third question covered this. I asked the jury to say whether in the two things that the defendants did—opening the street and maintaining it—they took all proper care. The answer of the jury negatived this, in my opinion, as to each of the two acts. But in any case, as it was not disputed and it was indeed obvious that the defendants knew of the existence of the ravine, their leaving the road with a trap in it known to them and hidden from persons using the road at night was necessarily in itself an actionable wrong and a breach of their duty to take reasonable care, assuming that such a duty existed. The second observation I wish to make is this. I had some doubt at the time whether the fourth question was a relevant or proper question to leave. The defendants do not invite the public to use a street in the sense in which the owner of premises invites persons to use them, and it is in that connection that the expression generally occurs in these cases, and the answer to that question does not appear to me to carry the case any further. Counsel for the plaintiff, however, did not rely on this answer except as illustrating the difference between the road as originally made and the street as made up and completed by the defendants, and I do not attach any real importance to the answer in coming to the conclusion at which I have arrived.

Counsel raised several contentions in support of his argument that the defendants were entitled to judgment. The first point with which I propose to deal is this. It was said that, whatever duty the defendants might be under, they did not create the nuisance—namely, the unfenced ravine—and that what in fact caused the accident was an omission by the defendants to fence or to light or to warn, or whatever it may be, that this was nonfeasance, and not misfeasance, and that consequently the defendants were not liable. This, in my opinion, involves a misconception as to what is meant in law by nonfeasance. The meaning of nonfeasance

in this connection and the reasons why a highway authority are not liable for nonfeasance [see note supra] have so often been explained that it is not necessary to go in any detail into it. A surveyor of highways not being liable at common law for merely suffering a highway to be out of repair it was held that when the legislature imposed the burden of repairing highways on a local authority the latter were not liable for the breach of what has now become a statutory duty, because there was nothing in the statute to indicate that a new liability was intended to be created. If a highway authority, therefore, leaves a road alone and it gets out of repair there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where a road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which if taken would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission, therefore, it was nonfeasance. Once establish that the local authority did something to the road the case is removed from the category of nonfeasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commision of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all. It appears to me the decision of the House of Lords in *Shoreditch Corpn.* v. *Bull* (1) and the principles enunciated by LORD HALSBURY in that case dispose of this part of the argument. *Dawson* v. *Bingley Urban District Council* (2) is to the same effect. The normal condition of this road was altered, and altered by the defendants, and, if there was any breach of duty, it would, in my opinion, be misfeasance and not nonfeasance.

The next question to be considered is a more difficult and serious one. It was contended that the defendants were under no duty to make up the street otherwise than they did or to take any steps to protect the public against the hidden danger. It was said that as the road had been dedicated to the public in the same condition in which it was at the time of the accident—namely, with an open ravine at one end—the public had to take the road as it was, and that, as the previous owner could not have been sued if one of the public had strayed over the road and fallen into the ravine, neither could the defendants, who did nothing more than improve the then existing highway. It was further said that as the legislature had authorised the paving, &c., of the whole of the highway, or such part as the defendants thought fit to pave, they were protected even if the road was a nuisance, and in support of this view *London, Brighton, and South Coast Rail. Co.* v. *Truman* (3) and similar cases were cited. In my opinion, these contentions are not well founded. It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made-up street, they must, in my opinion, exercise due care, and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertake and perform a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which if carelessly done may cause injury to others: *Gilbert* v. *Trinity House Corpn.* (4). Moreover, if statutory powers can be exercised reasonably so as not to injure other persons, to exercise them unreasonably and thereby cause an avoidable injury is in itself negligence. In *Geddis* v.

Bann Reservoir Proprietors (5) LORD BLACKBURN said (3 App. Cas. at pp. 455, 456): A

"It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." B

Thus where a highway authority diverted a public highway and omitted to protect those who might use it against straying into the old highway and being injured, it was held in *Hurst* v. *Taylor* (6) that they were liable for breach of duty to take reasonable care. Subject to one qualification it is always a question of fact for a C jury, assuming, of course, there is sufficient evidence to be left to a jury, whether a local authority in exercising statutory powers has exercised them reasonably—that is, with due regard to the safety of those who will be affected by that exercise.

The one qualification is this: If it can be shown that the legislature authorised the particular act to be done in the way in which it was done, no question can arise D as to the exercise of the powers being reasonable. The statutory authority to do the very act which has caused the damage is, of course, an answer to an action. In such a case there would be damnum sine injuriâ, and counsel for the defendants sought to bring the present case within those principles. He has failed, in my opinion, to do so. In all the cases in which it has been held that the damage suffered by the exercise of the statutory powers could not be made the subject of E an action it will be found that the reason was that on the true construction of the statute the particular act done in that particular way was expressly authorised. Thus in *London, Brighton, and South Coast Rail. Co.* v. *Truman* (3) it was held that the legislature had on the true construction of the Act authorised the railway company to select any site they pleased for the erection of the cattle pens that caused the nuisance. It was, therefore, held that the fact that they could have F erected them in a different place and so have avoided the nuisance did not affect their liability. The plaintiff's counsel was quite right, in my opinion, when he said that, whether or not the legislature has authorised the work as done so as to exclude the consideration whether the powers have been reasonably exercised, is a question depending upon the construction of the statute. It is clear it cannot be said on the construction of the defendants' Improvement Act, under which their powers G were exercised, that the legislature expressly authorised this road to be made as it was up to the brink of an unfenced ravine. They had general powers, permissive not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seems to me, to act reasonably in the exercise of those powers. It was a question, therefore, for the jury whether they did act reasonably and took proper care in exercising the powers under the special circum- H stances of the case. I have already said that the jury have, in my opinion, negatived the contention that they did, and the fact that they knowingly made up the street in such a way as to expose passers-by to a hidden trap seems to me of itself conclusively to show that they did not. They could have made up the street, leaving sufficient space between the street and the ravine to enable a driver of a vehicle, motor or otherwise, to stop before he came to the ravine. Posts could have been I placed in the part not made up and an efficient system of lighting could have been adopted which would have made it clear that the road came to an end. It was true, and this was conceded, that the defendants had no power at the time they made up the road to fence off the ravine at the expense of the frontagers. They acquired these powers by a later Act that was passed in 1907 and came into operation in Manchester in 1910, but this, in my opinion, is immaterial. The defendants, therefore, having exercised their powers, as the jury thought, negligently in such a way

as to leave a hidden trap for persons who went along that road at night, exposing them to unnecessary and avoidable danger, are liable to the plaintiff, who suffered damage by reason of this negligence.

I have pointed out that the plaintiff's witnesses did not agree whether the lamp at the edge of the ravine was lighted, and it may be said that it is consistent with the evidence and with the findings that an adequate system of lighting was provided and that all that could be complained of was that the lamp was not properly lit on that particular night. It seems to me to be clear that by their third finding the jury, in effect, found that the defendants adopted an inadequate and improper method of protecting the public. The reports that were made as to the dangerous condition of the street had reference to that, and not to the accidental breaking of the lamp, and I cannot doubt that the jury so intended to find. The light in Windsor Road was, as I have said, put up after the street was made up, in 1906. That cannot, therefore, affect the question of liability for what was done when the street was made up and opened in 1904.

It may, however, have some bearing on the other view which was presented by the plaintiff, with which I will now deal. But the ground on which I have come to the conclusion that there was an unreasonable exercise of the defendants' powers in 1904 is, of course, independent of this incident in the case. The plaintiff contended that, apart from the misfeasance in 1904, and assuming there was none, yet the defendants were liable for improperly and insufficiently lighting the street at the time of the accident, and that this was also covered by the third finding. For this purpose it is immaterial whether the lamp was lit, but was insufficient to warn the plaintiff or his driver of the existence of the ravine, or whether it would have been sufficient if lit and the accident was due to the defendants' servants not taking proper care to see that it was lit. The defendants contended that they were not liable for any such neglect, on the ground that they were under no duty to light and that if they were it was only nonfeasance and not misfeasance. In support of the first of these contentions he cited *Young* v. *St. Mary's, Islington, Vestry* (7). In that case the Divisional Court affirmed the county court judge and held that as a statute (Metropolis Management Act, 1855, s. 130) which enacted that the defendants should light the streets within their district "well and sufficiently" gave them a discretion to continue to light "at and during such times as such authority may think fit," they could not be sued for an accident caused by their having turned out the lights at an hour which they thought reasonable. The court, as I gather, held that they only did what they were expressly authorised to do. There was, of course, no such express authority in the present case. Other cases were cited as showing that when there was no duty to light and the defendants did not undertake to light a street they could not be held liable for a consequent accident. Counsel contended that if the defendants undertook to light and did light a street which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited *Lamley* v. *East Retford Corpn.* (8) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground.

With regard to the contention that this was nonfeasance, the answer seems to me to be this. In the first place, I do not think that the doctrine applies to the performance of such a duty as this. It has nothing to do with the non-repair of a highway. There are many public duties, no doubt, for the non-performance of which a plaintiff cannot sue because he loses the benefit of what would have been done if the duty had been performed, as, for instance, the obligation to provide a system of sewerage for the benefit of a district, as in *Glossop* v. *Heston and Isleworth Local Board* (9); but if a duty is undertaken and improperly performed and actual damage is occasioned thereby the person injured has, as I have already said, a perfectly good cause of action. The Court of Appeal obviously took that view in

Lamley v. *East Retford Corpn.* (8). *Mersey Docks Trustees* v. *Gibbs* (10) is another illustration of a similar principle.

[His Lordship then dealt with a defence under the Public Authorities Protection Act, 1893, which was repealed by the Law Reform (Limitation of Actions, &c.) Act, 1954.]

Judgment for plaintiff.

Solicitors: *Davenport, Cunliffe & Blake*, for *Ashworth & Inman*, Manchester; *Austin & Austin*, for *Thomas Hudson*, Town Clerk, Manchester.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

SHACKLETON *v.* SWIFT

[Court of Appeal (Vaughan Williams and Kennedy, L.JJ.), January 27, February 3, 1913]

[Reported [1913] 2 K.B. 304; 82 L.J.K.B. 607; 108 L.T. 400; 77 J.P. 241; 11 L.G.R. 462]

Mentally Disordered Person—Protection of persons acting under statute—Restraint —Lunacy Act, 1890 (53 & 54 *Vict.*, *c.* 5), *s.* 330.

By s. 330 (1) of the Lunacy Act, 1890, it was provided that a person who did anything in pursuance of the Act should not be liable to any proceedings, whether on the ground of want of jurisdiction or on any other ground, if he had acted in good faith and with reasonable care. By s. 330 (2), if proceedings were taken against such a person, they might be stayed.

Held: section 330 gave special protection to officers and other persons acting under the powers conferred by the Act (e.g., relating to the restraint of mentally disordered persons) in cases where, although they had misconstrued the Act and had done things which they had no jurisdiction to do, they had acted in good faith and in a reasonable manner.

Notes. The Lunacy Act, 1890, was repealed by the Mental Health Act, 1959, s. 141 of which is equivalent to s. 330 of the Act of 1890: see 39 Halsbury's Statutes (2nd Edn.) 1075.

Applied: *Re Frost*, [1936] 2 All E.R. 182; *Richardson* v. *L.C.C.*, [1957] 2 All E.R. 330.

As to protection for acts done under the Mental Health Act, 1959, see 29 Halsbury's Laws (3rd Edn.) 435, 436, and for cases see 33 Digest 271, 272.

Cases referred to in argument:

Beechey v. *Sides* (1829), 9 B. & C. 806; 2 Man. & Ry. M.C. 365; 4 Man. & Ry. K.B. 634; 8 L.T.O.S.K.B. 71; 109 E.R. 300; 38 Digest (Repl.) 129, *886.*

Lawrence v. *Lord Norreys* (1890), 15 App. Cas. 210; 59 L.J.Ch. 681; 62 L.T. 706; 54 J.P. 708; 38 W.R. 753; 6 T.L.R. 285, H.L.; 32 Digest 529, *1836.*

Appeal by the defendant from an order of Rowlatt, J., at chambers.

By her statement of claim the plaintiff said she was the daughter of Peter Shackleton and formerly resided with her father at Old Bank House, Rectory Road, Burnley. The defendant was the master of Burnley workhouse, in the Burnley union. The plaintiff alleged that on July 22, 1911, she was wrongfully and unlawfully taken against her will to Burnley workhouse by one Joseph Cryer, the relieving

officer of the union, and was unlawfully and falsely kept and imprisoned by the defendant from July 22 to July 31, 1911, in the workhouse asylum in the custody of the attendants and in the company of lunatics and imbeciles to the degradation and great mental suffering of the plaintiff, whereby she suffered damage. The defendant by his defence said that Joseph Cryer removed the plaintiff to the workhouse under s. 20 of the Lunacy Act, 1890, under an order requiring the defendant to receive into the workhouse the plaintiff, a person deemed to be a lunatic, who was not under proper care or control, and whom he was satisfied it was necessary for the public safety and her own welfare to place under care and control, until notice or information could be given, or she could be brought before a justice, and to relieve and detain her in the said workhouse for a period not exceeding three days, unless otherwise ordered before the expiration of such period. He said further that on July 25, 1911, a justice of the peace visited and examined the plaintiff at the workhouse, and that on the afternoon of the same day Dr. Eadie, the medical officer of the workhouse did under s. 24 (1) of the Lunacy Act, 1890, certify that the plaintiff was a lunatic and a proper person to be allowed to remain in the workhouse. The defendant contended that by s. 24 (2) that last-mentioned certificate was a sufficient authority to him for detaining the plaintiff against her will in the workhouse for fourteen days from the date of the certificate, and that he had acted in good faith and with reasonable care and was not liable in these proceedings by reason of the provisions in that behalf of the Act. On July 31, 1911, the medical officer made an order for the plaintiff's discharge from the workhouse, and she was discharged. On Dec. 9, 1912, the defendant took out a summons for an order that the action might be stayed on the grounds (i) that under s. 330 of the Lunacy Act, 1890, the action was not maintainable in the absence of any allegation that the defendant had not acted in good faith and with reasonable care in the detention of the plaintiff in the mental wards of the Burnley workhouse; (ii) that it was not alleged in the statement of claim, and no facts were stated therein to show or suggest that the defendant did not act in good faith and with reasonable care in the premises; (iii) that the action was frivolous and vexatious, or, in the alternative, that the action might be stayed unless and until the plaintiff paid into court or gave security for such sum as the court should think proper by way of security for the defendant's costs of action. On Dec. 19, 1912, Master Archibald made an order staying the proceedings under s. 330 of the Act. On Jan. 14, 1913, on appeal to Rowlatt, J., the order of the master was discharged. The defendant appealed.

By s. 330 of the Lunacy Act, 1890:

"(1) A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care. (2) If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding sub-section mentioned, or does anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the court or judge may think fit, if the court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care.

Ralph Sutton for the defendant.
Newbolt for the plaintiff.

VAUGHAN WILLIAMS, L.J.—To stay an action, to say that an action shall not be tried, is generally to take a step which ought not to be taken unless in a very clear case. It not unfrequently arises under the Judicature Acts and the rules made thereunder that there is an application to stay an action, or an application to declare that an action is frivolous, and in those cases the practice has always been not to stay the action under the general powers of the Judicature Acts because it is a strong thing to say to a plaintiff who is bringing an action that his complaint will not be heard and that the action will be stayed without there having been a trial, without the evidence having been heard. Generally speaking, the consequence is that judges are very slow to stay actions, but that does not mean that there is no discretion vested in judges. The general practice is that you should not stay actions unless the action, beyond all reasonable doubt, ought not to go on. In other words, you ought not to stay an action unless one of two things occurs—either the action before the court is what in the old days would have been held to be a demurrable claim, or the action is one of such a character that, although it may not be demurrable, there is plain reason why it must fail. In the present case we have the difficulty that ROWLATT, J., came to the conclusion that this action ought to be tried. When one judge thinks that an action ought to be tried it seems a strong thing for other judges to say that there is clearly no cause of action. Prima facie the conclusion seems plain that, if one judge thinks an action ought to go on, and two judges sitting on an appeal think that the action is unreasonable and ought not to go on, that constitutes sufficient reason why the action should go on. Especially is that so in a case where the power to stay the action is a discretionary power. The judge who heard the present case at chambers exercised his discretion.

I have intended to say enough in the observations which I have just made to show that I quite appreciate the full effect that ought to be given to the fact that the learned judge at chambers has come to the conclusion that there is a cause of action here, and that the action ought not to be stayed but ought to go on, and yet I have come to the conclusion that the learned judge is wrong, and that there is no cause of action which ought to be allowed to go on. It is to be observed that this case is not a case under the powers of the Judicature Act and the rules. We are not applying a general Act to some case which happens to fall within its scope. What we are trying here is the question whether this action ought to be stayed having regard to the terms of s. 330 of the Lunacy Act, 1890. That is a very different thing, to my mind, from the case of a question under the Judicature Act and the rules, whether an action ought to be stayed or not. Here we are dealing with a particular subject-matter—lunacy, and the Act of Parliament provides that public officers shall be employed in carrying out its provisions. Section 330 of the statute seems to me to be a provision which recognises in itself the difficulty that there may be on the part of the officials in carrying out this Act of Parliament. It is just like the provisions in other statutes which recognise the difficulties that occur when police officers make some mistake in the performance of their duties. There again the law recognises that the true test is whether the officer is to be placed in a different position, so far as liability is concerned, even though he may have made a mistake as to the terms of the statute, if he has honestly done his best to carry it out. I am not saying that the policeman is placed in the position in which I am going to hold that the officials under this Lunacy Act are placed. The position of a policeman is not precisely the same. At the same time he is protected in a way in which an ordinary citizen would not be protected. A policeman is so protected because he has difficult duties to perform. I say here this Act recognises that the officers who are employed to carry it out are placed in a difficult position. I do not know whether it makes much difference to the conclusions that I have arrived at that sub-s. (1) of s. 330 is expressed in the terms that it is. The intention of

this sub-section is to give special protection to those who are acting under the Act, and the special protection given is that they shall not be liable to civil or criminal proceedings, whether on the ground of want of jurisdiction or any other ground, if they have acted in good faith and with reasonable care. Sub-section (1) of s. 330 states the principle of the Act, which is: If the proper officers carrying out the provisions of the Act have acted in good faith and with reasonable care, even though they have made a mistake, even though the Act of Parliament gave them no jurisdiction in the particular case, and, therefore, there was want of jurisdiction, nevertheless they are to be protected. That does not mean, to my mind, protected in the end after there has been an action, or the action has been tried; it is a protection which, in my opinion, relieves them from liability before the action has been tried. But if there is any doubt about this, one must go on and read sub-s. (2), which gives the court power to stay an action in a case falling within the section.

I have already said that, generally speaking, the Court of Appeal does not interfere with the discretion of the judge in chambers, and here the judge in chambers has exercised his discretion by saying that the action may go on; but the discretion, to use an expression of SIR GEORGE JESSEL, M.R., must be a judicial discretion, and, in my judgment, here the words of the Act of Parliament limit the discretion which the learned judge is to exercise. He is to exercise such a discretion as will give to the officers and others who are acting under the Act the protection which the Act of Parliament intended they should have. In this particular case it is admitted that there was no bad faith—that means that there was no malice, there was no conscious doing of anything that the officers knew to be wrong or supposed to be wrong, but it is said that there was a want of reasonable care. Let us see what the suggestion of want of reasonable care is. Paragraph 3 of the affidavit of the plaintiff says:

> "The next day I explained the position to Mr. and Mrs. Swift. Mrs. Swift said to Mr. Swift: 'This is no place to bring the girl to; she has been tricked—its just a family dispute, the girl's all right.' I asked if I could see an independent doctor and my solicitor, Mr. Waddington, but Mr. Swift said it was against the rules to call in an outside doctor and with regard to a lawyer I must see to that after my release."

That paragraph is not relied on. What is relied on is something which happened later, because it is said in para. 5:

> "On July 29, 1911, I urged Dr. Eadie very hard to get me let out as he must see I was not a lunatic. He said: 'If I'd my way I'd give you your discharge this minute, but I promised Mr. Cryer I would detain you till Monday, the 31st'."

This action has been brought against people other than the master of the workhouse. It is possible—I do not wish to say anything, especially as there are actions pending—but I do say, however that may be, that there is nothing in this paragraph which in the slightest degree seems to bear on either good faith or want of reasonable care.

Under those circumstances one has to look and see what the facts of this case were. The facts were that whatever the justice of the peace may have thought or done, it was on his responsibility that the doctor was introduced. The doctor was introduced and he had a duty to perform, and having that duty to perform he gave a certificate. It is headed: "Certificate as to a pauper lunatic in a workhouse." We came to the conclusion when we looked closely at the sections, that the introduction of the word "pauper" there made no sort of difference, because some people, who are not strictly paupers, under s. 24 have to be treated as though the actual words were "deemed to be paupers." The certificate runs thus:

> "I, the undersigned medical officer of the workhouse of the above-named union, hereby certify that I have carefully examined into the state of health and mental

condition of Mary Helen Shackleton, a pauper in the said workhouse, and that she is, in my opinion, a lunatic and a proper person to be allowed to remain in the workhouse as a lunatic, and that the accommodation in the workhouse is sufficient for her proper care and treatment, separate from the inmates of the workhouse not lunatics (or that her condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that she shall be kept separate). The grounds for my opinion that the said Mary Helen Shackleton is a lunatic are as follows: The patient is excited in manner and speech. For observation."

That means that she is to be kept under observation. The certificate is signed, "A. W. Eadie, medical officer of the workhouse."

In my judgment, although prima facie where s. 20 of the Lunacy Act, 1890, applies the intention is not to detain more than three days, it was impossible that the master of the workhouse, upon the making of the certificate by the medical officer, should have discharged the person mentioned in the certificate—that is, the plaintiff. I think he would have done very wrong if he had done so; but, whether or not that conclusion is a right conclusion, I am quite satisfied that, if the master did suppose that under that order he was not entitled to discharge this person whom the doctor wanted to keep longer for observation, whether or not that was strictly authorised by the words of the Act, it is a conclusion that any man might reasonably and honestly have arrived at—at least I hope so, because I think I should have arrived at that conclusion myself. Under those circumstances, without going at further length through the Act of Parliament, I decide this question upon the ground that the Act gives special protection to those officers and others acting under the powers of the Act in cases where, although they have misconstrued the Act, and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner. In my opinion, there is not the faintest evidence that the defendant, the master of the workhouse, acted with any malice or otherwise than with good faith and with reasonable care. I think, as I have already said, it is a matter of very grave consideration when I am differing from the discretion of the learned judge at chambers. Still, in my opinion, it would be doing wrong if one were to allow this action to proceed against this defendant, because, in my opinion, it would be debarring him from the very protection which it was the intention of the Act that he should have, or any man should have, who acted on what he believed to be the powers of the Act in good faith and with reasonable care. Under those circumstances, in my opinion, this action ought not to be allowed to go on.

KENNEDY, L.J.—I am of the same opinion. I wish in the first place to express my entire concurrence with the views of my Lord that one ought to be extremely slow to stop an action before trial in those cases in which one has to consider the propriety of such stoppage, and in the next place I concur equally with him in what he said with regard to dealing with a question which the learned judge sitting at chambers had to consider as a matter in which he had a discretion. I will only add with regard to the last that one cannot forget that the discretion in this case had been exercised in the first instance by the master in chambers, and the master came to a different conclusion from the learned judge. MASTER ARCHIBALD, when the question came before him, was of opinion that this action ought to be stayed, and what we are dealing with is a reversal of the discretion of what I may call the court of first instance by ROWLATT, J., sitting to review according to his judgment the decision which was under appeal.

Having said that, what are the facts here? The facts here are that the plaintiff is suing the master of a workhouse in respect of her detention in that workhouse for a certain number of days. She was brought there under the authority of a relieving officer, who, if he was acting bona fide, was certainly entitled to remove her, she being believed by him to be a lunatic dangerous to others as well as to herself. She

was brought to the workhouse, and the defendant had no alternative but to receive her. She was brought under an order which justified him, and, as it appears to me, in the absence of some action by a magistrate, compelled him for three days to keep her under that order, which was binding upon him. Her counsel does not say that there was any wrong done in receiving her or keeping her the three days, but he does say that three days was the limit and that there was an illegal act on the part of the defendant in keeping her for the remainder of the period—that is to say, eleven days during which she was detained. With regard to that it is said that in fact there was no legal justification. That prima facie, constitutes a sufficient cause of action, but the statute has provided (I presume owing to the difficulties and the delicate responsibilities which it has thrown upon numbers of persons to act in circumstances often of great emergency) in effect in s. 330 that, if the person who is charged with having done something which is illegal can show that he has in fact acted "in pursuance of the Act," and can satisfy the judge that there was "no reasonable ground for alleging want of good faith or reasonable care," then under s. 330 (2) he is entitled to have the proceedings stayed. It is, therefore, a sufficient ground for what I think was the right course here, that, although there may have been something done which on the true construction of the Act could not be justified under it, yet, if it was done under circumstances in which there was no reasonable ground for alleging want of good faith or reasonable care, the court or judge may "upon such terms as to costs or otherwise as the court or judge may think fit," stay the action.

It is urged by counsel for the plaintiff that what was done in the further period beyond the first three days was not justified by the Act. It is said, if I may summarise the argument, that the detention cannot be justified unless there was an actual order made by a justice for the continued detention of the plaintiff in the workhouse. Is that so? There is no doubt that there was a certificate given under s. 24 by the medical officer, and under that section the certificate is to be deemed sufficient authority for detaining the lunatic therein named against his will in the workhouse for fourteen days from its date. Section 24 goes on to say:

> "No lunatic shall be detained against his will or allowed to remain in a workhouse for more than fourteen days from the date of a certificate under this section without an order under the hand of a justice having jurisdiction in the place where the workhouse is situate."

The certificate was given by Dr. Eadie after an interview with the justice, I say no more than that, the justice seeing the plaintiff herself. Dr. Eadie states that the justice did not make an order for her discharge, but concurred in leaving the patient in the workhouse for further observation, and Dr. Eadie gave the certificate for continuing the detention. I myself, if I had to decide it, am of opinion in spite of the arguments that have been adduced, that that certificate was a sufficient justification under the Act for the master to act as he did. I cannot myself think that it is the true view, having regard especially to the language of s. 24 (3) requiring an order under the hand of the justice in cases beyond fourteen days, that the certificate was not intended to be a protection for the detention for the longer period beyond the three days if given by the medical officer. Indeed, the master would have been disobeying the law had he, in spite of that certificate, released the plaintiff from the detention to which she had been originally properly given, there being, as it appears to me, in s. 24, legislation which made the certificate a document in relation to the detention of the plaintiff to which the master of the workhouse was bound to conform. When it is argued that there must be a positive order of the justice to detain even for the fourteen days, I think inferentially that is very difficult to maintain when it is expressly provided that for a detention beyond fourteen days a justice is to make an order under the very s. 24 which gives the certificate of the doctor full authority as an authority for the detention for fourteen days.

I will assume for a moment that that view is wrong. The object of the Act is to

protect people who are trying to do their duty under it although they may not, as I have said, have exactly complied with its regulations. A responsibility was cast upon the defendant of receiving, and, I think, under the certificate, which was plainly given by the doctor as an authority and a requirement, also of detaining the plaintiff till further examination, that is for the period of fourteen days. I think he was clearly prima facie entitled to believe that that authority was given properly by the doctor, and that the justice who had seen the plaintiff, to whom she could have appealed if there was anything wrong, would certainly not have gone away, not ordering her discharge, if he had not taken the same view—namely, that all that was required was that the doctor should give a certificate requiring her continued detention. Therefore, if the master was wrong, it seems to me there was every circumstance which shows that he was in fact acting not unreasonably; or, to put it more positively, that there was every reason for us to be satisfied that there was no reasonable ground for the allegation of want of good faith or reasonable care.

I have dealt so far only with reasonable care, and it is all that one has to deal with here, because the plaintiff does not allege as against the master a want of good faith. The only thing vaguely suggested is that his wife seems to have taken the view that the plaintiff had some case, but that is not the point here. The point is after the doctor had given his certificate, after the justice had left the plaintiff in custody after his personal examination in conference with the doctor and had concurred in the desire for there being further observation, was there at that moment anything which could be said to be want of good faith on the part of the defendant in acting on what had been done by the doctor and the magistrate? There clearly is no reasonable ground for alleging want of good faith, and, as I have said, so far as want of reasonable care is concerned, I see no evidence of it. I think the defendant acted in accordance with the Act of Parliament, but, whether he acted so or not, he has satisfied me upon the evidence that he was not wanting in reasonable care. For these reasons it seems to me, that, while there is no doubt a discretion in the word "may," certainly the person who is to be protected by express provisions such as those contained in s. 330 ought to be protected from the beginning, if is clear that that which permits the stay of the proceedings is established upon the evidence—namely, absence of any ground for charging him with want of good faith or care. I think, therefore, with great respect that Rowlatt, J., was wrong in overruling the master who dealt with this matter in the first instance, and that these proceedings ought to be stayed. We are told that there is an action pending against the person who, no doubt, so far as the defendant is concerned, effectively commenced these proceedings—namely, the relieving officer. Whether there are or may be any proceedings against any of the other parties I do not know. I wish to guard myself against expressing or being understood to hold any opinion as to what may be their rights or what cases they respectively could make out. It is sufficient to consider—and it is the only matter we have to consider here—whether there is a case which ought to be maintained against the defendant. In my opinion, there is not. The result, therefore, is that this appeal must be allowed.

Appeal allowed.

Solicitors: *Littledale & Lefroy*, for *Southern, Fullalove & Ritchie*, Burnley; *Stow, Preston, & Lyttelton*, for *J. C. Waddington*, Burnley.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

CLINTON *v.* J. LYONS & CO., LTD.

[KING'S BENCH DIVISION (Ridley and Bray, JJ.), May 10, 23, 1912]

[Reported [1912] 3 K.B. 198; 81 L.J.K.B. 923; 106 L.T. 988; 28 T.L.R. 462]

B

Animal—Cat—Liability of owner for injury to plaintiff—Cat with kittens—Attack on dog and owner of dog.

The plaintiff, carrying a dog, went, with the permission of the defendants, accompanied by her husband into a tea shop belonging to the defendants to have tea. She put the dog on the floor, keeping hold of its lead, when a cat, who was rearing C kittens at the time, came out of a storeroom and sprang on the dog and bit him. The plaintiff picked up the dog and gave him to her husband. They then prepared to leave the shop when the cat sprang on the plaintiff's shoulder and bit her arm. In an action by the plaintiff against the defendants for damages for the personal injuries sustained by her and also for the injury done to her dog,

D **Held:** a cat, when vicious towards dogs because she has kittens, did not cease to be a domestic animal and become ferae naturae; there was no evidence that the defendants, as persons of ordinary sense and prudence, had any reason to anticipate that the particular cat in question was likely to do mischief; and, therefore, the defendants were not liable for the plaintiff's injuries.

Notes. The Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) E 832), did away with the distinction between invitees and licensees, and, by s. 2, provided that an occupier of premises owed to all his visitors the same duty, the "common duty of care," which was defined as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

Referred to: *Manton* v. *Brocklebank*, [1923] All E.R. 416.

F As to the liability of the owners of animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663–668, and for cases see 2 DIGEST (Repl.) 316 et seq.

Cases referred to:

(1) *Nichols* v. *Marsland* (1875), L.R. 10 Ex. Ch. 255; 44 L.J. Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. G 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421.*

(2) *Baker* v. *Snell*, [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753; 24 T.L.R. 811; 52 Sol. Jo. 681; 21 Cox, C.C. 716, C.A.; 2 Digest (Repl.) 380, *554.*

(3) *Barnes* v. *Lucille, Ltd.* (1907), 96 L.T. 680; 23 T.L.R. 393; 2 Digest (Repl.) 384, *580.*

(4) *Hudson* v. *Roberts* (1851), 6 Ex. Ch. 697; 20 L.J. Ex. 299; 17 L.T.O.S. 158; 155 H E.R. 724; 2 Digest (Repl.) 334, *242.*

(5) *Baldwin* v. *Casella* (1872), L.R. 7 Ex. Ch. 325; 41 L.J.Ex. 167; 26 L.T. 707; 21 W.R. 16; 2 Digest (Repl.) 384, *582.*

(6) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 36 I Digest (Repl.) 46, *246.*

(7) *McDowall* v. *Great Western Rail. Co.*, [1902] 1 K.B. 618; 71 L.J.K.B. 330; 86 L.T. 558; 18 T.L.R. 340; reversed, [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603, C.A.; 36 Digest (Repl.) 40, *200.*

(8) *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173.*

(9) *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626, 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590.*

(10) *Jenkins* v. *Great Western Rail. Co.*, ante p. 216; [1912] 1 K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882, C.A.; 36 Digest (Repl.) 64, *346*.

(11) *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.H.; 2 Digest (Repl.) 329, *219*.

(12) *Osborne* (*Osborn*) v. *Chocqueel*, [1896] 2 Q.B. 109; 65 L.J.Q.B. 534; 74 L.T. 786; 44 W.R. 575; 12 T.L.R. 437; 40 Sol. Jo. 532; 2 Digest (Repl.) 384, *578*.

(13) *Lowery* v. *Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; 26 T.L.R. 108; 54 Sol. Jo. 99, C.A.; reversed [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol Jo. 62, H.L.; 2 Digest (Repl.) 332, *232*.

(14) *Bolch* v. *Smith* (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 8 Jur.N.S. 197; 10 W.R. 387; 158 E.R. 666; sub nom. *Bolett* v. *Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, *358*.

(15) *Smith* v. *London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 19 W.R. 230, Ex. Ch.; 36 Digest (Repl.) 37, *184*.

Appeal by the defendants from an order of His Honour JUDGE WOODFALL, sitting with a jury at the Westminster County Court.

Shakespeare for the defendants.

McCall, K.C., and *M. O'Connor* for the plaintiff.

Cur. adv. vult.

May 23, 1912. The following judgments were read.

RIDLEY, J.—This was an action commenced in the High Court, but remitted to the county court at Westminster, in which the plaintiff claimed damages for injuries caused to herself and also for injuries caused to her dog, from a bite of a cat in one of the defendants' tea shops. It appeared that the plaintiff, with a Pomeranian dog in her arms went into the tea shop accompanied by her husband. There was a cat on the premises which had kittens. The plaintiff said she put her dog on the floor and the cat, which in some way had got out of a storeroom where it was shut in, sprang on the dog and bit it. There was evidence that the dog had been smelling at the door of the storeroom, but the jury found that the cat was not provoked. The plaintiff interfered to save the dog and picked it up and gave it to her husband. Then the cat, as she said, sprang on her shoulder and bit her arm. She also said that she was nowhere near the dog when the cat bit her. There was evidence that a notice had been up prohibiting the admission of dogs, but the plaintiff denied having seen it. The plaintiff's husband said: "The manageress told me 'All cats with kittens are vicious, and naturally go for dogs.'" Miss Simpson, who was called as authoress of the BOOK OF THE CAT, said:

> "Cats rearing kittens are inclined to be savage and in a vicious state, even if gentle otherwise. If such a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her—that is, if it was in a vicious state or had been frightened."

The following questions were left to the jury:

> "(i) Did the plaintiff take her dog on the premises by the permission of the defendants?—Yes. (ii) Or with acquiescence of the defendants?—Yes. (iii) Had the cat (to the knowledge of the defendants), while rearing kittens, a disposition to attack a dog in her neighbourhood and a person holding a dog?—Yes. (iv) Did the cat attack the dog unprovoked?—Yes. (v) Were the plaintiff's injuries the result of the cat attacking her dog?—Yes. (vi) Did the defendants take reasonable precautions (under the circumstances) for the safety of their customers?—No. (vii) Damages?—£100."

It may be observed that, if the cat was to be classed as feræ naturæ, the sixth question left to the jury was not relevant, because according to *Nichols* v. *Marsland* (1) and *Baker* v. *Snell* (2) a person keeping such an animal is liable for the consequences, however arising. The case must have been put on two grounds, as it was before us—namely,

first, that this cat must be classed as an animal feræ naturæ, and, secondly, if not, it still constituted a danger against which it was the defendants' duty to take reasonable care to protect their customers, which they had not done.

As to the first point, the facts appear to me to show that the cat was not dangerous to human beings but was dangerous to dogs, and that nothing would have happened had not the plaintiff taken the dog with her into the room. It would be a strong thing to hold that a cat when vicious with dogs (because she has kittens) ceases to be a domestic animal and becomes feræ naturæ, so that her owner is responsible for all eventualities as in *Baker* v. *Snell* (2). An animal may, indeed, be dangerous from a temporary cause, as was the case in *Barnes* v. *Lucille* (3), but there it was shown that while with puppies the dog was dangerous to mankind, so that it was feræ naturæ. But this cat was not dangerous to mankind, nor would any mischief have happened but for the presence of the dog brought by Mrs. Clinton. Counsel for the plaintiff, however, contended that such a cat must nevertheless be accounted feræ naturæ because it is vicious towards such of mankind as are carrying dogs and must be likened to the bull which attacked a person wearing a red handkerchief: *Hudson* v. *Roberts* (4). In that case the defendant said after the accident that he knew that the bull (or a bull) would run at anything red, and that was left to the jury as evidence of scienter. The court refused to interfere, saying that there was evidence for the jury, and I am much disposed to agree, for I think that a bull which is vicious to persons wearing a red tie may well attack a person without one. But the hostility of a cat and dog, on the other hand, has passed into a proverb, and I am not disposed to say that, if a cat attacks a dog, and by accident a person who happens to be there, the cat is, therefore, dangerous to mankind. I think the cat is not to be classed as dangerous to mankind, but that the bull is. I have looked at *Baldwin* v. *Casella* (5) and find it is not against this view of the law, although it chiefly turns on another point—namely, whether the knowledge of the servant is the knowledge of the owner.

Taking this view of the first point argued, there could have been no liability on the defendants had the occurrence taken place under circumstance placing no liability on them except such as would arise from the mere ownership of the cat. But it was contended, secondly, that they were liable to the plaintiff because of the duty under which they lay as occupier to take reasonable care to prevent injury to their customers: *Indermaur* v. *Dames* (6). In that case the court thus laid the law down in a considered judgment with regard to a visitor (L.R. 1 C.P. at p. 288):

> "We consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

There is not here any suggestion of contributory negligence, and the jury found that the defendants had not taken reasonable precautions. Counsel for the defendants contended that the bite inflicted by the cat on the plaintiff was not such an unusual danger that the defendants were called upon to provide against it, that their liability in respect of the cat was limited by the duty imposed upon them legally in respect of an animal not in fact dangerous to mankind, and that this case was analogus to *McDowall* v. *Great Western Rail. Co.* (7). There the defendants had left upon a siding a van coupled to a train of trucks and sufficiently secured by brakes, as was found by the jury, unless interfered with. Some boys trespassing in mischief managed to undo the couplings and loosen the brakes, so that the van ran down the line and injured the plaintiff, who was on a highway. KENNEDY. J., gave judgment for the plaintiff, but the Court of Appeal reversed that decision upon the grounds (i) that there was nothing in the circumstances of the case which would induce a person of ordinary care to do more than the railway company did; and, (ii) that the effective cause of the accident was the act of a stranger.

And so in *Sharp* v. *Powell* (8), where the defendant's servant had washed a van of his on a part of the street opposite a coachhouse and the water ran along the gutter for some distance till, meeting an obstruction, it formed a pool which was soon frozen over. The plaintiff's horse fell in passing over the ice and received the injury which was the subject of the action. The judge at the trial ruled that the defendant was not liable; the Court of Common Pleas affirmed the direction, and BOVILL, C.J., said (41 L.J.C.P. at p. 98):

> "A man is not generally responsible for what are not such ordinary consequences [of his act] unless he be shown to have had knowledge of any fact which made it probable that the consequences, though not ordinary, would result from the act."

In the first of these cases the mischievous conduct of the boys and in the latter the accumulation of water was the proximate cause of the accident, and neither was the act of the defendant. But if the Great Western Railway in their case had known that the mischievous boys were likely to set the van loose they might have been liable; and so might Mr. Powell if his servant had been shown to have knowledge that a sheet of ice would be formed at the corner of the street.

In the present case the jury found that the cat had a disposition, when rearing kittens, to attack a dog and a person holding a dog. They also found that the plaintiff took the dog there with the defendants' acquiescence, and that the defendants did not take reasonable care for the safety of their customers. I consider that the defendants' duty was to take reasonable care to provide for the safety of their customers. But how does the rule stated by BOVILL, C.J., apply to these facts? It is not possible to treat the plaintiff as a stranger such as the boys in the railway case were; but she was there as a cause of the accident and as an effective cause, for without her and the dog it would not have occurred. Giving the best consideration to the matter that I can, I have come to the conclusion that the defendants are not answerable for what happened, because it was not an ordinary consequence of their acts, there being no evidence that they had any reason to expect it. In other words, the rule laid down by BOVILL, C.J., as quoted above applies.

I must not omit to notice *Cooke* v. *Midland Great Western Railway of Ireland* (9), which might be regarded as opposed to this view. In that case the railway company left a gap in their fence near the line giving access to a turntable; and there was evidence that children used the turntable as a plaything with the acquiescence of the company. The plaintiff, a child, in so using the turntable was injured. The House of Lords held that the railway company were liable, and LORD MACNAGHTEN said, in giving his judgment ([1909] A.C. at p. 234):

> "Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company was placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to the children resorting to the place and playing with the turntable?"

Because there was such a likelihood the defendants were held liable. But there the playing on the turntable was known to the railway company and in that very act was the danger, whereas here the danger was found in a combination of circumstances, and I cannot see that there was such a probability as would have been foreseen by a person of ordinary sense and prudence.

This view is much assisted by *Jenkins* v. *Great Western Rail. Co.* (10) in the Court of Appeal. There the plaintiff, a child of two and a half years, had been run over by a train and injured. The child lived in a house adjoining the railway and got on to the line through a fence to play on a pile of sleepers placed inside the fence. Beyond the sleepers was the line of railway. Some of the railway servants knew that she was in the habit of playing on the sleepers, but not that she was in the habit of getting from the sleepers on to the line of rail. The Court of Appeal, affirming the judge at the trial, entered judgment for the defendants, distinguishing the case from *Cooke* v. *Midland*

Great Western Railway of Ireland (9) and pointing out that there the company knew the turntable was used by the children, whereas in the case before them they did not know more than that the children played upon the sleepers and did not know of their playing upon the line.

As to the damages claimed for the injury to the dog, apart from those for the injury to the plaintiff, I agree with the observations of my brother BRAY which I have had the opportunity of seeing. For these reasons I am of opinion that the judgment should be entered for the defendants.

BRAY, J.—I agree with the decision at which my brother has arrived, and I think with the reasons he has given, but as I had already written out my judgment I will give my own reasons.

This is an appeal from a judgment entered by the county court judge in favour of the plaintiff for £100 damages. The case was tried with a jury, and the jury answered seven questions put to them, and on those answers the county court judge entered the judgment. The plaintiff claimed damages, first, for personal injuries sustained by herself, and second, for injuries sustained by her dog under the following circumstances. The defendants are restaurant keepers, and have a tea shop in Victoria Street. On Aug. 4, 1911, the plaintiff and her husband entered the tea shop and went down to the basement room. The plaintiff, according to her evidence, which I think it must be taken that the jury accepted as true, carried her Pomeranian dog down with her, and when she sat down she put the dog down by the table, keeping hold of the dog's lead. Then a cat came creeping out of the door of a storeroom and sprang on the dog and bit him. She picked up the dog with the cat on its back and gave it to her husband. They then prepared to go out when the cat sprang on the plaintiff's shoulder and bit her arm. At this time she said the dog was not near her. It appeared that the cat had got kittens. The manageress was aware of this, and that at that time cats were "vicious, and naturally went for dogs." There was evidence that there was a notice up that dogs were not admitted, but it must be taken that the plaintiff had not seen it, and had taken her dog, without objection, into other of the defendants' shops in the country. On this occasion no objection had been made to her bringing the dog, but it did not appear whether the manageress had seen the dog. The waitress had seen it immediately before the incident. A Miss Simpson, stated to be an expert in cats, was called for the plaintiff, and said that cats rearing kittens were inclined to be savage and in a vicious state, even if gentle otherwise, and that, if such a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her, that is, if it was in a vicious state or had been frightened. The questions put to the jury and their answers have been stated by my brother, and I need not repeat them.

The plaintiff's counsel relied on two grounds of action (i) a breach of duty by the defendants as possessors of a cat known to be vicious; (ii) a breach of duty which they owed to the plaintiff as a customer whom they invited into their shop. These points will have to be separately considered in relation to the plaintiff's personal injuries and the injuries to her dog. First, are the defendants responsible to the plaintiff for the personal injuries she sustained on the ground that they kept a vicious or dangerous cat? The jury have found by their first two findings that the plaintiff took her dog to the premises by the permission of the defendants. It must be taken, therefore, that the plaintiff was lawfully in the shop with her dog. The law with regard to the keeping of dangerous animals is thus stated by BOWEN, L.J., in *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (11) (25 Q.B.D., at 261):

> "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."

It cannot be doubted that a cat is an animal that is dealt with by mankind on the footing that a person may safely keep it. The question, therefore, is whether this cat, having kittens, was likely to do mischief, and whether the defendants through their manageress knew that. It is important to recollect that the scienter which it is necessary to show is that the animal had a ferocious disposition towards mankind: see *Osborne* v. *Chocqueel* (12). It need not necessarily be so to all mankind; it is sufficient if it be to a class of mankind not uncommon to meet with: see *Hudson* v. *Roberts* (4) where the defendant had a bull which was known to be dangerous to a man wearing a red handkerchief. I think that class would include a person accompanied by a dog. But is a cat with kittens likely to do mischief to such a person according to the experience of mankind? Was there any evidence to prove this? Miss Simpson stated that if a cat smelt the dress of the plaintiff who had been carrying a dog it might attack her. The manageress stated that all cats with kittens are vicious and naturally go for dogs, and Miss Sale said in cross-examination that a cat is then naturally vicious, but counsel for the defendants showed us from his notes that this meant vicious towards dogs. I have grave doubts whether there was any evidence which ought to have been submitted to a jury on this point.

FARWELL, L.J., in *Baker* v. *Snell* (2) says that it is a wrongful act to keep a dangerous animal. Is it a wrongful act to keep a cat with kittens? If so a good many people are doing wrongful acts every day and the breeding of cats must be stopped. The law recognises that it is proper and useful to keep cats and how is that to be done if the cats are not to have kittens? Perhaps FARWELL, L.J.'s, dictum goes too far, but is it to be said that a person who keeps a cat that has kittens does so at his peril? Surely this would be a most mischievous extension of the law relating to the keeping of animals. But then it is necessary for the plaintiff to show that the defendants knew of the danger. What evidence is there of this knowledge? The admission of the manageress that all cats with kittens are vicious and naturally go for dogs does not go far enough. It is not an admission that they are dangerous to persons who bring dogs into a room or shop. In my opinion, there was not sufficient evidence to support the third finding of the jury and the plaintiff's claim for damages for personal injuries to herself on this head fails.

Then comes the more difficult question whether the defendants were guilty of a breach of the duty which they owed to a customer whom they had invited into their shop or who was lawfully in their shop. It is not suggested that there would have been danger to her if she had come in without a dog. First, did they invite her to come in with a dog? The jury were not asked so to find and have not so found. They have found that they permitted her to do so, and acquiesced in her doing so. I do not read those findings as saying that the defendants invited the plaintiff to come with a dog. They invited her to come and did not object when she brought her dog. I think there is a clear distinction in the duty owed towards a person "invited" and a person permitted. This is pointed out by WILLES, J., in *Indermaur* v. *Dames* (6) and by BUCKLEY, L.J., in *Lowery* v. *Walker* (13). BUCKLEY, L.J., says ([1910] 1 K.B. at pp. 189, 190), quoting MARTIN, B. in *Bolch* v. *Smith* (14) (7 H. & N. at p. 745),

> "'Permission involves leave and licence but it gives no right . . .' The question which I have to investigate in this case is whether to persons of that class (meaning the persons who had been permitted to cross a field) the landowner does not owe this duty that he will not wilfully expose them to something whose evil character he knows but as to which he omits to caution the persons whom he thus allows to come there. . . . The proposition of law as I understand it, is that the donee must not look a gift horse in the mouth; if something is given it must be enjoyed as it is given and taken with its risks, but subject to this that if the giver knows of some evil character in it at the time and does not warn the donee he is responsible although it was a gift."

On that ground he held that the defendant, who knew that the horse he had put in the field was dangerous, was liable. This opinion of his was affirmed by the House of Lords and LORD LOREBURN said: ([1911] A.C. at p. 12):

> "The finding in substance amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually use the

A field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal."

B If this be the right view of the duty towards a permitted person, the plaintiff does not show any breach of that duty if I am right in holding as I have done, that the plaintiff has not proved that the defendant knew the evil or dangerous character of the cat. No doubt, if there were an invitation the duty would be larger. It would be a duty to take reasonable care to prevent a danger which he might reasonably have anticipated, or as WILLES, J., put it in *Indermaur* v. *Dames* (6) (L.R. 1 C.P. at p. 288):

C "And, with respect to such a visitor, at least we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know."

Counsel for the plaintiff put the duty higher, as a duty to take reasonable care to prevent D all dangers to their customers. I think this is putting the duty too high. In *Smith* v. *London and South-Western Rail. Co.* (15) BLACKBURN, J., says (L.R. 6 C.P. at p. 22):

"It can hardly be negligent not to provide against that which no one would anticipate."

This rule of law is sometimes put in another way by saying that the damage is too E remote. In *Sharp* v. *Powell* (8) BOVILL, C.J., says (L.R. 7 C.P. at p. 258):

"He is not liable for damage which is not the natural and ordinary consequence of such an act unless he knows or has reasonable means of knowing that consequences not usually resulting from such an act are by reason of some existing cause likely to intervene so as to cause damage to another person,"

F and GROVE, J., says "natural" means "probable." The county court judge does not seem to have put this to the jury, and if there was evidence to support the third finding it was not necessary that he should do so. If the defendants knew or ought to have known that the cat had a disposition to attack a person holding a dog, they ought to have anticipated the danger and taken care to avoid it. If I thought that there was evidence of an invitation to the plaintiff to come in with a dog I might have to consider G whether the case should go down for a new trial in order that it might be put to the jury whether the defendants could reasonably have anticipated the danger. It does seem to me, however, that this possible danger was so remote that a jury could not, on the evidence before them, properly find that the defendants could reasonably have anticipated. It was at least as remote as the danger in *Sharp* v. *Powell* (8).

It would penalise the possessors of useful animals too highly to make them responsible H for damages so remote as these. This was really a most improbable accident which might not happen once in a lifetime. We must see how far one would have to go if the plaintiff is entitled to succeed. There are probably hundreds of shops in London and other towns where no objection is made to a customer who brings a dog with him into the shop. Many of these tradesmen keep cats. Are they bound to keep cats with kittens at their peril? The truth is that the risk is so remote as to be negligible, and a person I who omits to guard against it is not guilty of negligence. In the result, therefore, I have arrived at the conclusion that there was no evidence to support the plaintiff's claim so far as her personal injuries were concerned.

It remains to consider whether there was any evidence to support the claim for damages for injuries to her dog. It is certainly the common experience of mankind that cat and dog will fight whether the cat has kittens or not, but it would be ridiculous to hold that for that reason every person who keeps a dog or a cat does so at his peril and is responsible for any damage his cat will do to his neighbour's dog or his dog will do to his neighbour's cat. There is no case to be found in the books showing such a liability.

Did the defendants invite the dog into their shop? There is no finding to that effect, and it cannot be sufficient if they permitted it to come in. In my opinion, the plaintiff's case equally fails as regards the damage arising from the injuries to her dog. It is to be observed that the jury did not assess the damages separately, and, therefore, the verdict cannot stand if either claim fails. In my opinion, however, both claims fail and the action should be dismissed with costs here and below.

Appeal allowed.

Solicitors: *C. F. Appleton*; *F. J. Berryman.*

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

R. *v.* ALLEN

[King's Bench Division (Lord Alverstone, C.J., Hamilton and Bankes, J.J.), December 15, 1911]

[Reported [1912] 1 K.B. 365; 81 L.J.K.B. 258; 106 L.T. 101; 76 J.P. 95; 28 T.L.R. 145; 22 Cox, C.C. 669, D.C.]

Case Stated—Magistrates—Examining magistrates—Costs—Order against prosecutor to pay costs—Application by prosecutor for Case on question whether order rightly made—Costs in Criminal Cases Act, 1908 (8 *Edw.* 7, *c.* 15) *s.* 6 (3).

Where justices acting as examining justices under s. 6 (3) of the Costs in Criminal Cases Act, 1908, dismiss a charge against a person of an indictable offence (not dealt with summarily) and order the prosecutor to pay the costs of the defence on the ground that in their opinion the charge was not made in good faith, they have power to state a Case for the opinion of the High Court, on the question whether the order as to costs was rightly made, and, if they refuse, the court has jurisdiction to order them to do so.

Notes. The Costs in Criminal Cases Act, 1908, has been repealed. See now the Costs in Criminal Cases Act, 1952. Section 6 (3) of the 1908 Act corresponds to s. 6 (3) of the 1952 Act.

As to the right of appeal to the High Court by way of Case Stated, see 25 Halsbury's Laws (3rd Edn.) 250 et seq., and for cases see 14 Digest (Repl.) 683–4. For Costs in Criminal Cases Act, 1952, s. 6, see 32 Halsbury's Statutes (2nd Edn.) 414, and for Magistrates' Courts Act, 1952, s. 87, see ibid. p. 488.

Cases referred to:

(1) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 16 Digest (Repl.) 114, *6.*

(2) *Hogmaier* v. *Willesden Overseers* (1904), 52 W.R. 654; 48 Sol. Jo. 494; sub nom. *Hagmaier* v. *Willesden Overseers*, [1904] 2 K.B. 316; 73 L.J.K.B. 638; 90 L.T. 683; 68 J.P. 343; 20 T.L.R. 494; 2 L.G.R. 965, D.C.; 16 Digest (Repl.) 115, *13.*

(3) *Foss* v. *Best*, [1906] 2 K.B. 105; 75 L.J.K.B. 575; 95 L.T. 127; 70 J.P. 383; 22 T.L.R. 542; 21 Cox. C.C. 226, D.C.; 33 Digest 408, *1176.*

Also referred to in argument:

R. v. *Howard, etc., Farnham Licensing Justices* (1902), 71 L.J.K.B. 754; sub nom. *R.* v. *Farnham Justices*, 66 J.P. 579; 50 W.R. 573; 18 T.L.R. 614; 46 Sol. Jo. 486, D.C.; affirmed [1902] 2 K.B. 363; 71 L.J.K.B. 754; 86 L.J. 839; 66 J.P. 579; 51 W.R. 21; 18 T.L.R. 690, C.A.; 16 Digest (Repl.) 336, *1144.*

Rule nisi for mandamus to justices of the borough of Bury, Lancashire, to show cause why they should not state a Case for the opinion of the High Court.

The applicant for the rule was the licensee of certain licensed premises. He had been summoned upon four charges, three for gambling or permitting gambling on his licensed premises and one for being drunk on his premises. Two police constables had sworn that the applicant was present on one of the occasions while the gaming was alleged to have taken place. The applicant successfully disproved this, and he thereupon obtained summonses against the police officers, charging them with having committed perjury. The justices, some of whom were the same as those who had heard the charges against the applicant, having heard the evidence, dismissed the summonses for perjury against the constables, and, being of opinion that the charge of perjury had not been made in good faith, they ordered the prosecutor, the licensee, under s. 6 (3) of the Costs in Criminal Cases Act, 1908, to pay £5 5s., the costs of the defence. The applicant then applied to the justices to state a Case on the question whether the order to pay costs was rightly made which the justices declined to do. The justices made an affidavit in opposition to the rule, and during the argument it was agreed, on the suggestion of the court, that the facts as set out in the justices' affidavit should be treated as the case stated by them, and the case was dealt with upon that basis.

Frank B. Merriman, for the justices, showed cause.

Gordon Hewart, for the applicant, in support of the rule.

LORD ALVERSTONE, C.J.—In this case counsel for the justices has taken a preliminary objection that there is no power to order the justices, sitting as these justices were, to state a Case. As the matter is of importance, I think I ought to state my reasons for holding that the justices can be ordered to state a Case. Our opinion upon the point is not in one sense really obiter, because the parties have properly dealt with this affidavit of the justices as being the Case that would have been stated by them if they had stated a Case; but as the objection that the court has no power to order them to state a Case has been taken and argued, I think we ought to express our opinion upon it.

The question really depends upon what is the position of justices when on dismissing a charge they are making an order under s. 6 (3) of the Costs in Criminal Cases Act, 1908, that the prosecutor should pay the costs. Section 6 (1) of that Act says:

> "The court by or before whom any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred";

and under s. 6 (2), where a person is acquitted, they have got certain other powers with which I need not deal. Then in s. 6 (3) it is said:

> "Where a charge made against any person for any indictable offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, but if the amount ordered to be paid exceeds twenty-five pounds the prosecutor may appeal against the order."

In this case the justices fixed the costs at five guineas, and therefore their decision is final on the question of amount. I call attention to this, that that section recognises the perfectly well known and admitted fact that if the justices are sitting as a court of summary jurisdiction and are hearing a case, even though the offence charged may be an indictable offence which the person charged might require to be tried by a jury, and if they are dealing with the case summarily, they have power to state a case. I need not refer to the provisions which give the justices power to state a Special Case; they are contained in s. 33 of the Summary Jurisdiction Act, 1879, as extended by s. 13 (11) of the Interpretation Act, 1889 (see now s. 87 of the Magistrates' Court Act, 1952).

It is contended by counsel for the justices that as the justices were only acting—s. 6 (3) of the Act itself says—as examining justices, they cannot be ordered to state a case, and in support of that contention he relies upon s. 1 (1) of the Act. That section, when dealing with another order that may be made—namely, an order for payment of the costs of the prosecution or defence out of the county or borough funds—refers to the

courts that the Act is supposed to be dealing with, and those courts are the following: (a) a court of assize or of quarter sessions; (b) a court of summary jurisdiction by which an indictable offence is dealt with summarily; and (c) any justice or justices before whom a charge not dealt with summarily is made against any person for an indictable offence (in the Act referred to as the examining justices). Therefore it was not intended that the examining justices referred to in cl. (c) should be otherwise than a court, and they are described as a court. The words "examining justices" were only put in for the purpose of interpreting the expression which is afterwards used in s. 6 (3). Under that section, combined with the earlier section, the court have got the power to make an order as to payment of costs. Upon the principles that have been recognised by this court, at least in regard to the matter of making the order as to costs, it seems to me that they are acting judicially and acting as a court. They have examined witnesses upon oath and they may have heard for this purpose the evidence of the person charged and his witnesses—as they often do hear such evidence—and then they, for reasons which seemed satisfactory to them, whether subsequent proceedings might be taken under the Vexations Indictments Act, 1859, [repealed] or not, dismissed the summonses, and they have the power under the section in certain circumstances to order the payment of the costs by the prosecutor. In my opinion, therefore, there is power to call upon the justices to state a case.

Counsel for the justices in support of the objection not unnaturally referred to *Boulter* v. *Kent Justices* (1), so much discussed in this court as to the position of justices sitting as a licensing meeting; and the same sort of discussion took place before us in 1904 in the case of *Hagmaier* v. *Willesden Overseers* (2), in which this court, consisting of WILLES, J., and KENNEDY, J., and myself, were of opinion that where justices were simply sitting in special petty sessions for the purpose of settling the jury lists, they were not acting as a court, and could not be ordered to state a Case. Counsel also relies, and quite properly, upon the expressions used by CHANNELL, which are more in point, in *Foss* v. *Best* (3), where he says ([1906] 2 K.B., at p. 110):

> "To begin with, a case can only be stated in respect of a 'conviction, order, determination, or other proceeding of a court of summary jurisdiction,' and I think that justices who are taking depositions for the purpose of committing a prisoner for trial have not this power to state a Case, as they are not exercising summary jurisdiction. Here the justices were not proceeding to deal with the case summarily."

As so stated that would include the point argued before us, but I desire to point out that the matter which was then being considered was not the question of an order made by the justices sitting as in this case, which would have the effect of making one of the parties before them pay the costs. The matter then being considered was quite a different matter—it was simply as to whether, as no notice in writing of the appeal had been served on the respondent as required by s. 2 of the Summary Jurisdiction Act, 1857, by reason of the fact that the respondent could not be found, the court could hear the appeal; and it is therefore rightly put in the headnote of the report as a semble that the justices have no power to state a case where they have dismissed an information for felony.

It seems to me that in those circumstances no question of this kind could really arise, because where an information for felony is dismissed there is nothing about which to state a case. Therefore CHANNELL, J., in the observations which I have read was not in any way referring to a case in which the magistrates make an order binding upon one of the parties before them. In my opinion, therefore, the preliminary objection fails. [HIS LORDSHIP then gave judgment upon the facts of the Case, holding that there was evidence upon which the justices could come to the conclusion that the summonses for perjury had not been taken out in good faith and that the prosecution had not been brought to promote the ends of justice, and that therefore the justices had jurisdiction under the section to make the order and that the rule should be discharged.]

HAMILTON, J.—I am of the same opinion. On the first point as to the preliminary objection I think that these justices can be ordered to state a special Case. It is clear

that they were acting as a court, and it appears to me that, having regard to the terms of s. 33 of the Summary Jurisdiction Act, 1879, with the extension given to it by s. 13 (11), of the Interpretation Act, 1889, they would come within the terms of that section, and would be liable to be ordered to state a Case, unless it can be said that s. 1 (1) of the Costs in Criminal Cases Act, 1908, alters the matter, although there the justices, exercising a function which causes them to be described in the Act as examining justices, are placed in a different category from justices constituting a court of summary jurisdiction. It is not the object of that section, and I do not think it is the effect of that section, to modify the effect of s. 33 of the Summary Jurisdiction Act, 1879, upon s. 6 of the Costs in Criminal Cases Act, 1908.

With regard to the substance of the case, upon the assumption that the affidavit of the justices is in substance the Case which they would have stated had they been ordered to do so, it appears to me that they had materials upon which they could come to the conclusion, and upon which they did come to the conclusion, that in their opinion the charge of perjury in this case was not made in good faith. [HIS LORDSHIP then dealt with the facts of the case, and concluded:] Putting all these materials together, the justices had facts before them upon which they could, in their honest discretion, arrive at the conclusion that the charge begun with such opportunities of knowledge, with regard to such persons, and pressed to the end in such a manner, was not a charge which was in their opinion made in good faith.

BANKES, J.—I agree.

Rule discharged.

Solicitors: *Snow, Fox & Higginson*, for *Harcourt E. Clare*, Clerk of the Peace, Preston; *Nicol, Son & Jones*, for *Charles H. Pickstone*, Radcliffe.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

HOWARTH *v.* PIONEER LIFE ASSURANCE CO., LTD.

[KING'S BENCH DIVISION (Ridley and Lush, JJ.), May 20, 23, 1912]

[Reported 107 L.T. 155]

Insurance—Proposal—Misstatement—Avoidance of policy—Policy—Absence of insurable interest in assured—Fraudulent misrepresentations as to relationship made by insurance agent—No finding of ignorance or non-participation in fraud by assured.

The plaintiff effected policies of insurance with the defendants a term of which was that if any of her statements were fraudulent or untrue the policies were to be entirely void and the plaintiff would not receive any benefit and would forfeit the premiums. The policies were in fact illegal through being effected on the lives of persons in whom the plaintiff had no insurable interest, and they were obtained by means of untrue statements representing those persons to be relatives in whose lives she had such an interest. It was found by the jury that the untrue statements were not obtained by the defendants' agent from the plaintiff, nor were they stated by the plaintiff to be true to the defendants' district manager, but that the agent made them knowing them to be untrue, told the plaintiff she would be paid in due course on the strength of the statements, and persuaded her to take out the policies knowing them to be illegal.

Held: the policies were void and the plaintiff was not entitled to recover the premiums because (i) there was no finding by the jury that she was induced by the fraud of the defendants' agent to sign the contract without knowing its terms; and

(ii) there was no finding by the jury exculpating the plaintiff from participation in the fraud of the defendants' agent, the onus of proving which was on the plaintiff in the case of an illegal contract where the parties were in pari delicto.

Notes. Refered to: *Hughes* v. *Liverpool Victoria Legal Friendly Society*, [1916–17] All E.R. Rep. 918.

As to the effect of fraud and illegality on the recovery of premiums of an insurance policy, see 22 HALSBURY'S LAWS (3rd Edn.) 172, 239, 241 et seq.; and for cases see 29 DIGEST 61 et seq., 345 et seq., 350 et seq., and 370 et seq.

Cases referred to:

(1) *Duckett* v. *Williams* (1834), 2 Cr. & M. 348; 4 Tyr. 240; 3 L.J.Ex. 141; 149 E.R. 794; 29 Digest 371, *2975*.

(2) *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 52 W.R. 457; 20 T.L.R. 264; 48 Sol. Jo. 275, C.A.; 29 Digest 346, *2789*.

(3) *Macdonald* v. *Law Union Insurance Co.* (1874), L.R. 9 Q.B. 328; 43 L.J.Q.B. 131; 30 L.T. 545; 38 J.P. 485; 22 W.R. 530; 29 Digest 354, *2862*.

Also referred to in argument:

Phillips v. *Royal London Mutual Insurance Co., Ltd.* (1911), 105 L.T. 136, D.C.; 29 Digest 62, *211*.

Appeal against an order of His Honour JUDGE GRAHAM, sitting with a jury at Burnley County Court.

The plaintiff brought an action to recover from the defendants the sum of £25 which had been paid as premiums on four policies of life insurance effected with the defendants. The insurances had been taken out on the lives of strangers in which the plaintiff had no insurable interest, and the plaintiff alleged that she was induced to effect the assurances owing to the fraudulent representations of an agent of the defendants called Anderson. At the trial she stated that in respect of each policy Anderson filled in a card, which he did not read to her, she being an illiterate woman, and that she signed it. On each occasion he informed her that the policy effected was a valid one. The cards signed by the plaintiff contained the following condition:

"I, the proposer, understand that if any of the foregoing statements are fraudulent or untrue the policy is entirely void and that I shall not receive and cannot obtain any money or benefit whatever, and that all the premiums will be forfeited."

The cards as signed by the plaintiff in fact contained untrue statements in that the persons insured were represented as being relatives in whose lives she had an insurable interest.

The jury found that the false statements were not obtained by Anderson from the plaintiff and were not stated to be true by the plaintiff to the defendants' district manager, Mr. Ross, and that Anderson made them knowing them to be untrue, told the plaintiff that she would be paid in due course on the policies on the strength of the answers and persuaded her to take out the policies knowing them to be illegal. The county court judge held that the plaintiff had not acted honestly or believed that Anderson was acting honestly, that she was persuaded by him to join with him in committing what both knew to be a fraud on the defendants; that Mr. Ross, the defendants' district manager, went through the cards with the plaintiff, that the plaintiff must have known that any terms or representations made to her by Anderson were not binding on the defendants and that she contracted only on the terms told her by Mr. Ross. He entered judgment for the defendants. The plaintiff appealed.

Mansfield for the plaintiff.

Rawlinson, K.C., and *Atkinson* for the defendants.

RIDLEY, J.—I am of opinion that it is not possible to interfere with the judgment of the county court judge in this case. The plaintiff brought an action to recover premiums paid to the defendants on the ground that they were paid owing to the fraud of the defendants. It would appear that they were paid on the terms appearing on a

certain card, and the main point taken by the defendants was that the relationship of the plaintiff to the persons whose lives were insured was wrongly stated on the cards, so as to give the plaintiff an insurable interest in such lives when in fact she had none. The card contained the following term:

> "I, the proposer, understand that if any of the foregoing statements are fraudulent or untrue the policy is entirely void and that I shall not receive and cannot obtain any money or benefit whatever, and that all the premiums will be forfeited."

The statements made on the card as to the plaintiff's relationship to the persons whose lives were insured were in fact untrue, but it was contended on behalf of the plaintiff that she was entirely innocent in the matter and had nothing to do with the fraud, which was wholly that of the agent of the company, and therefore she was entitled to say: "I am a perfectly innocent party, and I am entitled to a return of the premiums, notwithstanding the term contained on the card that if there is an untrue statement on it the premiums shall be forfeited, because that untrue statement was not untrue to my knowledge, but was, so far as I knew, a perfectly true one, and because the agent of the defendants so entirely deceived me that I was never aware of the fact that those untrue statements were made." The decision in *Duckett* v. *Williams* (1), where the contract was similar to that in the present case, was that if untrue statements were made the premiums should be forfeited. On that authority, if the case merely stood there, the fact that the statements made on the card were untrue would forfeit the premiums. No case has been quoted to us which varies that rule so far as it goes. Are there any facts in the case before us which will relieve the plaintiff from that consequence and enable her to say that she is entitled to a return of the premiums? If such a case is made, I think it must be done by saying that the agent of the defendants was the only person to blame for the untrue statements being made.

Harse v. *Pearl Life Assurance Co.* (2), to which we were referred, is not exactly in point on the whole of the facts of the present case, but it contains in the judgment of the court some sentences which appear to apply exactly to the rule which, as I think, ought to guide us in the present matter. That was a case in which the agent of the defendants, an insurance company, in good faith, as was found by the jury, and not fraudulently, represented to the plaintiff that, if he effected an insurance on the life of his mother, it would be a valid insurance. The plaintiff, relying on that representation, effected the insurance which, of course, was void, and then brought an action to recover back the premiums. It was held that the action would not lie because both parties were in an equal position; there was no fraud on the part of the company and none on the part of the plaintiff. In other words, it was the converse of a case of fraud on both sides with a similar result. In giving the judgment of the court HENN COLLINS, M.R., said ([1904] 1 K.B. at p. 563):

> "We therefore begin the discussion with the rule of law that primâ facie the plaintiff would be debarred from recovering the premiums paid on either policy. In this state of things it is said that what occurred between the plaintiff and the company's agent relieves the plaintiff from the operation of that rule. The statement, however, made by the agent was not a statement of fact, but one of the law, and was made innocently, as the jury have found. Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff, so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of the mistatement of law, and must submit to that loss."

I do not say that that statement in every detail applies to the present case because the facts were different, but it shows that it lies on the plaintiff in such a case, where primâ facie the loss falls on her, to show that by reason of the fraud being entirely on the part of the agent she is relieved from the consequences which primâ facie follow from the untrue statements made on the card. Have the findings of the jury discharged the plaintiff from the consequences of the untrue statements which were made? In my

opinion they have not. The questions left to the jury and their answers were as follows:

"(i) which, if any, of the answers on the four cards were untrue?—10, 15, and 16, we think, are untrue on all four cards. (ii) Did Anderson get the information required to make the untrue answers from the plaintiff?—We do not think so. (iii) Did the plaintiff at an interview with Mr. Ross (the defendants' district manager) and before these policies were issued say that these statements were true?—We do not think so. (iv) Did Anderson know that the answers on the proposal cards were untrue, and did he make them not knowing whether they were true or not?—He made them knowing them to be untrue. (v) Did Anderson tell the plaintiff that if she obtained policies on the strength of these answers she would be paid in due course?—Yes. (vi) Was Anderson guilty of any fraud, and, if so, what was it?—We think him guilty of misrepresentation. (vii) As to what the misrepresentation was.—That Anderson persuaded plaintiff to take out these policies well knowing them to be illegal."

Those answers show fraud on the part of Anderson, but it seems to me that they do not show that the plaintiff was not a party to the fraud. The judge in giving judgment said:

"But it must be remembered that the plaintiff must be taken to have known, and, in my opinion, did in fact know, that some of the answers were untrue."

She must also be taken to have had in her mind the statement printed on the card—viz.,

"I, the proposer, understand that if any of the foregoing statements are fraudulent or untrue the policy is entirely void."

I do not find it possible to interfere with that finding, and, that being so, the plaintiff has not discharged herself from the consequences which the law attaches to what she has done. For these reasons, in my opinion, this appeal must be dismissed.

LUSH, J.—I am of the same opinion. The plaintiff brought this action to recover premiums which she had paid on a policy of insurance which was admittedly void. The policy was one by which she insured the lives of persons in whom she had no insurable interest. In these circumstances the burden was on her to prove the facts which it was necessary to establish in order to make good her right to get back the premiums. Her claim was met by two defences, which were both properly raised in the court below. The first defence was that the contract under which the premiums were paid contained a term to the effect that, if any material statement on the card with which she was provided was either fraudulent or untrue, the policy should be void and the premiums forfeited. The second defence was that she was a party to an illegal contract and therefore she could not open her case without proving a contract which was illegal, and, that being so, she and the defendants were in pari delicto. If the matter stood there, that would be a complete answer to her action to recover the premiums.

On the first point as to the statements made on the card, the law is clear. In *Macdonald* v. *Law Union Insurance Co.* (3), where the proviso was

"that if the declaration under the hand of the plaintiff delivered at the defendants' office as the basis of the insurance is not in every respect true . . . then the insurance shall be void,"

the Court of Queen's Bench held that, if there were untrue material statements, the policy was void, although the statements were innocently made. BLACKBURN, J., in giving judgment said (L.R. 9 Q.B. at p. 332):

"I think, further, that the meaning and true construction of it is, that if the statement made by the plaintiff is not in every respect true in fact—not in the sense if it be fraudulent or if it be a lie, or in the sense that there is moral culpability—then the policy is void. The object being that the company may know what sort of risk

A they are taking, they secure themselves by saying, if the statements the insured have made are not accurate in fact, then the contract shall be void. Whether the premiums are forfeited would be a matter depending upon other considerations."

In that case the policy did not contain a clause such as is found in this contract to the effect that the premiums should be forfeited if the material statements made were B not true. In *Duckett* v. *Williams* (1), however, the contract did provide, not only that the policy should be void, but that the premiums should be forfeited as in the present case if untrue statements were made, and it was held that, as the parties had so contracted, they were forfeited if untrue statements had been in fact made, however innocent the party making them might have been.

In the present case it was not disputed that there were untrue statements; the jury C have found it as a fact, and it is manifest that such statements were made. How is that allegation met by the plaintiff? The onus being on her, she was bound to raise the question and obtain a finding from the jury which would in some way excuse her from the obligations she was under by the very terms of the contract. There is no finding by the jury which deals with that question. It is said by her counsel that she was an illiterate person. It is quite true that she said she was, but the only way she D could prove that fact so as to entitle to relief would be to get the jury to find it as a fact, and also to say that she was induced by the fraud of the defendants' agent to sign the contract, not knowing the terms of it, and that owing to such fraud she was left in ignorance of what the terms of the contract were. The jury were never asked to find and never did find any fact which would excuse the plaintiff from her obligations under the contract, and, therefore, on this first point, the case comes before us thus. Here E is a party to a contract who has contracted that if untrue statements are made she shall not recover her premiums. Such untrue statements were in fact made, and no facts are found which excuse the plaintiff from the condition in the contract which she has signed. That is ample to dispose of this case.

There is, however, another difficulty equally serious in the plaintiff's way. Being primâ facie in pari delicto with the defendants, she had to get findings from the jury F which would get rid of this difficulty. Although, primâ facie, the parties are in pari delicto, there might be special circumstances which show that the parties were not in fact in pari delicto, and that, although the plaintiff is suing on an illegal contract and has to make that contract part of her case, yet she is freed from this difficulty by reason of some circumstances which she might establish. One of such circumstances might be that, if the agent of the defendants, acting fraudulently or oppressively towards her, G has put her in a position in which she is not capable of protecting herself against the consequences of the agent's fraud, that would excuse her, and if she could prove that, she gets rid of the difficulty that she is in pari delicto with the defendants. How does she meet this point? The burden is still on her in meeting this defence, and it was incumbent on her to obtain a finding from the jury that while she was acting innocently she was defrauded or oppressed by the company's agent, and that owing to that fraud H she was not in pari delicto with the defendants. When one looks at the findings of the jury, there is a finding that the agent was guilty of fraud, but no finding that the plaintiff was not a party to it. Looking at the evidence, it is impossible to come to the conclusion that no fraud was ever imputed to her at the trial. Not only was she cross-examined as to the statements on the card, which, if she had seen them, she must have known to be untrue, but the defendants, in order to prove that she was a party to the fraud, I called a witness, Mr. Ross, who said: "I called on [the plaintiff] and verified the answers" —i.e., with her. The plaintiff was then recalled, and did not dispute that Ross called and verified the answers, and, when she was asked with regard to her knowledge of what was on the card, she did not swear that she never knew what was on it, but said she did not remember what was on it. Therefore the imputation was made on her that, however fraudulent the agent was, she allowed herself to be made a party to it. That being so, it was incumbent on her to get a finding from the jury, not only to the effect that the agent had been guilty of fraud, but exculpating her from fraud. No such finding was obtained by her. In the ordinary course it is for the defendant to get a finding that the

plaintiff has been guilty of fraud if he seeks to rely on it, but, when a plaintiff commences an action in which she is in the wrong, primâ facie, because she is in pari delicto with the defendants, the burden is on her to persuade the jury, if she can, to find those facts which may exculpate her from the consequences of the illegality of the contract under which the money sought to be recovered was paid.

In my opinion, therefore, on this ground also, the plaintiff is not entitled to succeed. The result is that this appeal must be dismissed. With regard to the facts which the judge stated that he had found, it does not seem to me, with all possible respect, that it was within his province to find them. However, that does not affect the case, because the plaintiff must succeed, if she can succeed at all, on the jury's findings. In my opinion the findings of the jury are clearly not sufficient to entitle her to maintain the action.

Appeal dismissed.

Solicitors: *W. J.* and *E. H. Tremellen*, for *A. L. Garnett*, Burnley; *Pritchard, Englefield & Co.*, for *J. Campbell*, Blackburn.

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

EDMONDSON AND ANOTHER *v.* COPLAND

[Chancery Division (Joyce, J.), March 29, 30, April 27, 28, May 9, 1911]

[Reported [1911] 2 Ch. 301; 80 L.J.Ch. 532; 105 L.T. 8; 27 T.L.R. 446; 55 Sol. Jo. 520]

Mortgage—Redemption—Notice by mortgagee requiring repayment—Mortgagor's right to tender payment—Liability for interest after refusal of tender—Profit on mortgage money not paid into court or held available—Liability of mortgagor to account.

When a mortgagee has given notice requiring repayment of principal and interest the mortgagor may at any time tender the principal with interest to the date of tender, without giving notice to pay off, and, if his tender is refused, he is not liable to pay additional interest in lieu of notice. But he will be liable to account for profit made on the mortgage money after tender, if he does not pay the money into court (if there are proceedings in which this can be done) or keep it ready and unemployed.

Bartlett v. *Franklin* (1) (1867), 36 L.J.Ch. 671, explained and distinguished.

Notes. Applied: *Barrat* v. *Gough-Thomas*, [1951] 2 All E.R. 48. Referred to: *Graham* v. *Seal* (1918), 88 L.J.Ch. 31.

As to the effect of notice requiring repayment given by a mortgage, see 27 Halsbury's Laws (3rd Edn.) 242, para. 438; and for cases see 35 Digest 361 et seq.

Cases referred to:

(1) *Bartlett* v. *Franklin* (1867), 36 L.J.Ch. 671; 17 L.T. 100; 15 W.R. 1077; 35 Digest 363, *1039*.

Also referred to in argument:

Day v. *Day* (1862), 31 Beav. 270; 31 L.J.Ch. 806; 7 L.T. 122; 8 Jur.N.S. 1166; 10 W.R. 728; 54 E.R. 1142; 35 Digest 363, *1048*.

Re Moss, Levy v. *Sewill* (1885), 31 Ch.D. 90; 55 L.J.Ch. 87; 54 L.T. 49; 34 W.R. 59; 35 Digest 362, *1041*.

Rourke v. *Robinson*, [1911] 1 Ch. 480; 80 L.J.Ch. 295; 103 L.T. 895; 35 Digest 365, *1061*.

Wiltshire v. *Smith* (1744), 3 Atk. 89; 26 E.R. 854, L.C.; 35 Digest 364, *1059*.

Lutton v. *Rodd* (1675), 2 Cas. in Ch. 206; 22 E.R. 913; 35 Digest 666, *4022*.
Gyles v. *Hall* (1726), 2 P. Wms. 378; 24 E.R. 774, L.C.; 35 Digest 361, *1031*.
Bank of New South Wales v. *O'Connor* (1889), 14 App. Cas. 273; 58 L.J.P.C. 82; 60 L.T. 467; 38 W.R. 465; 5 T.L.R. 342, P.C.; 35 Digest 257, *162*.
Kinnaird v. *Trollope* (1889), 42 Ch.D. 610; 58 L.J.Ch. 556; 60 L.T. 892; 5 T.L.R. 513; 35 Digest 667, *4028*.
Smith v. *Smith*, [1891] 3 Ch. 550; 60 L.J.Ch. 694; 65 L.T. 334; 40 W.R. 32; 35 Digest 362, *1044*.
Warner v. *Jacob* (1882), 20 Ch.D. 220; 51 L.J.Ch. 642; 46 L.T. 656; 46 J.P. 436; 30 W.R. 731; 35 Digest 507, *2381*.
Letts v. *Hutchins* (1871), L.R. 13 Eq. 176; 35 Digest 363, *1050*.
Re Alcock, Prescott v. *Phipps* (1883), 23 Ch.D. 372; 49 L.T. 240, C.A.; 35 Digest 362, *1043*.
Bovill v. *Endle*, [1896] 1 Ch. 648; 65 L.J.Ch. 542; 44 W.R. 523; 35 Digest 362, *1045*.
Cliff v. *Wadsworth* (1843), 2 Y. & C. Ch. Cas. 598; 7 Jur. 1008; 63 E.R. 268; 35 Digest 364, *1056*.
Smith v. *Manners* (1859), 5 C.B.N.S. 632; 28 L.J.C.P. 220; 32 L.T.O.S. 277; 5 Jur.N.S. 549; 141 E.R. 254; 12 Digest (Repl.) 358, *2776*.
Greenwood v. *Sutcliffe*, [1892] 1 Ch. 1; 61 L.J.Ch. 59; 65 L.T. 797; 40 W.R. 214, C.A.; 35 Digest 364, *1058*.
Hill v. *Rowlands*, [1897] 2 Ch. 361; 66 L.J.Ch. 689; 77 L.T. 34; 46 W.R. 26; 41 Sol. Jo. 639, C.A.; 35 Digest 363, *1053*.

Summons by the defendant in a redemption action to vary the master's certificate.

By two indentures dated respectively Nov. 8, 1905, and Feb. 2, 1909, the plaintiffs, James Edmondson and E. A. Sneath, mortgaged to the defendant Mrs. Copland, certain properties (of which, for all but conveyancing purposes, the plaintiff Edmondson was the owner), to secure the repayment of £2,500 with interest at five per cent., reducible to four and a half per cent. On Dec. 9, 1909, the mortgagee's solicitors sent to the mortgagors a notice to pay off the principal and interest, and the notice continued:

> In default of your so doing within three calendar months from the date hereof [the mortgagee] intends to sell the property subject to such mortgages or to otherwise act as she may be advised.

Correspondence ensued between the solicitors of the parties concerning the draft re-assignment. On Friday, Mar. 4, 1910, the mortgagors' solicitors posted that document to the mortgagee's solicitors, and proposed the following Wednesday (the day on which the notice to pay off expired) for meeting at the offices of the mortgagee's solicitors, Messrs. Paines, and executing the re-assignment; but the letter was misdirected and apparently arrived after office hours on Saturday. The mortgagee's solicitors replied on the Monday that they could not get their client to execute on the Wednesday, "as your clients will have to execute the deed before our client does so"; and the mortgagors' solicitors accepted the postponement. On Wednesday, Mar. 9, the mortgagee's solicitors returned the draft re-assignment with this note in the margin:

> Note.—Payment not having been made at the time appointed, the mortgagee's notice not having been complied with, six months' additional interest is payable in lieu of notice: see *Bartlett* v. *Franklin* (1), 36 L.J.Ch. 671.

The mortgagors' solicitors declined to pay the additional interest, and on Mar. 16, 1910, in pursuance of their letter of the day before, the mortgagors attended at the mortgagee's solicitors' offices and tendered principal and interest to date, asking for an undertaking that the mortgagee should execute the re-assignment; and this tender was refused.

On May 18, 1910, the mortgagors took out an originating summons for redemption, asking for an account; and on July 8 an order was made for an account and for repayment within six months after the certificate, at a time and place to be therein fixed, and for re-assignment. The certificate was made in January, 1911, and it was found

thereby that good legal tender was made on Mar. 16, and refused, and that a certain sum was due for principal and interest to that date, and fixing Feb. 27 and a place for payment. The mortgagors attended at that time and place, but the mortgagee did not attend, having taken out this summons to vary. The summons asked for additional interest from Mar. 16, 1910, to six months after the date of the certificate, and for a reversal of the finding as to tender. Payment of the principal was actually made on Apr. 11, 1911.

The case stood over after part of it had been argued to allow cross-examination of the mortgagor Edmondson on a point in his affidavit. It was agreed at the hearing that the case should be finally disposed of on this application.

Younger, K.C., and *A. F. Topham* for the defendant.

Hughes, K.C., and *E. Ff. Ball* for the plaintiffs.

Cur. adv. vult.

May 9, 1911. **JOYCE, J.**, stated the facts up to the letter of the defendants 'solicitors of Mar. 7, 1910, and continued: That suggestion that the mortgagors have to execute the deed before the mortgagee is to my mind simply absurd and ridiculous. [His Lordship quoted from the letters of Mar. 8 and 9]. This letter of Mar. 9 shows that the solicitors for the mortgagee had in their possession on that date a receipt signed by the mortgagee, and, I think, without giving themselves very much inconvenience, they might very well have had the re-assignment executed by her, too; but they had not, and so nothing was done on the 9th.

I now turn to the draft re-assignment, which possibly did not reach them until Saturday afternoon. It was a perfectly simple document; it was not necessary to make any alteration in it; and it was returned in the condition in which the mortgagee's solicitors received it, with this note in the margin. [His Lordship read the note, and continued:]

The claim of the mortgagee for that additional six months' interest was disputed all along, and, in my opinion, quite rightly disputed. I understand the law to be that no notice by the mortgagor, or payment of interest in lieu of notice, can be required where the mortgagee has demanded payment or taken steps to compel payment. In *Bartlett* v. *Franklin* (1), the case cited by the solicitors for the mortgagee, the headnote is this (36 L.J.Ch. 671):

> "A mortgage was made for a definite term, and notice to pay off at the end of such term was given by the mortgagee. The mortgagor presented a petition to provide a fund to pay off the debt, which did not come on to be heard in time to pay the mortgagee before the expiration of the term: *Held*, that the mortgagee was entitled to six months' interest in lieu of fresh notice."

Now I am not prepared to say that I should quarrel with that decision in the circumstances of that case. It was not strictly a case of notice to pay off, but a case of failure to pay off at the date at which originally the money was due. Malins, V.C., in his judgment, said (ibid. at p. 672):

> "It is not my experience that it makes any difference whatever whether the notice to pay off is given by the mortgagor or by the mortgagee [I quite assent to that] the rule is, that whenever there is default on the part of the lender [that, of course, must mean "borrower"] in payment of the debt on the day fixed for payment, he must give a fresh six months' notice of his intention to pay it off, or allow the mortgagee six months' interest in lieu of such notice."

Now if in the passage I have just read "day of payment" means the day on which the money is by the deed covenanted to be paid, I agree; but, if it means merely the day fixed for payment in the notice by the mortgagee, I respectfully disagree. The report is a very unsatisfactory one in all respects, and I am of opinion that in *Bartlett* v. *Franklin* (1) there is no authority at all for anything beyond what was actually decided in the circumstances of that case. The reporter for the "Weekly Reporter" had evidently some doubt in his mind, because in a note he refers (15 W.R. at p. 1078) to the second

volume of Burton's Cases and Opinions, p. 51. The passage in question, with which I agree, is:

> "When the mortgagee requires payment, all notice is out of the case; it is not notice, but a demand, which the mortgagee has a right to make, without any limitation of time whatever, and consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day, and if he refuses to receive it he can no longer demand interest, for his demand of the money has made notice from the mortgagor wholly unnecessary."

[His Lordship referred to the tender on Mar. 16, and continued:] It is now conceded —and having regard to the authorities it is perfectly clear—that this was a good legal tender of the proper amount unless the mortgagee was liable for six months' additional interest, in accordance with the note on the draft. This tender was refused. I say that it was a perfectly good tender, and I hold that where such a notice is given, or demand made, as there was here, mere failure to pay within the time does not render the mortgagor liable to pay an additional six months' interest, or anything of the kind, and most certainly this is not so where the failure to pay happened, or was occasioned, as it was in the present case. Therefore, on this point, the mortgagee was wrong, and she has remained wrong throughout, and she certainly must pay the general costs of the action.

[His Lordship referred to the redemption summons and the order of July 8, 1910, and continued:] In my opinion, that was a very unfortunate proceeding. The only point in question in the case was whether a good legal tender had been made on Mar. 16. If there is any blame, both parties are to blame, in the circumstances, for taking an order in that form. It was not until January that the master made his certificate. The certificate was perfectly right as to the tender, but wrong as to the amount fixed, mentioned at the end, if, any more interest was properly payable after Mar. 16, 1910.

[His Lordship referred to the certificate and the summons to vary.] I now proceed to consider the question of interest from Mar. 16, 1910, to Feb. 27, 1911. The point now raised before me in argument was not raised by the summons, and I think very probably it is an afterthought altogether on the part of the advisers of the mortgagee. It is contended that the mortgagor should have kept the money ready and idle, or dead, or something of that kind, after the date of the tender. The law on this matter is variously stated in the different books. But I think it is clear that, even after tender improperly refused, it would be unreasonable that the mortgagor should have, and make full use of, the mortgagee's money without paying any interest. On the whole, I think, speaking broadly, that, in order to avoid payment of interest after tender improperly refused, the mortgagor must either pay the money into court (if there be any proceedings in which that can be done), or keep the money ready, and either make no profit on it, or, if he make a profit (e.g., by getting interest on deposit), account for such profit to the mortgagee.

Now what happened here was this, as I understand it. The money was never actually set aside. (Possibly paying into current account would do, if the balance to credit always exceeded the mortgage money.) But on two occasions—viz., for the purpose of tender on Mar. 16 and for the purpose of the attendance on Feb. 27—the money was borrowed for a few hours from the mortgagor's bankers, without their charging any interest on these two loans, as they were entitled to do. The mortgagor's affidavit and what he said in cross-examination comes to this, that, without actually borrowing the money from his bankers he left security with them on which he might have borrowed the money at any moment, and he left it for that purpose. In other words, he contends that he left a sufficient amount of security lying idle. Meanwhile, I take it, he used in his business the money borrowed from the mortgagee. Now I must observe that from July 5, which is the date of the order, until after the date of the master's certificate, there was no necessity to keep the money ready, or any of his securities idle, because the money could not be called for until some period after the date of the certificate. Further, I think the mortgagor need not have deposited the additional securities with his bankers until the money was actually required; and, possibly, to be strictly correct,

he should not be liable for interest during the few hours on two occasions when the money was actually ready and idle.

But on the whole, and not without some doubt, I think that I cannot relieve the mortgagor from payment of interest in this case down to the date of the actual payment of principal, he having all the time had the mortgagee's money, and never having actually set aside the amount, or had to borrow it at interest, for the purpose of payment or having the money ready. As before stated, I think the mortgagee must pay the general costs of the action; and, though the certificate is not perfectly right, yet the summons to vary it is so wrong that I can see no good reason for making any distinction with reference to the costs, or part of the costs, of the application to vary. The defendant must pay the plaintiffs' costs throughout. The interest will be at four and a half per cent.

Solicitors: *F. J. Berryman*, for *Brennan & Brennan*, Maidstone; *Paines*.

[*Reported by* H. F. CHETTLE, ESQ., *Barrister-at-Law.*]

DAWSON & CO. *v* BINGLEY URBAN DISTRICT COUNCIL

[COURT OF APPEAL (Vaughan Williams, Farwell and Kennedy, L.JJ.), February 1, 2, March 9, 1911]

[Reported [1911] 2 K.B. 149; 80 L.J.K.B. 842; 104 L.T. 659; 75 J.P. 289; 27 T.L.R. 308; 55 Sol. Jo. 346; 9 L.G.R. 502]

Local Authority—Negligence—Breach of statutory duty—Misfeasance—Fireplug—Plate denoting position—Misleading direction—Fire brigade's difficulty in finding fireplug—Additional damage resulting to property—Liability of local authority—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 66.

In providing a fireplug and other works for securing a sufficient supply of water in case of fire under s. 66 of the Public Health Act, 1875, a local authority negligently put up a plate with a misleading direction in that it did not denote correctly the position of the plug, as it was required to do under the section. The plug became covered with dirt and ashes, and the fire brigade coming to a fire was delayed for fifteen to twenty minutes in finding it, with the result that the plaintiffs' property suffered additional damage from the fire.

Held: the local authority were liable to the plaintiffs for the additional damage, since putting up the plate with the misleading direction (which had caused the damage) was a breach of statutory duty and a tortious act of misfeasance.

Notes. Section 66 of the Public Health Act, 1875, was repealed by the Fire Brigades Act, 1938, Sched. 3, and the corresponding provision (for the purpose of this decision) is now contained in s. 14(3)(a) of the Fire Services Act, 1947.

Referred to: *McClelland* v. *Manchester Corpn.*, ante p. 562; *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.*, [1923] All E.R. Rep. 127; *Clark* v. *Brims*, [1947] 1 All E.R. 242; *Solomons* v. *Gertzenstein, Ltd.*, [1954] 2 All E.R. 625.

As to negligent exercise of statutory powers by a public authority, see 30 HALSBURY'S LAWS (3rd Edn.) 695 et seq., and for cases see 38 DIGEST (Repl.) 30 et seq. For the Fire Services Act, 1947, s. 14(3), see 10 HALSBURY'S STATUTES (2nd Edn.) 20.

Cases referred to:

(1) *Shoreditch Corpn.* v. *Bull* (1904), 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254; 2 L.G.R. 756, H.L.; 26 Digest (Repl.) 477, *1643.*

(2) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest (Repl.) 35, *178.*

(3) *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290.*

(4) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185.*

(5) *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J. Ex. 775; 36 L.T. 761; 25 W.R. 794, C.A.; 38 Digest (Repl.) 51, *263.*

(6) *Couch* v. *Steel* (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 990, *195.*

(7) *Russell* v. *Men of Devon* (1788), 2 Term. Rep. 667; 100 E.R. 359; 26 Digest (Repl.) 654, *2993.*

(8) *Gibson* v. *Preston Corpn.* (1870), L.R. 5 Q.B. 218; 10 B. & S. 942; 39 L.J.Q.B. 131; 22 L.T. 293; 34 J.P. 342; 18 W.R. 689; 26 Digest (Repl.) 390, *975.*

(9) *Pictou Municipality* v. *Geldert*, [1893] A.C. 524; 63 L.J.P.C. 37; 69 L.T. 510; 42 W.R. 114; 9 T.L.R. 638; 1 R. 447, P.C.; 26 Digest (Repl.) 420, *1291.*

Also referred to in argument:

Moore v. *Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; 55 L.J.Q.B. 304; 55 L.T. 309; 50 J.P. 756; 34 W.R. 559; 2 T.L.R. 587, C.A.; 38 Digest (Repl.) 41, *213.*

Grand Junction Waterworks Co. v. *Brentford Local Board*, [1894] 2 Q.B. 735; 63 L.J.Q.B. 717; 71 L.T. 240; 59 J.P. 51; 10 T.L.R. 572; 9 R. 788, C.A.; 38 Digest (Repl.) 257, *657.*

Peebles v. *Oswaldtwistle U.D.C.*, [1897] 1 Q.B. 625; 66 L.J.Q.B. 392; 76 L.T. 315; 61 J.P. 308; 13 T.L.R. 297, C.A.; affirmed sub nom. *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L.; 38 Digest (Repl.) 163, *41.*

Motion by the plaintiffs for judgment or a new trial in an action tried before GRANTHAM, J., and a special jury at Leeds Assizes and afterwards argued on further consideration.

The plaintiffs were the owners and occupiers of premises situate at Clyde Street, in Bingley, where they carried on business as yarn and waste merchants. They alleged that during the afternoon of Jan. 20, 1909, a fire broke out on the premises fronting on the street, and that within a few minutes of the outbreak of the fire the Bingley fire brigade arrived on the scene, but that the efforts of the brigade and of the defendants to extinguish the fire were considerably retarded owing to a delay of between fifteen and twenty minutes in finding the fireplug and attaching the hydrant thereto. As a result the fire was enabled to develop to such an extent that the damage (which in the total amounted to upwards of £1,200) was largely occasioned and was increased thereby. The plaintiffs brought an action for damages which, they alleged, they had sustained owing to the defendants having negligently covered up the fireplug with earth and owing to their having negligently failed to denote the situation of the fireplug as required by statute. The jury found that there was no evidence that the defendants had covered up the fireplug but that they had been negligent in not indicating the position of the plug on the plug plate provided and the resulting delay allowed the fire to make headway to a greater extent than if the hose could have been attached to the fireplug immediately when the loss of a pulling-house could have been saved. They awarded the plaintiffs £512 damages. On further consideration GRANTHAM, J., held that the action failed, inasmuch as (i) the defendants were not responsible for the covering up of the fireplug, and (ii) the wrong indication on the plate was not the causa causans of the injury complained of. He gave judgment for the defendants. The plaintiffs appealed.

Waugh, K.C., and *Richard Watson* for the plaintiffs.

Tindal Atkinson, K.C., and *Joshua Scholefield* for the defendants.

Cur. adv. vult. A

Mar. 9, 1911. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—Lord Halsbury says in *Shoreditch Corpn.* v. *Bull* (1) (90 L.T. at p. 211):

B

"I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor of highways, may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to C consider whether or not that which has been described as an act of nonfeasance in several of the cases in which that proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to show that the act which was being done was an alteration of the normal condition of the road, and, if there was anything wrong either in the mode of carrying out the work or in the period of D time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible."

E

Lord Macnaghten and Lord Lindley concurred in this opinion and its reasoning. I gather from this extract from the opinion of Lord Halsbury that, although well-established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injury in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such person is one, yet the public body will be liable if by F its acts it alters the normal condition of something which it has a statutory duty to provide or maintain, and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the public body is liable in such a case is that it is not mere nonfeasance but misfeasance of the public body which has caused the injury, and I think, although it is not necessary to decide it in the present case, mere negligence by the public body in the course of the performance of its duty G may constitute misfeasance if the result of negligent doing of the statutory duty makes that which the statute requires to be provided dangerous for those for whose benefit such statutory duty is imposed.

I will not try to apply the principles which I think are to be deduced from *Shoreditch Corpn.* v. *Bull* (1), as decided in the House of Lords, to the present case. The plaintiffs allege that the defendants, as urban authority, had the duty to level, pave, metal, H flag, channel, alter, and repair a street within the urban district which, being repairable by the inhabitants at large, was vested in and under the control of the defendants, and in fact had been repaired by them. It is admitted that this part of the claim cannot be supported, since the road was not in fact under the control of the defendants or repairable by the inhabitants at large. Secondly, the plaintiffs complain that, in accordance with s. 66 of the Public Health Act, 1875, it became and was the duty of the defendants to I cause fire-plugs and all necessary works, machinery, and assistance for securing a sufficient supply of water in case of fire to be provided and maintained in the said street and also to paint or mark on buildings and works within the said street words or marks near to such fireplugs to denote the situation thereof, and to do all such other things for the said purposes as might be expedient. The plaintiffs go on to allege that the defendants were guilty of negligence and misfeasance in the performance of their duty and/or carrying out repairs in the said street, and that in the course of the repair of the said street they buried to a depth of about six inches a fireplug situate at a distance of about

sixteen yards from the nearest point of the plaintiffs' premises in a north-easterly direction. It is also alleged that the defendants were guilty of negligence and misfeasance in the performance of their said duty under s. 66 of the Public Health Act, 1875, and in particular it is alleged that the plate mark, which should have denoted the situation of the plug was misleading, and did not really denote the position of the plug, and that the operations of the fire brigade to extinguish a fire, which had just broken out in the factory of the plaintiffs, were thereby delayed fifteen to twenty minutes in finding the plug, and that the said delay enabled the fire to develop to such an extent that the damage was largely occasioned and/or increased thereby.

The questions put to the jury and their answers were as follows: (i) Was there negligence in the defendants not keeping the plug level with the surface of the road?—Yes. (ii) Was there negligence in not indicating on the plug plate the position of the plug?—Yes. (iii) Did the defendants bring to and place ashes or other materials on the road so as to cover up the fire plug?—There is no evidence that the defendants covered up the plug. (iv) Did the delay in finding plug allow the fire to make headway to a greater extent than it would have done if the hose could have been attached to plug A on arrival of the reel cart?—Yes. (v) Could the fire have been kept to the drying-house if hose had been attached to plug A at once?—No. (vi) If the fire could not have been kept to the drying-house could it have been kept to the drying and dyeing houses?—Yes. (vii) If kept to those two houses would it have been kept so as to save the loss of the pulling-house?—Yes. (viii) If it could not have been kept so as to save the whole loss of the pulling-house, could it have been kept in so as to save some loss to the property?—No. (viii) is answered by No. (vii). (ix) If so, how much?—£512.

On these answers I think that the case for misfeasance depends entirely on the misleading notice on the plate which should have indicated the position of the plug, for I think that the answers to questions (i) and (iii) indicate nonfeasance rather than misfeasance, but I am clear that on the evidence the answer to question (ii) is a finding of misfeasance. The only observation which I wish to add is that, in my opinion, the observations of JAMES, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (2) (12 Ch.D. at p. 109), cited by LORD HERSCHELL in *Cowley* v. *Newmarket Local Board* (3) ([1892] A. C. at p. 352) do not affect the law in this case. The lord justice says in the cited passage:

> "It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon whom duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not, in a similar manner, be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would have been very much improved."

The case in which this remark was made was a case of nonfeasance; and the present case is a case of misfeasance; the reasoning, however, might be applied to misfeasance. The observations of the lord justice may lead the legislature to change the law and adopt a system of fines for misfeasance; but, as the law stands, I have no doubt actions lie for misfeasance by public bodies, and that the verdict of the jury must stand, and the judgment of the judge must be reversed.

FARWELL, L.J.—The defendants are bound by s. 66 of the Public Health Act, 1875, to cause fireplugs to be provided and maintained,

> "and they shall paint or mark on the buildings and walls within the streets words or marks near to such fireplugs to denote [i.e., so as to denote] the situation thereof."

The object of this enactment is to ensure that the position of the fireplugs shall be easily and correctly ascertained, although the plug itself may be difficult to see by reason of snow or mud or the like covering it up. In the present case a fire broke out, and the fire brigade turned out at once and found the pointer to the fireplug put up by the defendants: but such pointer was wrong and misdirected the searchers to the extent

of six feet. The result was that fifteen minutes were lost in finding the plug, and a building was consumed that would otherwise have been saved. Notwithstanding the verdict of the jury to this effect, the judge has dismissed the action on the ground that the plaintiffs have no cause of action.

I am unable to agree with him. The breach of a statutory duty created for the benefit of an individual or a class is a tortious act entitling anyone who suffers special damage therefrom to recover such damages against the tortfeasor. Thus in COMYN'S DIGEST, Action upon Statute (F.), it is stated (5th Edn., p. 442):

> "So in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law,"

and several precedents of declarations in case on statute will be found in CHITTY'S PLEADINGS (6th Edn.) at pp. 586 et seq. The breach of the statute is sufficient cause of action, because the tortious act being done in breach of the statute becomes by legal intendment an act done with intent to cause wrongful injury, just as a false and libellous statement is by legal intendment made maliciously. The act done or omitted may, apart from the statute, be innocent, or its omission may be not actionable, but the enactment makes it actionable. For instance, a man who mero motu put up a sign post on his own land by four cross-roads, but inadvertently put the arms wrong, would not be liable to anyone misled. No action lies for an innocent misrepresentation: *Derry* v. *Peek* (4). But if he was under a statutory liability to put up and maintain a signpost and made a similar mistake, he would be liable for breach of his statutory duty. The generality of the foregoing observations must be restricted by omitting some cases, at any rate of nonfeasance of duties enacted for the benefit of a body of men, and I am not concerned to consider whether the judge would have been right if this had been (as he thought it) nonfeasance and not misfeasance, because I am of opinion that this is misfeasance. The provision of a sign misdirecting inquirers may no doubt in a sense be said to be the non-provision of a correct sign, but it would certainly be wrong to read the commission of a wrong as the omission to do right in order to enable the defendant to escape liability: see LORD HALSBURY'S speech in *Shoreditch Corpn.* v. *Bull* (1) (90 L.T. at p. 211). The observations of JAMES, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (2) (12 Ch.D. at p. 109) must be read with reference to the case before the court, which was an application for a mandatory injunction to set up a scheme of drainage for a large district. If a man asks me the way to the Temple and I say nothing I do not either direct or misdirect him, but if I direct him to Lincoln's Inn I misdirect him, although it may also be added that I fail to direct him to the Temple. I am, therefore, of opinion that this appeal should be allowed, and judgment entered for the plaintiffs in accordance with the verdict for £512 with costs here and below.

KENNEDY, L.J.—In this case the following facts appear on the findings of the jury or have been proved by evidence adduced at the trial: (i) The damage done by the fire was increased to the extent of £512 by the delay of the fire brigade in finding the plug A. (ii) This delay was due to two causes: (a) the fireplug itself being covered up by two or more inches of dirt and ashes; (b) the misleading direction of the plate placed by defendants at the side of the road to denote the position of the fireplug, "F.P. 22ft. 3in."; a straight line drawn from the plate to the water main in the road would fix the position of the fireplug six feet, ten inches away from, and, if I understand the plan, to the north-west of, its real position. (iii) The defendants in placing the plate with the misleading direction committed a breach of the statutory duty imposed on them, as the urban authority, by s. 66 of the Public Health Act, 1875,

> "to paint or mark on the buildings and works within the said street words or marks near to such fireplugs to denote the situation thereof";

and the jury have found expressly in their verdict that the defendants were guilty of negligence in not indicating on the plug plate the position of the plug. The jury also found that there was negligence on the part of defendants in not keeping the plug itself

level with the surface of the road; but inasmuch as the road was not vested in the defendants and was not repairable by them, and (as the jury also expressly found) there was no evidence that the defendants had themselves placed on the road the material—dirt and ashes—which covered up the plug, the finding of the jury as to negligence of the defendants in not keeping the plug level with the surface of the road must, I think, be excluded from the consideration of the defendants' liability. At the same time it is quite reasonable to hold that the defendants, when putting up the plate, ought to have borne in mind that, in the natural course of things, the fireplug might become covered and hidden by snow or dirt, as in fact it did, and that, if that should happen, serious consequences might ensue, as they have ensued, if the denoting plate instead of giving a true index to the hidden plug gave untrue and misleading directions. The findings by the jury of negligence on the part of the defendants in disobeying s. 66 was certainly justifiable.

On the facts and findings I have stated it is contended on behalf of the defendants, and GRANTHAM, J., at the trial has held, that no legal liability has been established. It is argued that the thing of which the plaintiffs complain—the placing of a plate with a misleading direction as to the situation of the fireplug contrary to the duty imposed by s. 66, to paint or mark it so as to denote its situation—ought to be treated as, or as equivalent to, a nonfeasance, and therefore, say the defendants' counsel, not actionable. Now the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in ADDISON ON TORTS (8th Edn.) at p. 104, referring to COMYN'S DIGEST:

> "In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law: (COMYN'S DIGEST, Action upon Statute (F)). Accordingly where the statute is silent as to the remedy, the legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages, and in a proper case, for an injunction."

In the present case, the plaintiffs who have been injured by the defendants' breach of the duty imposed on them by the Public Health Act, 1875, s. 66, rely on the general principle of law which is, as I have said, in my opinion, correctly stated by Mr. Addison in the passage which I have just cited. The defendants, however, claim immunity on the authority of the judgment of the Court of Appeal in *Atkinson* v. *Newcastle Waterworks Co.* (5), and of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board* (3). So far as regards the first and earlier of these two cases, it is to be noted that (a) the defendants there were not a public body but a private company, so that the Act, in the words of LORD CAIRNS, L.C. (2 Ex.D. at p. 448), ought to be regarded,

> "not as an act of public and general policy, but rather in the nature of a private legislative bargain with a body of undertakers,"

and both the Lord Chancellor and COCKBURN, C.J., lay stress on this point; and (b) the Act in that case itself imposes remedies in the form of penalties, a circumstance on which all the members of the Court of Appeal, questioning the judgment of the Queen's Bench in *Couch* v. *Steel* (6), largely based their conclusion. In the case before us, the Public Health Act, 1875, contains no specific provision for the recovery of penalties or for other remedy, if s. 66 is infringed, and the defendants are not a private company or corporation, but a public authority invested by statute with powers and duties for the benefit of the inhabitants of the district in which that public authority exists. *Cowley* v. *Newmarket Local Board* (3) was a decision of the House of Lords that a local board in respect of its duties in regard to highways under s. 144 and s. 149 of the Public Health Act, 1875, is not legally liable for mere nonfeasance, according to principles illustrated in old days by *Russell* v. *Men of Devon* (7), and in modern times by *Gibson* v. *Preston*

Corpn. (8) and *Pictou Municipality* v. *Geldert* (9). That is all the case actually decided. A

LORD HERSCHELL, it is true, does, in the earlier part of his judgment ([1892] A.C. p. 352), express a serious doubt of the soundness of the general proposition that, wherever a statutory duty is created, any person who can show that he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. He quoted with approval certain observations of JAMES, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (2) (12 Ch.D., at p. 109) B on this point. But LORD HERSCHELL does not found his decision on this doubt. Like the other noble and learned Lords, he gives judgment for the defendants on the narrower point of the non-liability of the local board for damages arising from mere omission to repair a highway. He concludes ([1892] A.C. at p. 353),

> "I think it, to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained," C

and he then proceeds to the discussion of the narrower question and to give judgment on that. In regard to the observations of JAMES, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (2) (12 Ch.D. at p. 109), it is important, I think, to read them in connection with the class of action to which that case belonged. Not only was it not based, as the D lord justice points out (ibid. at p. 109), on any act done by the defendants, but not even on the omission to do any particular or definite act. The alleged neglect was the neglect of the performance of their duty to provide a satisfactory and healthy system of drainage for a whole district; and as the lord justice also points out (ibid. at p. 113), the defendants there were under no particular duty cast on them with reference to any particular individuals. E

The present case belongs obviously to a different class. Having regard, in the language of LORD CAIRNS, L.C., in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (5) (2 Ex.D. at p. 448),

> "to the purview of the legislature in this particular statute and the language which they have there employed," F

the absence of provision for any other remedy, the precise enactment of a definite duty for the protection of the class of persons to which the plaintiffs as local residents belong against the very mischief which has occurred, I am not prepared to say that even if the breach of statute consisted in the omission to set up a denoting plate, an action on the case would not lie against the defaulting urban authority. It is not, however, G necessary in the present case to decide this point. Here there has been, not merely an omission to put up a plate truly denoting the position of the fireplug A, but the putting up of a plate with untrue directions, calculated to mislead, as the circumstances have shown, at just such a time of emergency as that for which the statute by s. 66 was intended to provide. There has, it appears to me, been an actual misfeasance causing damage to the plaintiffs, and, in my judgment, this appeal must be allowed.

Appeal allowed.

Solicitors: *Young & Co.*, for *F. W. Butterfield*, Keighley; *Church, Adams & Prior*, for *A. Platts*, Bingley.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BILLERICAY RURAL DISTRICT COUNCIL *v.* POPLAR UNION AND ANOTHER

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.), July 4, 5, 6, 1911]

[Reported [1911] 2 K.B. 801; 80 L.J.K.B. 1241; 105 L.T. 476; 75 J.P. 497; 55 Sol. Jo. 647; 9 L.G.R. 796]

Highway—Damage—Extraordinary traffic—Excessive weight—Recovery from user of highway—Need for authority to prove extraordinary expenses resulting and excess over average expense of comparable highways—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict., c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict., c.* 29), *s.* 12.

Where a local authority sought to recover expenses incurred by reason of damage to a highway arising from the excessive weight passing along it or extraordinary traffic on it under s. 23 of the Highways and Locomotives (Amendments) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, **held,** that they must not only show that the user was such that they had been caused extraordinary expenses in repairing the highway, but must also prove by evidence that such expenses in the period in question had been in excess of the average expense of maintaining other comparable highways in the neighbourhood.

Notes. Section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, was replaced by the Road Traffic Act, 1930, s. 54. The corresponding provisions are now contained in the Highways Act, 1959, s. 62.

Applied: *Colchester Corpn.* v. *Gepp*, [1912] 1 K.B. 477; *Ledbury R.D.C.* v. *Colwall Park Granite Quarries Co.*, *post* p. 1110. Referred to: *Cambridgeshire County Council* v. *Pepper and Hollis* (1912), 76 J.P. 393; *Windlesham U.D.C.* v. *Seward* (1912), 11 L.G.R. 324; *Morpeth Rural Council* v. *Bullocks Hall Colliery Co.*, [1913] 2 K.B. 7; *Worsborough U.D.C.* v. *Barnsley British Co-operative Society* (1914), 111 L.T. 429; *Ledbury Rural Council* v. *Somerset* (1915), 84 L.J.K.B. 1297; *Eastbourne County Borough* v. *Fuller & Sons* (1928), 93 J.P. 29.

As to recovery of extraordinary traffic repairs on a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 153 et seq., and for cases see 26 DIGEST (Repl.) 437 et seq. For the Highways Act, 1959, s. 62, see 39 HALSBURY'S STATUTES (2nd Edn.) 480.

Cases referred to in argument:

Hill v. *Thomas*, [1893] 2 Q.B. 333; 62 L.J.M.C. 161; 69 L.T. 553; 57 J.P. 628; 42 W.R. 85; 9 T.L.R. 647; 4 R. 565, C.A.; 26 Digest (Repl.) 439, *1370.*

Etherley Grange Coal Co. v. *Auckland District Highway Board*, [1894] 1 Q.B. 37; 69 L.T. 702; 58 J.P. 102; 42 W.R. 198; 10 T.L.R. 62; 38 Sol. Jo. 38; 9 R. 88, C.A.; 26 Digest (Repl.) 440, *1382.*

R. v. *Ellis* (1882), 8 Q.B.D. 466; 30 W.R. 613; sub nom. *Ellis* v. *Maidstone Rural Sanitary Authority*, 46 J.P. 295, D.C.; 26 Digest (Repl.) 438, *1363.*

Bromley R.D.C. v. *Chittenden* (1906), 70 J.P. 409; 4 L.G.R. 967, C.A.; 26 Digest (Repl.) 447, *1432.*

A.-G. v. *Scott*, [1904] 1 K.B. 404; 73 L.J.K.B. 196; 89 L.T. 726; 68 J.P. 137; 2 L.G.R. 461, C.A.; 26 Digest (Repl.) 492, *1769.*

Lord Aveland v. *Lucas* (1880), 5 C.P.D. 351; 49 L.J.Q.B. 643; 42 L.T. 788; 44 J.P. 360; 28 W.R. 571, C.A.; 26 Digest (Repl.) 437, *1362.*

Appeal by the plaintiffs against an order of CHANNELL, J., in an action tried by him without a jury, reported at [1911] 1 K.B. 734.

Under s. 25 of the Local Government Act, 1894, and the Public Health Acts the plaintiffs were liable to repair a highway in the parishes of Laindon, Little Burstead, and Dunton, in their district, extending for a distance of about four and a half miles, and

leading from Laindon railway station to a workhouse or farm colony of the defendants situate at Sumpner's Farm in the parish of Dunton. They alleged that in June, July, August and September, 1909, large quantities of manure were conveyed by means of trucks drawn by heavy traction engines from the Laindon railway station to the workhouse or farm colony along the highway in question by or in consequence of the order of the defendants, the guardians of the poor of Poplar Union, or by or in consequence of the order of the defendant Keeling. One of the traction engines was about eleven tons in weight and drew two trucks, and another of the engines was about six tons in weight and drew one truck, the trucks being about two tons in weight when empty and ten tons when loaded with manure. Two or three journeys were said to have been made each day between the railway station and the farm.

The plaintiffs submitted that the traffic so conducted was excessive in weight, and extraordinary traffic within the meaning of the Highways and Locomotives (Amendment) Act, 1878; and they claimed the sum of £290 2s. 9d. as being extraordinary expenses incurred by them within the meaning of s. 23 of the Act in repairing the highway by reason of the damage caused by the excessive weight passing along it and the extraordinary traffic thereon. They also alleged that it had been duly certified to them by their two surveyors that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses had been incurred by them to this amount in repairing the highway. It appeared that the defendants, the guardians of the poor of Poplar Union, had in April, 1909, made an agreement with the defendant Keeling, who contracted to supply the cartage of all coal, manure, and other materials required by the defendants to be brought from Laindon railway station to the workhouse farm, and Keeling was subsequently joined as a defendant.

The judge found as a fact that there had been extraordinary traffic on the highway, though not to a considerable extent, and that the extraordinary traffic had in fact damaged the road in some places, though the damage was not large, so that the expense of repairing the road had been somewhat increased, though the increased expenditure, whatever it might have been, had not substantially increased the highway rate in the district so as to throw any increased or unfair burden on the other ratepayers of the district. He held that the damage to a highway caused by excessive weight passing along it or extraordinary traffic thereon, in respect of which a local authority could recover under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, must not only be damage caused by reason of the excessive weight or extraordinary traffic on the highway, but must also be such as to cause extraordinary expenses in repairing the highway, as a consequence of which the highway rate of the district was substantially increased and an unfair burden thereby put on the ratepayers of the district; and, in considering whether expenses were extraordinary or not, regard must be had to the average expense of repairing highways "in the neighbourhood," which meant a neighbourhood of a similar character to that in which the highway in question was situate; and he held that the plaintiffs, having failed to satisfy him that there had been such extraordinary traffic as to cause extraordinary expense, judgment must be given for the defendants. The plaintiffs appealed.

Macmorran, K.C., and *Naldrett* for the plaintiffs.
C. A. Russell, K.C., and *A. A. Bethune* for the defendants, the Poplar Guardians.
Sir F. Low, K.C., and *C. E. Jones* for the defendant Keeling.

VAUGHAN WILLIAMS, L.J.—It is common ground in this case that, although the case as to extraordinary traffic may be weak, we are to deal with it on the basis that there was extraordinary traffic, and that was what the judge found. The question is as to the damage resulting from the extraordinary traffic, and the expense to which the local authority have been put by reason of such damage. The sole matter that we have to decide is this. The judge having found all these things concludes his judgment by saying:

"In these circumstances, has there been extraordinary expense incurred? I am not satisfied that there has. I think, therefore, that this is a rather weak case as to the traffic being extraordinary, and not a strong case as to the amount of the damage.

A The general result is that, although this traffic has caused a certain amount of expense to the highway authority which they would not have had to incur if this traffic had not gone over the road, yet I cannot say that the expense is extraordinary expense within the meaning of the section, or even that it at all substantially increased the burden on the ratepayers of the district. Therefore, with regard to this special statutory right to recover this statutory sum, I think that the necessary B conditions have not been made out by the plaintiffs to entitle them to recover. The burden of proof is on them, and they have failed to satisfy me that there has been such extraordinary traffic as to cause extraordinary expense, and therefore I must give judgment for the defendants."

I think we must accept that conclusion, and in those circumstances this appeal fails. C I will try to say shortly what I think was necessary to constitute this proof which the judge said it was on the plaintiffs to provide, and of which he said they had failed to supply the necessary evidence. Section 23 of the Highways and Locomotives (Amendment) Act, 1878, runs thus:

D "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognisance E of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

I think it is plain that in those cases where a claim was made by the local authority to be recouped the extra expense to which they had been put by reason of the damage caused by an individual in his use of a road, whether the damage was caused by extra- F ordinary traffic which is the suggestion in this case, or whether the damage was caused by excessive weight, the legislature thought first that no such action ought to be brought unless as a condition precedent the surveyor's certificate mentioned at the beginning of s. 23 had been given. I think further that the legislature intended that, in dealing with the question whether such expenses had been incurred, the court should have regard to the average expense of repairing highways in the neighbourhood mentioned G at the beginning of that section. That being so, it follows that one of the matters involved had to be dealt with by the judge having regard to this average, and he says he had not the materials before him to enable him to do that.

It is not suggested that there has been any wrongful user of this road in kind; it is a road which is adapted in its foundation and make-up for user by traction engines or traction engines with trucks behind. Therefore, there is no sort of tort in the fact that H the road was used for this purpose, and all that is really complained of is that the user was extraordinary. The judge had to deal with this question whether there had been such extraordinary traffic as to cause extraordinary expense. I have already said that in determining this matter he had to take into consideration the damage which is described in the last words of the section as "damage arising from such weight or traffic as aforesaid." The effect of that is that working it out in detail involves first ascertain- I ing the date at which the road was constructed and how long it had been in use, and, when dealing with the extra expense which it was alleged the local authority had been put to, not charging the individual who was alleged to have caused the extra expense with the full amount of repair, because he would have to be given credit for so much of his user as was not extraordinary. He would have to have credit for the ordinary user, and, of course, the amount of that credit must necessarily depend on the time when the extraordinary user took place.

That being so, the question the judge had to ask himself was: Have I the materials before me in order to arrive at a conclusion on this question? It is common ground

here that the plaintiffs not only did not give any sufficient figures to arrive at a conclusion as to this question of average, but, and I do not blame them for doing so at all, they took the view that it was unnecessary for them to do so. I think, therefore, the judge was right when he said that, having regard to the terms of s. 23 he had not sufficient materials before him to enable him to deal with this question of average. The average expense which the judge had to take into consideration was not the average expense of repairing this road, but the average expense of repairing highways in that neighbourhood. In those circumstances I am clear that the judge was right in saying that the plaintiffs did not supply him with any materials to enable him to find the amount which ought to be charged against the defendants as extraordinary expense in respect of this extraordinary traffic.

If one has to find out how much of the expense incurred is attributable to the extraordinary user as distinguishable from the ordinary user, one must obviously make a calculation which it is not only very difficult but almost impossible to arrive at with real accuracy. I think it was in those circumstances, and with that fact in view that the legislature passed s. 23. That section provides that, as a condition precedent to recovering the extraordinary expense resulting from this extraordinary traffic by the defendants, the local authority must have this certificate of the surveyor. Then, after taking into account the matters that the surveyor has to inquire into and certify, a calculation has to be made which it is so difficult to deal with with accuracy, that it is only reasonable that, instead of leaving it to the plaintiffs to prove in pounds, shillings, and pence the exact proportion which is attributable to the extraordinary user, they must prove that it is such an extraordinary user as that the expense of repairing the damage makes the expenses during the time in question in excess of the average expenditure, not in respect of this particular road, but in respect of the repairing of highways in the neighbourhood. Therefore, I think that this appeal fails, and that the judgment of the court below must be upheld.

FLETCHER MOULTON, L.J.—At the present day the essential characteristic of the legitimate user of our roads is that every member of the public is entitled to use them probably as much as he needs. That is a principle which did not always obtain. It is well within the memory of many persons that the great main roads of the country were at one time under turnpike trusts, where payment was roughly dependent on user. That state of things has entirely changed. We each of us use the road that is most convenient to us as much as we want, and the fact that from the position of our dwellings or the nature of our business we use one road more than another, and perhaps one road more than any other member of the public uses it, makes us in no sense more liable for the upkeep of that road than any other member of the public. Probably our user of that implies that we use others less, but, whether it does or does not, the community have come definitely to the conclusion that absolute freedom of user and communal upkeep is the wisest thing for the nation. I think that state of things probably would not only have continued, but probably would have been made more and more perfect if it had not been thought that in recent times a very considerable modification in the nature of the vehicles by which roads are used has taken place, and I think that it was by reason of the vista of possibilities which that opened up that in 1878 the legislature recognised that there might be a user which was so excessive that it was worth while making an exception to this absolute freedom of user, and to some extent where the user was of this type throw a special liability on the person making the user to defray the expenses it caused. We therefore have this s. 23 of the Highways and Locomotives (Amendment) Act, 1878, but before I consider it in detail I wish to say that in my opinion there is no more dangerous guide in construing a remedial section than to assume that the legislature intended to do ideal justice in all cases of the type referred to. On the contrary, I think the legislature is wise in recognising that the power of challenging a thing in the law courts is itself a grave evil, and these clauses and similar clauses in other Acts cannot be read without recognising that the legislature did not intend that these remedies should be applied excepting in cases of such a magnitude that it was worth while giving the power of bringing the matter into court.

A The legislature has here shown an intention that the interference with freedom of user should only be in what I may call grave or substantial cases by enacting that there shall be a condition precedent without which the section cannot be invoked. This condition precedent is very carefully defined, and, in my opinion, needs to be construed before we can deal with this case. The section is as follows:

B "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority. . . ."

Stopping there, in the first place there has to be a certificate by a responsible officer —namely, the surveyor. But what is the certificate of? In my opinion it was not C intended to be a certificate of opinion only, it was to be a certificate which could not be given excepting in the presence of a certain state of facts, viz., where the expenses of the road were extraordinary compared with the average expense of maintaining the roads in the neighbourhood, which I am willing to construe as the comparable roads in the neighbourhood, so that the word "extraordinary" ceases to refer to a matter of opinion. It means this, that unless this road is one where the cost of repairing the D highway is higher than the average, the section does not apply at all. And that is a great security to the general public. It is only in cases where that which has happened has made the road an expensive one to the authority that this certificate can be given at all. Supposing that that state of facts exists, what else has the section to say? It says:

E ". . . extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon."

Here we come to a certificate of opinion of this responsible officer. He must be of that opinion, and must certify it, and he must convince his authority that the road bill of that road has been higher than the average road bill of such roads by reason of damage F caused by excessive weight or extraordinary traffic.

I think all those words require very careful consideration in their construction. I do not think "damage" means fair wear and tear. I think "damage" means that the road has been injured. What makes me think that is because I find associated with excessive weight and extraordinary traffic something more than the road was intended normally to bear. I cannot think, if a road is constructed to bear, we will say, light G traffic, or ordinary agricultural traffic, any amount of that justifies using the word "damage" or the words "extraordinary traffic." To my mind the traffic on a road is the justification of its existence. There is no right to put on the general community the bearing of the expense of roads that are absolutely useless. The more a road is used the more it justifies its position as a communal upkept road, and I do not think it H can be said that the ordinary traffic of a road damages it, nor do I think that the fact that the road is so well suited to the wants of the community that there has been a constant stream of proper traffic on it can be called a case of extraordinary traffic. Therefore, I think, having got a case in which the road bill is higher than the average, one has to consider whether that is due wholly or partly to the damage of the road by excessive weight, or damage to the road by something which I do not think it is necessary I here to define, but which is called extraordinary traffic. To that extent the authority have a remedy over against the persons who have caused the excessive weight or the extraordinary traffic to go along. I do not think that all the extraordinary expenses of a road in which the road bill is heavier than the average are necessarily expenses which can be recovered, for they may come from other than these two causes. For instance, a particular road may be very liable to be flooded in wet weather far more so than the other roads in the neighbourhood, and the consequence is that there may be a case where its road bill is heavier than the average, partly by reason of excessive weight or extraordinary traffic, and partly from the fact that it has been a very wet season. But

I am inclined to think that the excess over the average road bill may be fairly taken to be that which was meant by extraordinary expenses, and the surveyor has not only to certify that there are extraordinary expenses, but that some portion of them is due to one of these two main causes.

That being the nature of the condition precedent, and that certificate having been given, and the authority having been convinced that this action is properly founded, the question of whether the defendants are liable does not depend on that certificate. Their liability arises, of course, under the latter part of the section. I am glad that the admission of counsel for the defendants relieved us from the necessity of defining what extraordinary traffic is, because cases have been quoted which at all events raise the possibility that one would have been obliged to say that it had something to do with the past user of the road. I should be most reluctant to come to the conclusion that the legislature meant to penalise a person whose proper traffic had made use of the road which lay useless before, and that the measure of his burden is the extent to which he had justified the existence of the road. We have not to consider the cases, for it is admitted by counsel for the defendants that, though but a very weak case, there was some excessive weight or extraordinary traffic, so that that portion of the section need not be construed by us.

I come now to the end of the section which marks what the plaintiff can recover from the defendant, which is this: He may recover

> "the amount of such expenses as may be proved to the satisfaction of the court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

Now, the plaintiffs contend that that gives the go-by entirely to all that has been said in the earlier part of the section with regard to the condition precedent, and that "such expense" means ordinary or extraordinary expenses alike. After very carefully considering the language of the section, I am convinced that that is not the true construction. I think that the word "such" throws one back on the earlier portion of the section and connotes that these expenses are extraordinary expenses, just like the words "such weight or traffic" throws one back on the earlier part of the section and connotes that these are excessive weights or extraordinary traffic. It appears to me that the true mode of construing the latter words of the section is by recognising that they are elliptical; that "such expenses" means "extraordinary" following the word "as," and while we say it is "such expenses as may be proved," we must not reject, therefore, the other interpretation of the word "such" which refers one to extraordinary. I think, if I might paraphrase it, it really ought to be construed in this way: "The amount of such expenses so far as they may be proved." It is really an elliptical contraction of "such expenses so far as they may be proved to the satisfaction of the court having cognisance of the case to have been incurred by such authority" and the phrase "such extraordinary expenses as may be proved." I do not think there was any intention, when the words "such expenses" were used, to depart in the least from that which the certificate referred to. I think it refers solely to the extraordinary expenses. I do not think the word "expenses" would have been used in the other sense; I think that they would have said: "Such damages as have arisen from the weight or traffic as aforesaid." I think all throughout it is only considering the extraordinary expenses so far as they have been caused by the weight or traffic.

I wish to apply this to the facts of the present case. Neither party has gone into the evidence at any length. Each party has accepted the findings of the judge in his judgment. I think the true findings of the judge if properly understood amount to this; I do not think it is proved that the cost of this road has been above the average of like roads in the neighbourhood. It seems to me one of the main roads in the district, I may say one of the principal roads, and we are assured that the evidence, so far from showing that the expense was greater than the average throughout the neighbourhood, shows it to have been considerably less. But a plaintiff has got to make out his case, and I cannot read the judgment of the judge without coming to the conclusion that he thinks that there was no material which would enable him to say that it was a case

where there were extraordinary expenses at all. He thinks it was not higher than the average expenses of such roads in the neighbourhood. In that event I do not think there is any material for applying this section at all. I do not think there are any other such expenses as it is intended to apply to. The judge's finding is a finding of fact that the certificate ought not to have been given, and that, therefore, there were no extraordinary expenses. Therefore, so much of these expenses as was caused by the damage was something which did not exist. Therefore, I can find neither damage nor extraordinary expenses, and I think the judge was bound to dismiss this action on the ground that the plaintiffs had not made out their case. I rely especially on the words where he says:

> "The real difficulty is that I have not got figures before me which would enable me to see whether the expense incurred in this particular year on this particular road has or has not, or to what extent it has, exceeded the average expense of that particular road in previous years."

I confess I should have preferred the sentence to have ended "the average of roads in the neighbourhood," but as the whole case of the plaintiffs was that this was a road so little used that it was less expensive than the average, the way in which the judge has stated it is too much, if anything, in favour of the plaintiffs, and I think it is clear from this that he thought that the plaintiffs had failed to show him the figures to enable him to come to the conclusion that there were any such expenses on this road in this year as the section applies to. For these reasons I think the appeal ought to be dismissed.

BUCKLEY, L.J.—In favour of the plaintiffs the judge found as facts, first, that extraordinary traffic on this highway had been proved; and, secondly, that this extraordinary traffic had damaged this highway. The plaintiffs are the appellants. There is no cross-appeal. Those facts, therefore, stand unchallenged before us. On those facts the judge had then to consider whether or not it was shown that extraordinary expenses had been incurred by reason of those facts, and that involved an investigation of the meaning of this section.

Before going into what the judge said, I will address myself to what I believe to be the true meaning of this section. It consists of two parts. The first part defines an event; the second part provides that in an event a certain person may recover something. There are two separate branches. The event was defined in this way; I am going to read it shortly:

> "Where by a certificate of a surveyor it appears that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred in repairing such highways by reason of the damage that is mentioned."

I think that the effect of these words is that the surveyor in giving his certificate is not to set himself to find what was the average expense of repairing this particular highway. It is a matter difficult to investigate. It is sufficient for him to take accounts which presumably will be accessible and available, and say in this neighbourhood (by which I understand in the case of roads comparable with this road being used for agricultural purposes or whatever the neighbourhood may be) I find that the average expense of repairing such a road as this is so much a yard or so much a rod. He is entitled to start with that. Then he has got to ascertain, having regard to that average expense, whether extraordinary expenses have been incurred in respect of this highway by reason of the damage caused. Now, suppose that he is making up an account as between the highway authority and the person charged or sought to be charged, the effect of those words "having regard to" is not, in my opinion, that he has to give credit to the person charged for the average expense of repairing the highway over, say, a year or over any other time. If the damage which has been occasioned by the act of this person has taken place, we will assume a very short time—within a week—that person of course would have been entitled to wear out the highways to a certain extent without

paying anything for it. He would be entitled to give it a week's ordinary wear and tear, and he would be chargeable with the difference between the excessive wear and tear and the ordinary wear and tear in respect of the expense of restoring the road. So "having regard to the average expense" means, I think, that one is to assume that this road is repairable is respect of ordinary wear and tear at such a rate as one finds to be the average of the roads of that class, and then, having made that assumption, one is to ascertain, and for this purpose one must have regard to the time, amongst other things, what is the expense caused by the excessive use and the expense caused by what would have been ordinary or reasonable use from the time on which one has to make the calculation. That, I think, is the way in which the surveyor has to proceed. It seems to me that a reasonable view of the section is this: Every person who uses the highway is entitled to wear it out to a certain extent; he is not entitled to wear it out, having regard to this section, to an excessive extent by excessive weight or extraordinary traffic. One has to find out the difference between those two, and, ascertaining the difference between those two, one is to have regard to the fact that, taking one road with another over the neighbourhood, the average expense of repair is what is produced by taking these figures and making the calculation. That is what I think is the duty of the surveyor so far as regards the first branch of the section.

The second branch is this, that, if the surveyor has gone into all that and done that, then the authority may recover the amount of such expenses as may be proved to the satisfaction of the court to have been incurred by reason of the damage. The word "such" there does not, in my judgment, send one back to the earlier portion of the section. The words "such expenses" in this connection mean "such expenses as may be proved to have been incurred." The word "such" and the word "as" are correlative. The word "such," I think, refers only to the words "as may be proved." But, having said that, it seems to me it does not make very much difference to the true construction of the section. One of those who have preceded me has expressed the opinion that this word "such" throws one back to the earlier portion of the section. I think it does not. But it seems to me the same result may be, and I think is, arrived at in this sense. The words are "such expenses as may be proved to have been incurred by reason of the damage." One must ascertain, therefore, what are the expenses incurred by reason of the damage. That would mean, if I am right in my view of the section, the difference between the expenses incurred by the excessive user and the expenses incurred by what would have been the legitimate user—the difference between the excessive wearing out of the road and the expenses incurred in respect of the legitimate wearing out of the road. If that is so, that only sends one back. It means the same thing as is expressed in other words at the beginning of the same section. I have concluded what I have to say on the section except that there is one most emphatic fact, and that is that in the certificate portion of the section what the surveyor has to ascertain is the extraordinary expenses incurred in repairing such highway—i.e., the particular highway of which one is speaking —and in the latter part of the section the expenses are those proved to the satisfaction of the court as incurred by reason of the damage arising from such weight of traffic. That damage is necessarily damage on the particular highway, so that what has to be ascertained, as it seems to me, is the extraordinary expenses attributable to the user of the particular highway, and in ascertaining that one is entitled, and, under the section, is bound to have regard to the average expense of repairing other highways—viz., other comparable highways in the neighbourhood.

That is what I understand to be the true construction of the section, and I go on to see what the learned judge has said—and with all respect to him, I think that the portions of his judgment to which I am going to refer are erroneous, for reasons which I will state. After finding that there is extraordinary traffic, and finding that there is damage from extraordinary traffic, he says this:

> "If that were all, I should have to find that the plaintiffs were entitled to recover something; but, according to my view of the section, I do not think it is all, because, besides the fact of there being damage, the damage must be such as to cause extraordinary expenses"

—so far I agree. Next comes this sentence, from which I differ—

> "which means, as I have already said, that the highway rate of the district must be substantially increased by it so as to make it an unfair burden on the other ratepayers."

Well, of course, the highway rate of the district will not be raised if the larger expenditure on this road is compensated by a smaller expenditure on other roads, and those are the circumstances to which the learned judge is referring. He goes on to say a little further down:

> "What appears from the figures is that the expenditure in this particular year did not exceed the average of the previous seven years;"

and by the context it is plain that he does not mean the expenditure on this particular road did not exceed the average, but he means the expenditure generally of the highway authority in this particular year was not increased. That, I think, was the wrong test. The same thing, I think, is made still more clear a little further on, where he says:

"In 1908 the expenditure was considerably below the average of the previous years."

Now those are sums not referring to this particular road but to the total expenditure of the parishes to which he is referring. He proceeds:

> "But taking the average of the two years 1908 and 1909 together, the result is very little in excess of the previous years. So that the state of things seems to have been that the expenditure was slightly increasing year by year, and when it was a little less in one year, it was consequently a little more in the next. In that state of things for the year in question when the extraordinary expense was supposed to have been incurred, the expenses of these parishes, taking them all together or taking them separately, are nearly the same or just about the average."

The figures which the judge was considering there were figures not relating to this road at all; those figures had not been got out. But the figures on which he was commenting were figures of aggregate expenditure by the parish on all its roads, and what he was investigating was whether the facts were such that the highway rate of the district was substantially increased, and he came to the conclusion that it was not.

In all that it appears to me that the judge was setting himself to find that which was not relevant. The relevant question was not whether the highway rate went up or down—whether the extraordinary expense on this road had been compensated by diminished expenses on another road; the question was in the language of the section whether extraordinary expenses had been incurred in repairing such highway i.e., this particular highway. But it is singular, having discussed that matter up to that point, that the judge then seems to have taken up without noticing it a totally different question, because his next question is this:

> "The real difficulty is that I have not got figures before me which would enable me to see whether the expense incurred in this particular year on this particular road has or has not, or to what extent it has, exceeded the average expense of that particular road in previous years."

There he is indicating I think the true question to be tried. It is not the question he had been discussing before because what he goes on to say is that he had no materials to enable him to try that which was I think, the real question to try—viz., whether in respect of this particular road extraordinary expense had been incurred or not. I thought it necessary to deal with this question at this length, because my view of the judgment is that, so far as it states and describes the true effect of the section, it is erroneous, but, so far as it arrives at the conclusion that the plaintiffs on account of the deficiency of evidence had not succeeded in making out their case, the judgment is right. It is a fact, and I have gathered the facts, that the plaintiffs did not prove, certainly did not prove to the satisfaction of the judge who heard the witnesses, that in respect of this particular year there had been expense of any amount on which the judge could arrive at the finding that extraordinary expense had been incurred. On that ground it seems

to me that his judgment under appeal must be sustained. The plaintiffs fail, not because they might not have had a case for recovering something, for I think that they might, but by reason of the fact that they did not give evidence to support their case. On this ground I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Indermaur & Brown*, for *Lewis & Quennell*, Brentwood; *E. J. Marsh*; *W. Hilliard & Ward.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

SADLER *v.* ROBERTS

[King's Bench Division (Lord Alverstone, C.J., Bray and Bankes, JJ.), April 3, 1911]

[Reported 105 L.T. 106; 75 J.P. 342; 22 Cox. C.C. 520]

Factory—Laundry—Laundry "ancillary to another business"—Laundry in hotel to wash table linen, sheets and blankets used in hotel, but not visitors' linen—Factory and Workshop Act, 1907 (7 *Edw.* 7, *c.* 39) *s.* 1.

The respondent, the occupier of a hotel, employed two women to wash table linen, sheets, blankets, etc., which were used in and for the purposes of the hotel, but not visitors' linen, the washing being done by the women in two rooms in the hotel. For the purpose of the case it was assumed that the rooms were fitted up as a laundry as distinct from rooms in which clothes were washed in a washtub from time to time. The respondent was charged with offences against the Factory and Workshop Act, 1901, in relation to the use of the two rooms.

Held: the laundry was "carried on as ancillary to another business," i.e., the business of the hotel, within the meaning of s. 1 of the Factory and Workshop Act, 1907, and, therefore, the Act of 1901 applied to the two rooms, and the respondent was guilty of the offences charged.

Notes. By s. 151 (1) (v) of the Factories Act, 1937, the expression "factory" included "any laundry carried on as ancillary to another business." As from Apr. 1, 1962, the Factories Act, 1937, is replaced by the Factories Act, 1961, s. 175 (2)(e) of which contains the same wording as s. 151(1)(v) of the Act of 1937.

As to special classes of premises included in the expression factory, see 17 Halsbury's Laws (3rd Edn.) 13 et seq. For cases on the subject see 24 Digest (Repl.) 1021 et seq.

Cases referred to:

(1) *Burns* v. *North British Rail, Co.* (1900), 2 F. (Ct. of Sess.) 629; 34 Digest 264, *h.*

(2) *Pearce* v. *London and South Western Rail Co.*, [1900] 2 Q.B. 100; 69 L.J.Q.B. 683; 82 L.T. 487; 48 W.R. 599; 16 T.L.R. 336; 2 W.C.C. 47, C.A.; 34 Digest 264, *2247.*

Also referred to in argument:

Caledonian Rail Co. v. *Paterson* (1898), 1 F. (Ct. of Sess.) 24; 2 Adam, 620; 36 Sc.L.R. 60; 6 S.L.T. 194, J.; 24 Digest (Repl.) 1031, **27.*

Dundee and Arbroath Joint Rail Co. v. *Carlin* (1901), 3 F. (Ct. of Sess.) 843; 34 Digest 264, *l.*

McGovern v. *Cooper & Co.* (1901), 4 F. 249; 39 S.L.R. 102; 9 S.L.T. 245.

Wrigley v. *Bagley and Wright*, [1901] 1 K.B. 780; 70 L.J.K.B. 538; 84 L.T. 415; 65 J.P. 372; 49 W.R. 472; 3 W.C.C. 61, C.A.; on appeal, sub nom. *Wrigley* v.

A *Whittaker & Sons*, [1902] A.C. 299; 71 L.J.K.B. 600; 86 L.T. 775; 66 J.P. 420; 50 W.R. 656; 18 T.L.R. 559, H.L.; 34 Digest 264, *2249*.

Knight v. *Cubitt & Co.*, [1902] 1 K.B. 31; 71 L.J.K.B. 65; 85 L.T. 526; 66 J.P. 52; 50 W.R. 113; 18 T.L.R. 26; 46 Sol. Jo. 49; 4 W.C.C. 42, C.A.; 34 Digest 264, *2250*.

Case Stated by justices of the peace for the county of Carnarvon.

B On Aug. 8 and Oct. 17, 1910, two informations were heard by the justices whereby the respondent, John S. Roberts, as occupier of Queen's Hotel, Llandudno, was charged by the appellant, Emily Sadler, one of His Majesty's inspectors of factories, with two offences under the Factory and Workshop Acts, 1901 and 1907—namely, (i) employing a woman named Barron otherwise than in accordance with the period of employment allowed for women in laundries under the said Acts; and (ii) not having affixed at the C entrance of the workshop the prescribed abstract of those Acts.

At the hearing of the informations the following facts were admitted or proved before the justices: The respondent was the occupier of the Queen's Hotel, Llandudno, and at all material times was carrying on there the business of a hotel proprietor. On the day in question the respondent was employing two women in a laundry under such circumstances as to constitute the breaches of the Factory Acts complained of if the said D laundry was, within the meaning of s. 1 of the Factory and Workshop Act, 1907, carried on as ancillary to the business of hotel proprietor. The laundry had been in use prior to the commencement of the Act of 1907, and the respondent had never been required to affix the abstract of the Factory Acts or to comply with any other requirements of the Acts. The laundry was not used for the washing of visitors' linen but only for washing, as occasion required, the table linen, sheets, blankets, &c., used in and for the E purposes of the hotel, for which purpose during four months in the summer two women were employed, and during the remaining eight months one woman was employed. The women lived in the hotel but were employed exclusively for the purpose above mentioned.

It was contended by the appellant that the women were employed in a "laundry carried on as ancillary to another business" within the meaning of s. 1 of the Factory F and Workshop Act, 1907—that is to say, in a laundry ancillary to the business of the hotel. The respondent contended that the laundry was not, within the meaning of s. 1, carried on as ancillary to the hotel business, since: (a) work was ancillary to a trade or business when it was not necessary thereto (STROUD'S JUDICIAL DICTIONARY). (b) The washing of the linen at an hotel was necessary and therefore part and parcel of the business of the hotel: (*Burns* v. *North British Rail. Co.* (1)). (c) Section 1 of the G repealed Workmen's Compensation Act, 1897, showed that the meaning of the word "ancillary" in that statute was virtually the same as the above definition: (*Pearce* v. *London and South Western Rail. Co.* (2)). (d) A great deal of work done in hotel laundries (such as the "washing" of table napkins, bed sheets, &c., which are only used once and sprinkled and mangled or ironed before being used again) could not be sent to a public laundry on the ground of expense. (e) If the laundry in question was within the H Factory and Workshop Act it would follow that every laundry or wash-house, except those attached to private houses, would also come within its provisions. The justices held that the laundry was not carried on as ancillary to another business and dismissed the informations.

The Factory and Workshop Act, 1907, s. 1, applied the provisions of the Factory and Workshop Act, 1901 to,

I "Laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business or incidentally to the purposes of any public institution."

Rowlatt for the appellant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—In this case, unfortunately, the respondent has not been represented. It is unfortunate, because we might then have had a clearer statement as to what was the actual condition of the rooms which the magistrates have called a

laundry; but we have to deal with the case on the argument we have had on behalf of the appellant, and on the case as it stands. Now, in the Case I think it must be assumed —and I desire to emphasise this point, because otherwise it might be held that our decision went further than I wish it to go—that the premises, the two rooms as we understand, in which the washing took place, were a laundry. By "laundry" I do not mean a room in which some washing took place, but a room which is fitted up as a laundry, probably having permanent washing tubs, a wringing machine, or probably having a mangle or things of that kind, which are the common incidents of a fitted up laundry as distinguished from a room in which clothes are washed in a washtub from time to time. It is stated in the Case that "the respondent was employing two women in a laundry," and in the same paragraph it is said "that the laundry had been in use prior to the commencement of the Act of 1907"; and it is then said

> "the laundry was not used for the washing of visitors' linen but only for washing (as occasion required) the table linen, sheets, blankets, &c., used in and for the purposes of the hotel, for which purpose during four months in the summer two women were employed and during the remaining eight months one woman."

I should have thought that pointed to the establishment of something which could properly be called a laundry. Then it is not suggested in the Case on behalf of the respondent that this was not a laundry, or that it was only a room in which washing was carried on, but the respondent has taken points which turn entirely upon the proper construction of the words of the Act which we have to consider, and in stating his points the respondent's solicitor suggests

> "that if the laundry in question was within the Act it would follow that every laundry or wash-house, except those attached to private houses, would also come within its provisions."

Then the magistrates say: "We held that the laundry was not so carried on." In these circumstances I think we must assume for the purpose of our decision, that the magistrates have found, in fact, that this was a laundry. That being so, we have to say whether it comes within para. 29 set out in s. 1 of the Act of 1907, which is to be added to Part 2 of the 6th schedule to the earlier Act of 1901. Section 1 of the Act of 1907 says that the schedule [Sched. 6 of the Factory and Workshop Act, 1901] is to include

> "Laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business or incidentally to the purposes of any public institution."

We have to construe this section as enunciating what was the final decision of the legislature with regard to this matter after a considerable discussion of the subject. The laundry now in question was not one "carried on by way of trade," nor was it a laundry, properly speaking, carried on "for the purposes of gain." There was indirect gain because the keeper of the hotel was saved the expense of sending linen to a laundry to be washed; it was an indirect advantage rather than gain, but I think it has been decided that a laundry in these circumstances is not to be taken as carried on for gain. Then we come to the words "or carried on as ancillary to another business or incidentally to the purposes of any public institution." In my opinion, all those cases only apply to a laundry, and if a place is not a laundry, then that provision in the Act does not apply at all. In these circumstances what is the meaning of the words "carried on as ancillary to another business"? There must first be a business other than a laundry, and then there must be a business carried on as ancillary to it. If the words are to be read as meaning the business of a laundry carried on as ancillary to the business of, we will say, a hotel, then it seems to me that we are either saying the same thing over again, or else are bringing the laundry within the two earlier provisions of that paragraph, "carried on for purposes of gain," or "carried on by way of trade." In these circumstances it seems to me that the words "carried on as ancillary to another business" must have a wider meaning than would be included in the other two denominations of "laundry." Speaking for myself, I do not think that one could suggest any expression

much more appropriate to describe this laundry than as "ancillary to the hotel business." The only two instances which have occurred to me are cases where a quantity of linen has to be washed in connection with other businesses—for steamship owners or railway companies—and no profit is made in respect of the washing and no money is paid for the washing, but the things are washed because it is necessary for them to be washed for the purpose of the business. It seems to me that hotel laundries ought to come and would fairly come within those words. I think, therefore, the decision of the magistrates was wrong, and that the Case should go back to them to convict, assuming, of course, that these premises were in fact a laundry. In my opinion, therefore, the appeal must be allowed.

BRAY, J.—I think it is extremely unsatisfactory to have to decide this case without any argument on the other side, and I have a good deal of doubt, I must say, about it. "Laundries carried on by way of trade"; That does not mean the rooms, and it does not mean the premises. One does not carry on premises by way of trade or for the purpose of gain. "Laundry," therefore, must mean a laundry business, as it seems to me, in that paragraph; and now the difficulty arises whether this really is a laundry business. There is no difficulty about the later words "or carried on as ancillary" to a business, because if it is a laundry business I think it is clearly ancillary to the business of the hotel. Now the only way, as it seems to me, to get out of the difficulty is by confining my judgment most carefully to the particular facts and findings in this case, and therefore I desire to shelter myself under the fact that the justices are to be taken to have found that there was a laundry business carried on, and if they found that a laundry business was being carried on, then I think it would come within the Act, but I desire to give no decision on the matter in a case in which there is a room or rooms where the people wash things. I desire to have an opportunity of reconsidering that on some future occasion if it should arise.

BANKES, J.—I quite agree, on the facts as found by the justices, that the Case ought to go back to them for a conviction, but I quite realise that there may be cases in which a question may arise with regard to the nature of the premises and the nature of the work that is done there, and all I desire to say is that in those cases I think it is necessary to consider, not only the nature of the business, as to whether or not it is properly called a laundry, but also the character of the work which is done there, as well as whether the people are or are not exclusively employed in laundry business. That may be a matter for future consideration in subsequent cases, but upon this Case as stated, where the justices have found that this is a laundry and carried on as a laundry, I entertain no doubt whatever that there ought to be a conviction.

Appeal allowed. Case remitted with a direction to convict.

Solicitor: *Treasury Solicitor.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

TACKEY *v.* McBAIN

[PRIVY COUNCIL (Lord Macnaghten, Lord Mersey, and Lord Robson), May 12, 15, and October 31, 1911]

[Reported [1912] A.C. 186; 81 L.J. P.C. 130; 106 L.T. 226]

B

Deceit—Need to prove actual fraud.

At the trial of an action for deceit the jury returned answers to certain questions, the effect being to absolve the defendant from the fraud attributed to him. The plaintiff sought a new trial on the grounds that the jury had been misdirected.

Held: in an action for deceit it was incumbent on the plaintiff to prove actual fraud, and, as the judge had not misdirected the jury, a new trial would not be ordered. C

Notes. Referred to: *Armstrong* v. *Strain*, [1951] 1 T.L.R. 856.

As to the essentials for an action for deceit, see 26 HALSBURY'S LAWS (3rd Edn.) 862 et seq.; and for cases, see 35 DIGEST 58 et seq.

Cases referred to:

(1) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 35 Digest 18, *106*. D

(2) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(3) *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, *119*.

Also referred to in argument: E

Arnison v. *Smith* (1889), 41 Ch.D. 348; 61 L.T. 63; 37 W.R. 739; 5 T.L.R. 413; 1 Meg. 388, C.A.; 35 Digest 42, *374*.

Andrews v. *Mockford*, [1896] 1 Q.B. 372; 65 L.J.Q.B. 302; 73 L.T. 726; 12 T.L.R. 139, C.A.; 35 Digest 43, *376*.

Swift v. *Winterbotham* (1873), L.R. 8 Q.B. 244; 42 L.J.Q.B. 111; 28 L.T. 339; varied on appeal sub nom. *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 26 Digest (Repl.) 33, *202*. F

Scott v. *Shepherd* (1773), 3 Wils. 403; 2 Wm.Bl. 892; 95 E.R. 1124; 14 Digest (Repl.) 501, *4832*.

Richardson v. *Silvester* (1873), L.R. 9 Q.B. 34; 43 L.J.Q.B. 1; 29 L.T. 395; 38 J.P. 628; 22 W.R. 74; 35 Digest 36, *284*.

G

Appeal from a judgment of the Full Court for China and Korea (DE SAUSMAREZ, C.J., and LINDSEY SMITH, J.), sitting at Shanghai which had refused to order a new trial and affirmed a judgment of the Chief Justice in favour of the respondent in an action brought against him for deceit.

Bailhache, K.C., and *A. H. Chaytor* for the appellant, contended that the trial judge had misdirected the jury in the following respects: (i) the respondent must be taken to have intended the reasonable and probable consequences of his action in making the mis-statements; (ii) the respondent's motive and the knowledge of the probable effects of his statements, were matters of evidence which ought to have been considered by the jury. H

Sir R. Finlay, K.C., Atkin, K.C., and *Giveen* for the respondent.

I

Oct. 31, 1911. **LORD MACNAGHTEN.**—This is an appeal from an order of the Supreme Court of China and Korea sitting as the full court at Shanghai. The order appealed from dismissed an application made on behalf of the appellant—the plaintiff in the action—for a new trial on the ground of misdirection. The trial had taken place before DE SAUSMAREZ, C.J., and a jury. The full court consisted of the Chief Justice and an assistant judge. The Chief Justice held that there was no misdirection in his charge to the jury. The assistant judge took a different view. According to the rule

of the court, the opinion of the Chief Justice prevailed. Disembarrassed of the wild rumours which seem to have been rife on the Shanghai Stock Exchange, reduced to its proper proportions, and confined to the real point in controversy, the case does not present any difficulty. The action was an action of deceit. In such an action it is incumbent on the plaintiff to prove actual fraud. That has been the law in this country from the earliest times, and the law has been emphatically reasserted in the comparatively recent cases of *Smith* v. *Chadwick* (1) and *Derry* v. *Peek* (2). After a trial which lasted four days, and a most elaborate summing up by the Chief Justice, the jury returned answers to certain questions in the result negativing altogether the charges of fraud and dishonesty which had been brought against the respondent.

Mr. McBain, the defendant in the action and respondent in this appeal, was a director and the general agent at Shanghai of an oil-producing company commonly known as the Langkat Company. The company, whose chief property was in Sumatra, had been established for several years. Apparently it was paying satisfactory dividends, but there was a good deal of gambling in its stock, and in March, 1909, there were rumours of a "corner in Langkats." On April 10, 1909, the Saturday before Easter Sunday, Mr. McBain received a telegram from the manager in Sumatra, stating that hole No. 94, which had been recently opened, was producing oil in large and, indeed, unprecedented quantities. Mr. McBain sent the manager a congratulatory telegram. Then he bethought him that in February he had sold for the June settlement 400 shares, a number which had exceeded his actual holding by 110 shares. He was going up country in the afternoon, so he sent a note to Mr. Elmore, who had been in his employ since 1902, requesting him if there should be any decided strength or advance in Langkats in the early part of the following week to buy for him 400 or 500 shares for the June settlement. On the evening of Wednesday, April 14, Mr. McBain returned to Shanghai. The next day, Thursday, April 15, is the most important date in the history of the proceedings which led to this litigation. On that day Mr. McBain went to his office at 9.30 a.m. At 10 a.m. his broker, Mr. Benjamin, called. The rise in Langkats was the subject of conversation between them. Mr. Benjamin had returned to Shanghai too late on April 14 to do anything in execution of Mr. Elmore's orders, so Mr. McBain asked him to buy back if he could the shares which he had sold in February for the June settlement, and said that he should like 200. Mr. Benjamin said that he would do what he could and left the office. At 10.30 a.m. Mr. Benjamin returned and said that he had bought 200 Langkats. This amount more than covered the number by which Mr. McBain had sold short. At 11 a.m. Mr. Arthur Anderson, who was then chairman of the Shanghai Stock Exchange, looked in to find out, if he could, for his own advantage, what was the cause of the sudden advance in Langkats, and what news, if any, the directors had received from Sumatra. He had been acquainted with Mr. McBain ever since Mr. McBain came to Shanghai. Mr. McBain, he says, was very affable and chatty as usual. Mr. Anderson plied him with suggestions and questions until at last Mr. McBain, who had done his best to avoid disclosing confidential information, was driven into a corner, and then (as perhaps better men have done in the stress of similar circumstances) took refuge in a false statement. He said that the company had received no information, good, bad, or indifferent. There can be little doubt that Mr. McBain did say so, for he made the same statement to another broker later in the day, and apparently on that occasion without any pressure. It is hardly conceivable that he would have so made such a statement unless he had been already committed to it. In the afternoon of the same day Mr. Benjamin offered Mr. McBain ninety-five shares in Langkats for cash, and Mr. McBain, objecting to the price, took them rather unwillingly. On April 17 there was a meeting of the directors. In the meantime a telegram had been received from Sumatra in answer to an inquiry from Shanghai, saying that the yield from hole No. 94 was maintained. Then in view of the excitement on the Stock Exchange, and a strong suspicion of leakage in the office, the directors resolved to publish the news in the "North China Daily News" and to send a circular to the shareholders. This circular was delivered to the shareholders on Monday, April 19. On that Monday, Mr. Benjamin offered Mr. McBain 200 more shares in Langkats. Mr. McBain did not want to take them. He thought that the price was then too high and that it would soon fall, as in fact it did.

But Mr. Benjamin, to use his own words, "forced those shares down his throat." That is the sum and substance of Mr. McBain's dealings in Langkats in April, 1909. He was censured very severely and very properly by the learned Chief Justice for gambling in the shares of a company of which he was director, and he was taunted throughout the proceedings with having told a lie. But for all that he seems to have given his evidence in a very straightforward manner and to have made a favourable impression on the judge and on the jury.

In determining whether the untrue statement made by Mr. McBain was uttered with the fraudulent intention of depressing the shares in the Langkat Company for his own advantage, all the circumstances of the case, including, of course, the position in which Mr. Anderson had placed him and the difficulty of escaping from Mr. Anderson's pertinacity, must be taken into consideration. One thing at least is clear. It could not have been originally any part of the fraudulent scheme attributed to Mr. McBain to use the Shanghai broker as his instrument in depressing the market. He did not seek them out. They flocked to his office. Mr. Anderson and other brokers descended upon him in the hope of picking up some confidential communication not intended for their ears. It is, perhaps, conceivable, but not by any means likely, that when Mr. McBain was pressed by Mr. Anderson he saw his opportunity and determined on a sudden to use Mr. Anderson as an instrument for disseminating false news. Mr. McBain was severely cross-examined. He stated on oath that in withholding from the public the news received from Sumatra he never thought of his own private interest, such an idea, he said, did not enter his head. The judge and the jury saw his demeanour in the witness box, and apparently they believed him. Moreover, it must be borne in mind that at the time when the untrue statement was uttered Mr. McBain had already secured as many shares as were wanted to make him safe for the June settlement, and he was evidently unwilling to buy more at the price which they had then reached. Mr. Anderson's justification or excuse for his conduct in seeking to extract a confidential communication seems to have been a bold assertion that it was the practice of the company to publish at once all telegrams as they were received. That assertion, however, was absolutely disproved. The only foundation for it was that on one occasion the directors did publish a wire stating that oil had been found. That was on a concession at Acheen, about a hundred miles away from Langkat. The field had not been developed or proved at the time, so that it was a very different case. Then it was said that every broker in Shanghai was ready to do what was done by Mr. Anderson. That is true more or less. All the brokers examined on behalf of the appellant, with one honourable exception, had no scruples on that score. Mr. Benjamin, however, who seems to be the leading broker in Shanghai, in cross-examination as to his interview with Mr. McBain on April 15 being asked what Mr. McBain said to him, answered: "I went there, I told him, I said there seem to be quite a boom in Langkats, but I did not ask him why because I knew that he would not tell me. I did not think that it was my duty to ask him as a broker." All the other brokers examined on behalf of the appellant were shocked to think that the manager of a company could tell an untruth to a broker, but there was not one of them who seemed to have thought that there was any harm in a broker trying to worm out secrets from the confidential manager of a company.

If the case had been left to the jury on this simple issue—fraud or no fraud—probably they would have had no difficulty in coming to a conclusion. But unfortunately, and apparently at the instance of the respondent's counsel, a set of questions was put to the jury framed on the propositions laid down by LORD CAIRNS in *Peek* v. *Gurney* (3). Undoubtedly there is a superficial resemblance between this case and the case with which LORD CAIRNS was dealing. There is, however, this essential difference. In *Peek* v. *Gurney* (3) there was a prospectus adjudged to have been fraudulent as between the promoters and the persons who took shares on the faith of the statements which it contained. The only question was: Could the plaintiff connect himself with that prospectus as one of the class of persons to whom it was addressed? Here the real question is:—Was Mr. McBain's statement, though undoubtedly untrue, made with the fraudulent intention attributed to Mr. McBain by the appellant? The question whether the appellant was in a position to connect himself with the person or persons to whom the state-

ment was made in another question which does not arise unless the statement was fraudulent as well as untrue. It is not necessary to set out or discuss the questions left to the jury by the Chief Justice. On the material question which involved the question of fraudulent intent the jury at first hesitated under a misapprehension, not improbably created by the questions which were left to them and the learned disquisition of counsel on authorities more or less irrelevant. They came back for further directions. But on being instructed, and as their Lordships think properly instructed by the Chief Justice, they found a verdict which completely absolved the respondent from the fraud attributed to him. It would serve no useful purpose to discuss the judgment of the learned assistant judge. Their Lordships are unable to agree with his view as to the facts or his view as to the law. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Coward, Hawskley, Sons & Chance*; *Stephenson, Harwood & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

CLYDESDALE BANK, LTD. *v.* SCHRÖDER & CO.

[KING'S BENCH DIVISION (Bray, J.), October 18, 1911, May 10, 1912]
[Reported [1913] 2 K.B. 1; 82 L.J.K.B. 750; 106 L.T. 955; 56 Sol. Jo. 519]

Money Had and Received—Payment under compulsion of law—Recovery of sum paid—Order of foreign court—Payment under protest.

The plaintiffs were mortgagees in possession of a ship lying in a Chilian port. The defendants, to whom the shipowners were indebted for considerable sums, obtained an order of the Chilean court which enabled them to arrest the ship. The defendants made an offer to the plaintiffs to release the ship on receiving an unconditional guarantee covering the amount of the debt due to them from the owners of the ship, plus interest and expenses, but the plaintiffs paid the amount in question under protest, purporting to reserve the right to open up the whole question in London, and the ship was thereupon released. The plaintiffs now sought to recover the amount so paid.

Held: if proceedings were taken against a person in an English court, and that person chose to pay the claim, he could not recover the money back, even though he made the payment under protest; there was no difference in principle if the proceedings were in a foreign court; the plaintiffs had paid under compulsion of law; and, therefore, they could not recover the money they had paid.

Notes: As to the recovery of money paid under a mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 921 et seq., and for cases, see 35 DIGEST 147.

Cases referred to in argument:

Moore v. *Fulham Vestry*, [1895] 1 Q.B. 399; 64 L.J.Q.B. 226; 71 L.T. 862; 59 J.P. 596; 43 W.R. 277; 11 T.L.R. 122; 39 Sol. Jo. 133; 14 R. 343, C.A.; 12 Digest (Repl.) 631, *4871.*

Holsworthy Urban Council v. *Holsworthy Rural Council*, [1907] 2 Ch. 62; 76 L.J.Ch. 389; 97 L.T. 634; 71 J.P. 330; 23 T.L.R. 452; 51 Sol. Jo. 445; 5 L.G.R. 791; 12 Digest (Repl.) 226, *1683.*

Brisbane v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest 159, *545.*

Duke of Cadaval v. *Collins* (1836), 4 Ad. & El. 858; 2 Har & W. 54; 6 Ner. & M.K.B. 324; 5 L.J.K.B. 171; 111 E.R. 1006; 12 Digest (Repl.) 625, *4830*. A

Fulham v. *Down* (1798), 6 Esp. 26, n, N.P.; 12 Digest (Repl.) 623, *4815*.

Hirachand Punamchand v. *Temple*, [1911] 2 K.B. 330; 80 L.J.K.B. 1155; 105 L.T. 277; sub nom. *Punamchand Shrichand & Co.* v. *Temple*, 27 T.L.R. 430; 55 Sol. Jo. 519 C.A.; 12 Digest (Repl.) 519, *3897*.

Tamvaco v. *Simpson* (1865), 19 C.B.N.S. 453; 34 L.J.C.P. 268; 13 L.T. 160; 11 Jur.N.S. 926; 13 W.R. 1109; 2 Mar.L.C. 249; 144 E.R. 863; affirmed (1866), L.R.I.C.P. 363; Har. & Ruth. 374; 35 L.J.C.P. 196; 14 L.T. 893; 14 W.R. 376; 2 Man. L.C. 383, Ex.Ch.; 16 Digest (Repl.) 218, *1063*. B

Pitt v. *Coombs* (1835), 2 Ad. & El. 459; 1 Har & W. 13; 4 Nev. & M.K.B. 535; 4 L.J.K.B. 83; 111 E.R. 178; 12 Digest (Repl.) 625, *4827*.

Green v. *Duckett* (1883), 11 Q.B.D. 275; 52 L.J.Q.B. 435; 48 L.T. 677; 47 J.P. 487; 31 W.R. 607, D.C.; 18 Digest (Repl.) 444, *1876*. C

Action, tried by Bray, J., in the Commercial Court brought by the plaintiff bank against the defendants claiming repayment of the sum of £1,783 2s. 9d. as money had and received by the defendants to the use of the plaintiffs.

Bailhache, K.C., and *Raeburn* for the plaintiffs. D

Bateson, K.C., and *Leck* for the defendants.

BRAY, J.—In this case the plaintiffs are seeking to recover the sum of £1,783 2s. 9d., which was paid by them to the defendants under circumstances which I am about to relate. They seek to recover that sum of money on the ground that in fact a payment could never have been enforced against them either by detention of the ship or otherwise, E and having paid it under protest they say they are entitled to recover it back. Now, the plaintiffs were mortgagees of the *Chelmsford*, and in the early part of June, as the ship was about to reach Valparaiso, they made up their minds to take possession of the ship as mortgagees, and thus get an opportunity of receiving the freight. The defendants, or rather the Franklin Bank, whose agents the defendants were, were in this position: they had promissory notes upon which they were entitled to sue somebody, F and they had, in addition, a document which purported to give them a right to the ship, and a lien on the freight, and when the ship arrived, as they wanted their money, they took proceedings on July 10. They applied to the court in order to obtain the detention of the ship. Whether an actual order was made for this or not it is not necessary to decide, but legal proceedings were commenced. They gave notice to the plaintiffs that they intended to take these proceedings. The plaintiffs were about to detain the ship G by virtue of their lien, and in consequence of the notice which they had received from the defendants they wrote to the defendants on July 9 as follows:

> "Your letter of 8th inst. to Messrs. J. Hardie and Co., of Glasgow, has been handed to us. From it we observe that your Valparaiso firm hold three captain's drafts amounting to £2,452 10s. We are interested as mortgagees over this vessel, and recently foreclosed in virtue of the mortgage. We know very little how matters H stand so far as outside liabilities are concerned, but in the circumstances are agreeable to give you a letter of guarantee to meet the three drafts referred to, provided we are satisfied that the same are on account of ship's disbursements. We would ask you therefore to cable to Valparaiso to release the ship, and when the accounts come home we can settle matters with your good selves in London."

That was an offer made to enter into a contract, and that offer was not accepted. On I July 11 Messrs. Schröder, having communicated with the Franklin Bank, wrote the defendants as follows:

> "With reference to our lines of yesterday, we received this morning a cable from our friends in Philadelphia as follows:
>
> 'Your cable 10th received. £1,650 advanced owners Oct. 31. Probably remitted captain, West Coast South America, for disbursements, £800—Advanced Sydney should have been all disbursements. Owner should be in a position to

A give full details. Do not release her without satisfactory security for payment of drafts,'

which please note. We can only therefore cable out to our friends in Valparaiso to release the vessel on receiving your unconditional guarantee, covering the amount of the drafts plus interest, and also all cable and legal expenses incurred in the matter."

B Therefore, they would not accept the plaintiffs' offer, but made a counter offer. On July 13 the plaintiffs wrote a letter which I read as a refusal to accept the counter offer. They write:

"We have your letter of 11th inst., and regret you cannot see your way to meet us in this matter. In view of the position you take up, we inclose herewith bank C draft in your favour £2,452 10s., receipt of which please acknowledge. We make this payment under protest, and reserve to ourselves the right to open up the whole question in London when the documents come home."

In my opinion there was no contract at all, and they were not purporting to make a contract. They told the defendants, as was the fact at that time, that possession had D been taken; how far they had gone they did not know, and they said they were paying under protest. It may be that if there had been no threat of legal proceedings, nor any actual legal proceedings, they could have recovered that money back if they could have shown that the defendants were not entitled either to threaten or take such proceedings; but the defendants say that money was paid under compulsion of legal proceedings. Proceedings of some kind had been taken in court, and they paid the money E in order to get rid of these legal proceedings. It is quite clear, however, that in English courts, at all events, if proceedings are taken against a person, and that person chooses to pay the claim, he cannot recover that money back. Where proceedings have been taken for the very purpose of deciding whether the money is payable or not, and if one party wants to show that the money is not payable, he must resist those proceedings, and cannot by payment reserve his right to test the matter later. Counsel for the F plaintiff has argued that this does not apply to foreign courts, but there is no authority on the point. It seems to me that there is no difference in principle between proceedings in a foreign court and proceedings here. I have no right to assume that such proceedings will not be properly conducted and lead to an improper result. The principle as a principle is the same. The money was paid under compulsion of legal proceedings, and cannot be paid back. Counsel for the plaintiff suggested that his clients could not have G been parties to the proceedings, and could not have fought the matter out there, but there is no evidence of this, and I am not going to assume that the Chilian courts are so unjust that when they make an order in favour of one party they will not allow the other party to appear. We have heard evidence about Chilean law to show that these proceedings were merely provisional. I cannot believe that they will detain a vessel without any ground for doing so. The plaintiffs brought to the court a document H and evidence to show that the documents were properly signed. I am not going to hold that I am satisfied that if a ship is in a foreign port an application will be granted for its seizure without showing any title at all. A gentleman was called who desired to show that the proceedings of the defendants in Chile must have failed. If they must have failed the plaintiffs here should have fought the case and they would have succeeded. I have no reason to suppose that the same remedy is not open to the owner of a ship I there as here, and it seems to me that the plaintiffs should have made the necessary application, paid the deposit, and got permission to fight the question; but having paid under compulsion of law they cannot recover, and the action is dismissed with costs.

Solicitors: *William A. Crump & Son*; *Stibbard, Gibson & Co.*

[*Reported by* L. C. THOMAS, ESQ., *Barrister-at-Law.*]

A

BRITISH ASSOCIATION OF GLASS BOTTLE MANUFACTURERS, LTD. *v.* NETTLEFOLD

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Ashbourne, Lord Macnaghten, and Lord Atkinson), July 1, 19, 1912] B

[Reported [1912] A.C. 709; 81 L.J.K.B. 1125; 107 L.T. 529; 56 Sol. Jo. 702]

Discovery—Affidavit of documents—Further affidavit—When ordered—Basis of affidavit misconceived.

As a general rule the court will not go behind an affidavit of documents in the absence of an admission in the affidavit or in some other document. But where the basis on which the affidavit of documents is made turns out to be wrong, and the party making the affidavit has misconceived his case, so that the court is practically certain that if he had acted upon a proper view of the law he would have disclosed further documents, a further affidavit may be ordered. C

Notes. Followed: *Performing Right Society* v. *London Theatre of Varieties*, [1922] 1 K.B. 539. Applied: *Reddaway* v. *Harker* (1928), 72 Sol. Jo. 502. D

As to how far an affidavit is conclusive on discovery, see 12 HALSBURY'S LAWS (3rd. Edn.) 30–31; and for cases see 18 DIGEST (Repl.) 51 et seq.

Cases referred to:

(1) *A.-G.* v. *Emerson* (1882), 10 Q.B.D. 191; 52 L.J.Q.B. 67; 48 L.T. 18; 31 W.R. 191, C.A.; 16 Digest (Repl.) 263, *318*. E

Also referred to in argument:

Jones v. *Montevideo Gas Co.* (1880), 5 Q.B.D. 556; 49 L.J.Q.B. 627; 42 L.T. 639; 28 W.R. 758, C.A.; 18 Digest (Repl.) 51, *395*.

Hall v. *Truman, Hanbury & Co.* (1885), 29 Ch.D. 307; 54 L.J.Ch. 717; 52 L.T. 586, C.A.; 18 Digest (Repl.) 54, *414*. F

Morris v. *Edwards* (1890), 15 App. Cas. 309; 60 L.J.Q.B. 292; 63 L.T. 26, H.L.; 18 Digest (Repl.) 47, *377*.

Kent Coal Concessions v. *Duguid*, [1910] 1 K.B. 904; 79 L.J.K.B. 423; 102 L.T. 225; 26 T.L.R. 345, C.A.; affirmed [1910] A.C. 452, H.L.; 18 Digest (Repl.) 38, *300*.

Appeal from an order of the Court of Appeal (COZENS-HARDY, M.R., and FARWELL, L.J.), reversing an order of BUCKNILL, J., refusing to order the appellants to file a further and better affidavit of documents. G

Younger, K.C., *A. Neilson*, and *H. E. Wright* for the appellants.

Buckmaster, K.C., and *A. H. Chaytor* for the respondent.

Their Lordships took time for consideration.

July 19, 1912. The following opinions were read. H

VISCOUNT HALDANE, L.C.—The question which is raised in this appeal is whether the appellants should be ordered to file a further and better affidavit of discovery. The action was brought by the appellants against the respondent, who was a shareholder in the appellant company, to recover calls. The defence was twofold. The respondent alleged that the appellants, although nominally registered as a company under the Companies Acts, were in reality a trade union, and that consequently, under s. 5 of the Trade Union Act, 1871, their registration was void. In the second place it was alleged that the appellants were a combination or association illegal at common law as being in restraint of trade by arbitrarily restricting output and fixing prices, and that consequently the appellants could not sue. I

An order for directions was made on July 26, 1911, ordering against the appellants an affidavit of documents. On Oct. 25, 1911, an affidavit was delivered disclosing certain documents, and among them a mortgage by the plaintiffs and a foreign company to

another company called Owens' European Bottle Machine Co., together with a form of licence to use Owens' machine. In their statement of defence the respondent had given particulars relating to the alleged illegality at common law, and had alleged in these particulars that the plaintiffs had entered into agreements with the foreign company above referred to, being an international association of glass-bottle manufacturers formed for similar purposes in restraint of trade. It was further alleged in these particulars that there was a written contract between the appellant company and the foreign company for regulating the relations between them and their dealing with Owens' patent, with a view to controlling output and price; and that in pursuance of this purpose the appellants had granted written licences to certain licensees containing clauses intended to secure restriction. The appellants' solicitors, in reply to a letter of July 12 asking for production of this contract, wrote on Oct. 25 that no such contract had any bearing upon or relevance to any question in the action; and that in consequence they had not included any such document in their affidavit of documents, although they did not seek to say that they had not such a document in their possession. On this a summons was taken out by the respondent under Ord. 31, r. 19A (3), for inspection of the contract. In his affidavit in answer the secretary to the appellants deposed that no such contract was relevant to the questions in issue, and for that reason no such document had been included in the affidavit of documents. On Nov 7 the master ordered production of the contract, but SCRUTTON, J., on appeal directed the application to be adjourned to the judge who should try the case, on the ground that he was not then satisfied that the document should be inspected, but thought that it might become material at the trial. The Court of Appeal set aside the order of SCRUTTON, J., on Nov. 23 and restored the master's order directing production of the contract. The respondent's solicitors then wrote to the appellants' solicitors taking the point that, as a consequence of the judgment of the Court of Appeal, the view taken originally by the appellants as to the relevancy of the document now produced had been found to be erroneous, and they assumed that the appellants would now wish to do what should have been done at the outset, and produce various documents which, they suggested, must exist, and, they alleged, must now be taken to bear on the issues raised. They therefore asked for a further affidavit of discovery. The appellants' solicitors wrote in reply declining to file a further affidavit, and the respondents thereupon took out a summons to enforce their demand. The master refused to make an order, and BUCKNILL, J., affirmed his decision. The respondent appealed to the Court of Appeal, and on Dec. 16 the Court of Appeal reversed the decision and ordered a further and better affidavit of discovery. In the meantime, on Nov. 27 the master had made an order for interrogatories, in answer to which the appellants stated that certain licences had been granted in the form of a written licence already disclosed in the original affidavit of documents. Upon an order for a further and better answer, it was stated in an affidavit by the secretary of the appellants that there had been no other licences.

The ground of the decision of the Court of Appeal on Dec. 16 was that the court was entitled to draw the inference that there were documents not disclosed originally which had been withheld in the belief, ascertained by the previous decision of the Court of Appeal to be erroneous, that such documents were not relevant. The Master of the Rolls said that the old Court of Chancery would not allow cross-examination upon an affidavit of documents, but that if there were an admission by the person making the affidavit, either in the affidavit itself or in some other document, which showed that there were other documents which ought to have been included, the court could act. Adopting the language of BRETT, L.J., in *A.-G.* v. *Emerson* (1) (10 Q.B.D. at p. 204), he said that

> "if the court has that degree of certainty that the defendant has misconceived the nature of the documents, then the court is entitled not to act upon the affidavit."

FARWELL, L.J., took the same view. He pointed out that under Ord. 31, r. 19A (3), the strictness of the principle that the statement in an affidavit of documents must be taken as conclusive was relaxed by enabling a person dissatisfied with the affidavit, by suggesting a specific document and his belief that the other side had it, to compel

him to make a further affidavit. He said that while the general principle of the old rule as to discovery remained, the practice of the court was at all events to this extent not rigid, that if there appeared from the contents of the affidavit of documents to be other documents which were obviously omitted, a further affidavit might be ordered. The ground of the decision of the Court of Appeal was therefore based on the proposition that the appellants had originally made a mistake in the principle by which they were guided as to relevancy, and that, having omitted to apply the proper principle, the affidavit of documents was to this extent discredited. If, therefore, on the face of it, or from admissions in other documents, the court had reasonable ground for being fairly certain that there were other relevant documents which ought to have been disclosed, it could order further discovery. I think that this decision was right. It was contended before your Lordships that the respondents had got all that the rules applicable entitled them to get, and that neither the affidavit itself nor any admissions in the pleadings or other documents showed that there were in the plaintiffs' possession any relevant documents not disclosed. But while it is true that as a general rule you cannot go behind the affidavit in the absence of admissions in that or some other document, the rule is qualified where the basis on which the affidavit of documents has been made turns out to have been wrong. If the party making the affidavit has misconceived his case, so that the court is practically certain that, if he had conceived it properly and had acted upon a proper view of the law, he would have disclosed further documents, then the court can refuse to recognise an affidavit as conclusive, and order a further affidavit. In this case the letter of Oct 25 already referred to is sufficient to discredit the original affidavit, and I think that the circumstances are such as to justify the order appealed from.

I desire to make only one further observation. Unless under very exceptional conditions, I do not think that a case in which, even assuming the appellants had been right in their contention, the only matter at stake was this obligation of filing a brief further affidavit denying, if they could, that they had further documents, was a proper case to bring before this House by way of appeal. The decision of the Court of Appeal is not one against which I should have been disposed to encourage an appeal to this House even had I not agreed with it. I move your Lordships to dismiss the appeal with costs.

LORD ASHBOURNE, LORD MACNAGHTEN, and **LORD ATKINSON** concurred.

Appeal dismissed.

Solicitors: *Crowders, Vizard, Oldham & Co.*; *Coward, Hawksley, Sons & Chance.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

IRWIN *v.* WATERLOO TAXI-CAB CO., LTD.

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.), June 25, July 25, 1912]

B [Reported [1912] 3 K.B. 588; 81 L.J.K.B. 998; 107 L.T. 288; 28 T.L.R. 567; 56 Sol. Jo. 720]

Master and Servant—Liability of master for act of servant—Negligence of servant—Injury to third person—Act within course of employment—Servant acting on unauthorised orders of general manager.

C The general manager of the defendant company's motor yard ordered B., an employee of the company, to drive him on an unauthorised journey for his own purposes in a car belonging to the company which was appropriated exclusively to the use of a particular customer. B. did not know the order was improper. While driving the car on this journey B. drove negligently and injured the plaintiff. In an action in which the plaintiff claimed from the defendant company damages for personal injuries caused by their servant B.,

D **Held:** it was B.'s duty to obey the orders of the general manager; in obeying his apparently proper order he was acting within the scope of his employment; and the defendant company were liable.

Notes. As to the liability of a master to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq., and for cases see 34 DIGEST 125 et seq.

E Cases referred to in argument:

Storey v. *Ashton* (1869), L.R. 4 Q.B. 476; 10 B. & S. 337; 38 L.J.Q.B. 223; 33 J.P. 676; 17 W.R. 727; 34 Digest 140, *1093.*

Mitchell v. *Crasweller* (1853), 13 C.B. 237; 22 L.J.C.P. 100; 20 L.T.O.S. 237; 17 Jur. 716; 1 W.R. 153; 138 E.R. 1189; 34 Digest 139, *1088.*

Rourke v. *White Moss Colliery Co.*, (1877), 2 C.P.D. 205; 46 L.J.Q.B. 283; 36 L.T. 49; F 41 J.P. 580; 25 W.R. 263, C.A.; 34 Digest, 26, *46.*

Joel v. *Morison* (1834), 6 C. & P. 501, N.P.; 34 Digest, 139, *1090.*

Murray v. *Currie* (1870), L.R. 6 C.P. 24; 40 L.J.C.P. 26; 23 L.T. 557; 19 W.R. 104; 3 Mar.L.C. 497; 34 Digest 25, *44.*

Sleath v. *Wilson* (1839), 9 C. & P. 607; sub nom. *Heath* v. *Wilson* 2 Mood. & R. 181, N.P.; 34 Digest 140, *1091.*

G *Beard* v. *London General Omnibus Co.*, [1900] 2 Q.B. 530; 69 L.J.Q.B. 895; 83 L.T. 362; 48 W.R. 658; 16 T.L.R. 499, C.A.; 34 Digest 142, *1113.*

Appeal from a decision of PICKFORD, J., with a jury, in an action brought by the plaintiff against the defendant for damages for personal injuries caused by the negligent driving of a motor car by the defendant company's servant or agent. PICKFORD, J., H gave judgment for the plaintiff for £350. The defendant company who called no evidence at the trial, now appealed.

E. Shortt, K.C., and *T. C. P. Gibbons* for the defendant company.

Clavell Salter, K.C., and *Tindale Davis* for the plaintiff.

Cur. adv. vult.

July 25, 1912. The following judgments were read.

I **VAUGHAN WILLIAMS, L.J.**—This is a case in which one Black, the manager of a yard from which taxi-cabs were let out on hire, acting, not in the interest or for the benefit of his master, the proprietor of the yard, ordered one Bird, a driver, whose duty it was to obey Black's orders in respect of driving the taxi-cabs, to drive him to some destination for his (Black's) personal pleasure or convenience, to effect some purpose of Black's own. Bird carried out this order, and drove Black in the cab to the named destination. In the course of that drive the accident, in respect of which this action is brought, occurred. Bird had no knowledge that the order which Black gave him was

an order which Black had no right to give. As a matter of fact the taxi-cab in which Black went to see his friend, and which Bird drove, was a car in respect of which the company had entered into an agreement with one Graham Harding, giving him the exclusive use of the said car. The car had been specially fitted for Graham Harding, and the agreement was subsisting at the time of the matters in question in this action. There can be no doubt that Black was not, in this transaction, acting as his master's servant. Primâ facie, therefore, apart from any duty of the driver to his master to obey Black's orders, the defendant company would not be liable to the plaintiff for the accident occurring to the plaintiff during the drive through the carelessness of the driver acting under the orders of Black. Does it make any difference that Bird as the servant of the company was bound to obey the orders of Black? Can the plaintiff, a stranger, say Bird obeyed Black's orders because it was as their (the company's) servant he came under the obligation to obey Black?

This is not a case in which the plaintiff could say: "You (the defendants) had by prior practice held out Bird as your servant." It is not like the case of a master who has held out Bird as acting for him. Bird was never held out to the plaintiff in any capacity. The case of the plaintiff must be: "Bird in driving was in fact acting as the defendants' servant; you told him, in respect of his duties as your servant in the taxi-yard, to obey, as his orders, all the directions of Black." I think, therefore, that any defence which is founded on Bird not being a servant of the defendant company fails. As to the defence founded upon the car not being at the disposal of the defendant company because it was, at the time of the accident, by agreement, appropriated exclusively to the use of Graham Harding, and specially fitted for Graham Harding, I do not think this affords a defence. The servant of the defendant company, by a direction conveyed to him by the manager whose directions it was his (Bird's) duty to the defendants to carry out, did drive this car on the day the accident occurred. I do not think that this prevents Bird in driving being a servant of the defendant company, since Bird drove in pursuance of the direction of Black, whose direction he (Bird) was by his duty to the defendants bound to carry out, unless there was something about the direction of Black which would make a reasonable man doubt the authority, which is not the case here. I think this appeal must be dismissed with costs.

FLETCHER MOULTON, L.J.—In this case the plaintiff sues for damages for injuries occasioned by the negligence of a servant in the employment of the defendant company when driving a motor car. The employment, the negligence, and the amount of the damage are admitted. The sole question is whether under the peculiar circumstances of the case the defendant company is liable for that negligence. The jury have found a verdict for the plaintiff, and therefore the question before us is whether there was evidence which justified that finding. The defendants are a company which carries on the business of letting out motor cars for hire. Their general manager was a man named Black, who was in the car at the time of the accident. Bird, the driver of the motor car was in their employment, and there was evidence which justified the jury in coming to the conclusion that driving was a part of his duties. He was, of course, under the orders of Black as general manager, and, therefore the jury were entitled and, I think, bound to find, that at the time of the accident Bird was driving the car as servant to the defendant company to the knowledge and by the direction of Black, whose orders in such matters he was bound to obey.

The ground on which the defendants contest their liability is that Black was guilty of a breach of duty in thus ordering Bird to drive him in the motor car. They say, in the first place, that Black was driving to see a private friend, and not on the business of the company, and that he had no right to use a car for such purposes without previously providing for the fare. In the second place, they say that Black had no right to make use of that particular car, because the defendant company had contracted with a customer to give to him the exclusive use of it. There is evidence to support both these allegations, and they must be taken to be facts. At the same time there is no evidence that Bird knew anything about these matters, and the jury were justified in finding that he was wholly unaware that Black was acting improperly in ordering him to drive him.

A I may at once get rid of the latter of these points. There is nothing in the evidence which would require the jury to regard the contract as amounting to a demise of the car, or even justify them in so regarding it. It was merely a contract to give the customer the exclusive use of the car for a certain period. The car still belonged to the defendant company, and remained in their possession and under their control, and Bird was bound to obey Black's orders with regard to this car precisely as he was bound to obey his orders B with regard to other cars belonging to the defendant company and used in their business.

Under these circumstances I am of opinion that Bird was acting within the scope of his employment, and under the order of his masters, the defendant company, when he was guilty of negligence. If a master directs a servant to take his orders in respect of matters within his contract of service from A. B., such orders, when given, become the orders of his master. A master can always delegate his authority, and he does so when C either expressly or impliedly he designates a person as authorised to give orders for him and on his behalf. In the present case the fact that Black was the general manager implied that it was the duty of a servant in the position of Bird to obey the orders given to him in the ordinary matters of his service. His driving the car on this occasion was thus in fulfilment of his duty of obedience to his masters, the defendant company, and therefore he was at the time their servant doing what he was engaged upon by their D orders. Nothing more than this is needed to make the principle respondeat superior apply. A little consideration will make it clear that the contrary view would not only be unjust, but would lead to endless confusion. Suppose that the general manager of a railway company wires orders to a stationmaster to send a special train to a certain station, and in going there it runs over a member of the public by the negligence of the servants of the company; could the company be allowed to raise as a defence that the E general manager gave the order improperly, say because he intended to use the train for his private ends? For the convenience, I might even say for the necessities, of working their system the company order all their servants to obey implicitly the orders of the general manager, and therefore, in obedience to the command of the company itself, all their staff and plant are at his orders. If the company take the advantages of this arrangement, it cannot say that one of its servants, who in matters appertaining F to his service obeys an order of the general manager, is doing otherwise than obeying an order of the company itself. An accident happening to the servant under such circumstances would unquestionably be an accident arising out of and in the course of his employment, and would entitle him to compensation, and conversely a negligent act by him would be done in the course of his employment in carrying out his master's orders, and the master must bear the consequences of it. For these reasons I am of opinion G that the judgment appealed against was right, and that this appeal must be dismissed with costs.

BUCKLEY, L.J.—I agree for the reason that Bird, when the accident occurred, was acting as the defendants' servant, and none the less because he was obeying an order which Black had no business to give him. Black did give the order, and Bird was by H the defendants' direction bound to obey the order.

Appeal dismissed.

Solicitors: *Johnstone & Wiley*; *Simpson, Thomas & Clark.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re O'SHEA. Ex parte LANCASTER

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), July 14, 1911]

[Reported [1911] 2 K.B. 981; 81 L.J.K.B. 70; 105 L.T. 486; 18 Mans. 349]

B

Gaming—Loan for gaming—Guarantee of overdraft to enable betting debt to be paid—Gaming Act, 1892 (55 & 56 *Vict.*, *c.* 9), *s.* 1.

O., who was a bookmaker, was in financial difficulties and unable to pay a betting debt. L. gave a guarantee to a bank to secure an overdraft for O. to the extent of £500, and O. paid the debt. More than two and a half years later L. paid a sum to the bank under this guarantee and one made earlier. Subsequently L. obtained judgment in default against O. for £3,000 and a bankruptcy notice was given. O. objected to the making of a receiving order on the grounds that the judgment debt was not recoverable having regard to the Gaming Acts.

C

Held: the guarantee of the £500 was not a loan to enable a bet to be made, and no money paid in respect of that sum was paid in respect of a contract rendered null and void by the Gaming Acts.

D

Per COZENS-HARDY, M.R.: It is so probable as almost to be a certainty that any vice that there was must have been cured because having regard to the rule in *Clayton's Case* (1) the presumption is almost irresistible that the original payment of the betting debt has been satisfied and wiped out.

E

Notes. Explained: *MacDonald* v. *Green*, [1950] 2 All E.R. 1240. Referred to: *Maskell* v. *Hill*, [1921] 3 K.B. 157; *Humphery* v. *Wilson*, [1929] All E.R.Rep. 171.

As to money lent for gaming see 18 HALSBURY'S LAWS (3rd Edn.) 179–180; and for cases, see 25 DIGEST 414–416. For the Gaming Act, 1892, see 10 HALSBURY'S STATUTES (2nd Edn.) 777.

F

Cases referred to:

(1) *Davaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 8 L.J.Ch. 256; 35 E.R. 767, 781; 36 Digest (Repl.) 493, *616*.

(2) *Re Lister, Ex parte Pyke* (1878), 8 Ch.D. 754; 38 L.T. 923; 26 W.R. 806; sub nom. *Re Lister, Ex parte Pike*, 47 L.J.Bcy. 100, C.A.; 25 Digest 415, *191*.

(3) *Tatam* v. *Reeve*, [1893] 1 Q.B. 44; 67 L.T. 683; 57 J.P. 118; 41 W.R. 174; 9 T.L.R. 39; 5 R. 83; sub nom. *Tatham* v. *Reeve*, 62 L.J.Q.B. 30, D.C.; 25 Digest 411, *146*.

G

(4) *Saffery* v. *Mayer*, [1901] 1 K.B. 11; 70 L.J.Q.B. 145; 83 L.T. 394; 64 J.P. 740; 49 W.R. 54; 17 T.L.R. 15; 45 Sol. Jo. 29, C.A.; 25 Digest 414, *175*.

Also referred to:

Read v. *Anderson* (1884), 13 Q.B.D. 779; 53 L.J.Q.B. 532; 51 L.T. 55; 49 J.P. 4; 32 W.R. 950, C.A.; 25 Digest 410, *139*.

H

Hyams v. *Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 24 T.L.R. 675; 52 Sol. Jo. 551, C.A.; 25 Digest 401, *58*.

Appeal from a decision of a registrar dismissing a bankruptcy petition, presented by one, Lancaster, on the ground that the money claimed by the petitioning creditor had been advanced for betting transactions, and could not be recovered by him under the provisions of the Gaming Act, 1892, and, therefore, there was no debt.

I

A bookmaker named O'Shea had a friend, Lancaster, and in March, 1903, Lancaster lent O'Shea £1,000 on an IOU. The Court of Appeal accepted for the present purpose O'Shea's evidence on this point, which was believed by the registrar, that the money was lent distinctly to enable O'Shea to make bets, and upon terms that Lancaster should have half of the profits which might be made by betting. In the same year Lancaster gave a guarantee to the bank to secure an overdraft to the extent of £1,000. In Sept., 1903, O'Shea owed £500 to another bookmaker named Turner. He had not the money to pay him. He went to Lancaster, and asked him to find the money. He

said in his evidence: "I told him I owed the money to Turner for bets. He said he would guarantee a further £500 at the bank to enable me to pay the debt, and I paid Turner." The guarantee was given, the overdraft was allowed by the bank, and Turner was paid. In 1906, more than two and a half years after this transaction, a sum of £1,633 was paid by Lancaster to the bank under these two guarantees. Judgment was then obtained by Lancaster against O'Shea in default of defence for nearly £3,000, and in respect of that judgment debt a bankruptcy notice was given. O'Shea objected to the making of a receiving order and contended that the judgment on which it was founded was not in respect of any legal claim. The registrar found that £15 of the debt was not in any way tainted with the Gaming Acts, but that as to the rest the money was not recoverable having regard to the Gaming Acts, and he accordingly dismissed the petition.

Clayton, K.C., and *Macklin* for the plaintiff.
G. Malcolm Hilbery for the defendant.

COZENS-HARDY, M.R.—This case no doubt raises a curious and important point. Mr. O'Shea appears to have been in an impecunious condition for the last seven or eight years. [HIS LORDSHIP then stated the facts, and continued:] The £1,000 lent by Lancaster on the IOU in March, 1903, was to enable O'Shea to make bets, and the guarantee given by Lancaster to the bank in the same year to secure an overdraft to the extent of £1,000 was probably tainted with the same defect. It is said that whatever may be the case as to the other parts of the transaction (as to which counsel for the plaintiff most properly does not waive his right to assert hereafter that he has a good claim, and as to which nothing that I may say must be taken to indicate any opinion either for or against it) the guarantee for £500 is a guarantee to secure an overdraft, and is not in any way invalid. Now, under the law prior to 1892 it seems to me quite plain that that argument is sound. This court in *Ex parte Pyke* (2) in the year 1878 drew a distinction to the effect that the money was not lent to the bankrupt to enable him to make a bet, but it was lent to him to pay a bet which he had already made and lost, and as the law then was the court held that there was no objection to that, and it took the view that the Act must be construed strictly, and that there was nothing in the earlier Acts which applied to the transaction which was a loan to enable the payment of a bet that had already been made and lost.

Has that law been altered by the Act of 1892? It is said, and the learned registrar seems to have taken that view, that it was within the language or the spirit of the decision of the Queen's Bench in *Tatam* v. *Reeve* (3) which was approved by the Court of Appeal in *Saffery* v. *Mayer* (4). I am unable to accept that view. We have to consider whether it is brought within the language of the Act of 1892, and what that Act says is

> "Any promise express or implied to pay a person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Was this a promise to pay any sum of money paid by Lancaster under or in respect of any contract rendered null and void? It was not a loan to enable a bet to be made, it was not a loan in respect of a contract to enable something to be done. That seems to me vital.

There is another point that must put an almost irresistible obstacle in the way of the respondent. What was this transaction with reference to the £500? It was a guarantee to secure an overdraft. That was in Sept., 1903. What was done under it? The banking account went on for years. The £1,633 paid in respect of that guarantee was not paid until Sept., 1906. I cannot bring myself to doubt that it is so probable as almost to be a certainty, that any vice that there was must have been cured, because having regard to the rule in *Clayton's Case* (1), the presumption is almost irresistible, that the original transaction with Turner must have been satisfied and wiped out, so that no question arises with regard to it. In the present case I think that the old law

applicable before the year 1892 prevails, and in that state of things I think there is a good petition on the creditor's part on which the registrar ought to proceed, making such an order as he thinks fit. I do not say a word prejudicing the question as to the amount in respect of which the proof will ultimately be allowed.

FARWELL, L.J.—I am of the same opinion. The argument of counsel for the defendant struck me as being rather taking at first, but I am convinced it is not sound, and I am glad to be so convinced, because otherwise the consequences would be far reaching. His point was that the money was paid on a promise which comes within the Gaming Act, 1892. I think the fallacy of it is that it applies to every case where a man asks his friend to lend him money to pay a bet or where a bookmaker draws a cheque on his banking account directing his bankers to pay what are obviously losses for bets. The words of the Act are:

> "Any promise express or implied to pay a person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the [Gaming Act, 1845] . . . shall be null and void and no action shall be brought or maintained to recover any such sum of money."

This was not so paid apart from the question of the rule in *Clayton's Case* (1). This was simply an overdraft guaranteed by Mr. Lancaster to the extent of £500, and no money paid in respect of that sum was paid in respect of any contract rendered null and void at all. It was simply a payment made at the request of the now appellant. The case has been a little complicated, I think, by the reference to *Saffery* v. *Mayer* (4) and that class of case; but it is quite plain here that there was nothing in the nature of partnership or agency authorising the agent to bind the credit of the so-called partner or principal as the Court of Appeal thought there was in *Saffery* v. *Mayer* (4), because the evidence is clear that Mr. Lancaster was not to be liable for losses, and inasmuch as there was no creditor who could recover on bets at law, there were no creditors who would contend that they could not make that agreement so as to be binding on them. The case is simply a plain one, where the plaintiff is asked as a friend to lend another friend a sum of money to pay a bet. I am not prepared to hold that that is a transaction which the law forbids. The friend who is so obliging seeks to recover the sum which was paid for that purpose on the promise so to pay it. I agree with the Master of the Rolls that the appeal must be allowed.

KENNEDY, L.J.—I am of the same opinion. It is important, I think, to get the facts quite clear having regard to the terms of the statute under which counsel for the defendant very ably argued that this transaction should not be allowed to stand in support of the claim made by the present petitioning creditor. The parties had an arrangement by which no partnership was created, and the debtor had no right at all to pledge the credit of Lancaster. There was as to certain contributions to that fund which came into the hands of the bookmaker, the present debtor, an arrangement with regard to profits. There were no profits in fact. As to the effect of what that arrangement was as regards proof we say nothing here; but there was in Sept., 1903, and this is the subject of the present discussion, a debt which existed to a man named Turner, a bookmaker to whom the present debtor owed money to the extent of £500. In order to pay Turner that racing debt the debtor went to Lancaster and asked him—I am taking the debtor's own testimony—to find the money. He said: "I told him I owed the money to Turner for bets, and he said he would guarantee a further £500 at the bank to enable me to pay the debt, and I paid Turner." He goes on to say: "This was not a loan for further betting purposes." So that the further guarantee was not for the purpose of carrying out what I call a prior arrangement; it was a friendly and a kindly act on the part of the lender, the person advancing the money, by giving a guarantee to enable the debtor to pay a debt, which was no doubt a gambling debt, to Turner.

Now, is that transaction which was carried out, a guarantee of a further sum of £500 to the debtor's bankers, a void transaction within the Gaming Act, 1845? The passage in the Act of 1892 that is material is quoted in the judgment of Lord Coleridge, C.J.,

in the case mainly relied upon by the defendant, and apparently accepted by the learned registrar, who decided in favour of the debtor—namely, *Tatam* v. *Reeve* (3). That quotation is,

> "Any promise, express or implied, to pay a person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the [Gaming Act, 1845] . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

I do not think that this transaction fairly falls within those words. In that case an actual payment had been made by the plaintiff to certain gambling creditors of the defendant at the defendant's request. The plaintiff had paid moneys, not under any contract, because he was not a party to the contract between the person to whom he paid the money and his creditor, but it was actually a payment to the creditor in respect of a contract between the defendant and other creditors. The court held that it fairly came within the section. I cannot apply that section to this case. Here the debtor went to Lancaster and said: "I have incurred a debt, will you increase the guarantee to the bank in order to enable me to pay it?" I cannot, without forcing the words, treat that as a transaction in which there was a payment by Lancaster to the creditor, Turner. It was a placing of the debtor in funds which he could use to pay the debt, and which he undoubtedly said he had asked for expressly to enable him to pay the debt. There has been no payment by the appellant in respect of any contract or agreement, and, unless there has been such a payment the statute does not apply. I do not think it right to construe this section so as to bring within it a transaction like the present. I think the appeal must be allowed.

Solicitors: *S. F. Miller, Varden & Miller*; *Henry Hilbery & Son.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

HALL *v.* BURNELL

[CHANCERY DIVISION (Eve, J.), July 31, 1911]

[Reported [1911] 2 Ch. 551; 81 L.J.Ch. 46; 105 L.T. 409; 55 Sol. Jo. 737]

Sale of Land—Contract—Breach—Breach by purchaser—Deposit—Right of vendor to retain—Right of vendor to rescission.

It is an implied term in the case of money paid on the signing of a contract for the sale of land that, if the purchaser refuses to perform the contract, the deposit becomes the property of the vendor, and it makes no difference to this principle that the money is in the hands of a stakeholder.

Further, there is nothing inconsistent in a vendor being given relief by way of rescission and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit.

Notes. Applied: *Holford* v. *Trim* (1921), 65 Sol. Jo. 768. Referred to: *Farrant* v. *Olver*, [1922] All E.R.Rep. 783; *John Barker & Co. Ltd.* v. *Littman*, [1941] 2 All E.R. 15; *Barber* v. *Wolfe*, [1945] 1 All E.R. 399.

As to forfeiture of deposit on a sale of land contract, see 34 HALSBURY'S LAWS (3rd. Edn.) 322 et seq., and for cases see 40 DIGEST (Repl.) 242 et seq.

Cases referred to:

(1) *Howe* v. *Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, *2027*.

(2) *Jackson* v. *De Kadich*, [1904] W.N. 168; 48 Sol. Jo. 687; 117 L.T. Jo. 339; 40 Digest (Repl.) 239, *1998*. A

Also referred to in argument:

Olde v. *Olde*, [1904] 1 Ch. 35; 73 L.J.Ch. 81; 89 L.T. 604; 52 W.R. 260; 40 Digest (Repl.) 239, *2008*.

Westerman v. *Pantlin* (1900), 3 Seton on Judgments and Orders, 7th Edn. 2218; 40 Digest (Repl.) 239, *2009*. B

Motion by the plaintiff, William Hall, asking for (i) an order rescinding an agreement of Oct. 21, 1910, made between himself as vendor of the fee simple of certain land and the defendant, Robert Norman Burnell, as purchaser; (ii) an order that a sum of £50 paid by the defendant as a deposit to the plaintiff's solicitors as stakeholders on the signing of the agreement might be forfeited to the plaintiff, or, in the alternative, that the plaintiff might be declared entitled to a charge thereon for his costs of the action including the costs of the present motion; and (iii) an order that all further proceedings in the action might be stayed except those necessary for carrying the order into effect. C

By the agreement of Oct. 21, 1910, it was agreed that the plaintiff would sell to the defendant the fee simple of certain land for £2,450 and the agreement provided that "the sum of £50 shall on the signing of this agreement be paid as a deposit to . . . the vendor's solicitors as stakeholders." The balance of the purchase money was payable on completion on Nov. 11, 1910. It was further provided by the agreement that: if from any cause whatever other than the default of the vendor the purchase should not then be completed, the purchaser was to pay interest on the balance of the purchase money at four per cent. per annum from that day until actual payment, or the vendor should have the option of taking the rents and profits (less outgoings) up to the actual day of completion in lieu of interest; and: if the vendor should be unable or unwilling to comply with any objection or requisition regarding title the purchaser should receive back the deposit. In pursuance of this agreement £50 was paid as deposit and the plaintiff's title was accepted by the defendant and a draft conveyance had been sent, and approved by the defendant's solicitors in Dec., 1910. Subsequently the defendant refused to carry out the agreement and the Court on May 2, 1911, granted a decree of specific performance to the plaintiff, the defendant having appeared but not having delivered a defence. The defendant was ordered to pay the amount certified to be due in respect of the balance of the purchase money which was subsequently found by the Master to be £2,400 with £41 6s. 2d. the plaintiff's costs of action. D E F

W. E. Greaves for the plaintiff.

The defendant was not represented. G

EVE, J., stated the facts, and continued.—The plaintiff in the action as he is now entitled to do moves on notice of motion dated July 20, 1911, and duly served on the defendant for an order rescinding the contract for forfeiture to him of the deposit of £50 in the hands of his solicitors as stakeholders, and for a stay of all further proceedings in the action. No difficulty arises on the application except in so far as it relates to the deposit. As to this the contract contains no express stipulation what is to become of it in the event of the purchaser making default. Money paid as a deposit must, however, according to the view expressed by FRY, L.J., in *Howe* v. *Smith* (1), be paid on some terms implied or expressed, and in a case where no terms are expressed it becomes necessary to inquire what terms are to be implied. H

The answer to this inquiry is to be found in the words which follow the statements in the judgment to which I have just referred. They are as follows (27 Ch.D. at p. 101): I

> "The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

To the same effect are the observations of Cotton, L.J., where he says (ibid. at p. 95):

> "What is the deposit? The deposit, as I understand it, and, using the words of James, L.J., is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to James, L.J., he can have no right to recover the deposit."

And Bowen, L.J. (ibid. at p. 98), after remarking,

> "We have, therefore, to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term 'deposit,'"

adds, by way of answer,

> "it comes shortly to this—that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase."

The lords justices were there speaking of a case where the deposit was actually paid to the vendor, but I cannot conceive that the mere fact that the money is placed in the hands of a third party as stakeholder could be treated as altering the nature of the deposit or the implied terms on which it is paid. Whether it be paid to the vendor direct or to a third party as stakeholder the implication in the absence of any other element of difference must in each case be the same.

Such being the nature of the deposit and the implied terms upon which it was paid, is there any sufficient reason why I should not, as against a purchaser who has receded from and persistently refused to perform the contract, declare that the deposit has been forfeited, and belongs to the vendor who has been in no way in default, and has done everything in his power to force the purchaser to carry out his bargain? I think not. The deposit cannot be left indefinitely in the hands of the stakeholder, and the only alternative to its being paid to the vendor is its return to the purchaser. But the decision in *Howe* v. *Smith* (1) negatives the purchaser's right to recover it when paid to the vendor in a case where the purchaser has repudiated the contract, and establishes the right of the vendor in such circumstances to retain it. From this it would seem to follow that in a case like the present, where the money is in the hands of a third party, the court ought to make such an order as will secure to the vendor payment of that which he would, on the authority of *Howe* v. *Smith* (1), be entitled to retain if it were already in his hands. It is true that in *Jackson* v. *De Kadich* (2), where the facts were very similar to those of the present case, Farwell, J., refused to make an order declaring the vendor entitled to the deposit in the hands of the auctioneers, and in so doing pointed out that the claim for rescission was inconsistent with the claim for damages for breach of the contract, and further made the observation that in *Howe* v. *Smith* (1) there was no rescission. But as is pointed out by Mr. Cyprian Williams in an instructive note (Williams on Vendors and Purchasers (2nd Edn.), vol. 2, p. 1055n) there had in fact been rescission in *Howe* v. *Smith* (1), for, as appears on page 90 of the report (27 Ch.D.) the vendor, before delivering his defence in the purchaser's action for specific performance, had resold the property, and in his defence he relied on the plaintiff's delay as justifying rescission of the contract, and in Fry's, L.J.'s, judgment it is made quite clear that the vendor had prior to such re-sale justifiably elected to treat the contract as rescinded, and had sold under his absolute title and not under a clause in the contract authorising him to re-sell on the purchaser's default. The case was therefore one in which the vendor was held entitled to rescind the contract and at the same time to retain the deposit.

It would appear from the report of *Jackson* v. *De Kadich* (2) ([1904] W.N. 168) that these matters were not fully brought to the attention of the learned judge, and it may be that these considerations have had something to do with the case never having been

reported except in the form of a weekly note, but, however this may be, I think I am justified in saying that *Howe* v. *Smith* (1) does amount to the authority for which the learned judge was asking in *Jackson* v. *De Kadich* (2) and am entitled to hold that it establishes that there is nothing inconsistent in a vendor being given relief by way of rescission, and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit. The judgment in *Jackson* v. *De Kadich* (2) did not in any way turn on the fact that the money there was in the hands of stakeholders, and as I have already stated that fact alone cannot, in my opinion, alter or affect the respective rights of the vendor and purchaser therein. I propose, therefore, to make the order as asked, and the purchaser, who has had due notice of this application and has not chosen to come here to show cause why the vendor should not get the whole relief for which he asked, must pay the costs.

Solicitors: *Hughes, Bartlett & Thornton.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re EARL DE LA WARR'S COODEN BEACH SETTLED ESTATE

[Court of Appeal (Cozens-Hardy, M.R., Farwell, and Hamilton, L.JJ.), October 29, 30, 1912]

[Reported [1913] 1 Ch. 142; 82 L.J.Ch. 174; 107 L.T. 671; 29 T.L.R. 30; 57 Sol. Jo. 42]

Settled Land—Improvements—Application of capital money—Compensation paid to outgoing tenant by custom and under Agricultural Holdings Acts—Fee to valuer to ascertain amount of valuation—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38), *s.* 21 (*x*). By s. 21 of the Settled Land Act, 1882 [now s. 73 of the Settled Land Act, 1925]:

"Capital money arising under this Act . . . shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others of the following modes, namely, . . . (x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act."

Neither the compensation paid to an outgoing tenant by custom or under the Agricultural Holdings Act, 1908 [see now Agricultural Holdings Act, 1948], nor the fee paid to a valuer to ascertain the amount of compensation, is payable out of capital money under s. 21(x).

Notes. The Settled Land Act, 1882, has been repealed and is replaced by the Settled Land Act, 1925. The Agricultural Holdings Act, 1908, has been repealed and is replaced by the Agricultural Holdings Act, 1948.

As to powers in respect of capital money in general, see 34 Halsbury's Laws (3rd. Edn.) 540 et seq.; and for cases, see 40 Digest (Repl.) 818 et seq. For the Settled Land Act, 1925, see 23 Halsbury's Statutes (2nd Edn.) 12.

Appeal from an order of Joyce, J., on an originating summons taken out by a tenant for life, Earl De la Warr of Beaulieu, against the remainderman and trustees of the settlement.

By a settlement dated Jan. 30, 1877, the Cooden Beach estate, in the County of Sussex, was held in trust for Earl De la Warr, who was beneficially entitled in possession as tenant for life, with remainder to his son as tenant in tail, with remainders over. In 1911 the tenant for life with the approval of the trustees determined to develop the estate as a building site. In order to do this, it was necessary to determine the tenancy of one J. W. Wintersgill who claimed compensation in respect of tenant right and

effects upon Cooden Farm and in respect of disturbance and unexhausted improvements in accordance with custom and the Agricultural Holdings Act, 1908. Valuers made an award of £363 15s. and the fee of the valuer who acted for the tenant for life was £24 2s.

The tenant for life contended that the sum paid as compensation and also the sum paid to the valuer were expenses of and incidental to the exercise of the powers conferred upon the tenant for life by the Settled Land Acts, 1882 to 1890, and could be properly discharged out of capital moneys arising under the Acts by virtue of the provisions of s. 21 (x), of the Act of 1882. There was in hand capital money available to pay the sums in question in the event of the court being of opinion that they were properly payable out of capital money. An originating summons was accordingly taken out by the tenant for life (to which the infant remainderman and the trustees of the settlement were made defendants) asking that it may be declared that the trustees were at liberty to apply capital money in their hands in discharge of (i) the sum of £363 15s., the amount payable to J. W. Wintersgill under the award of Dec. 11, 1911, for the tenant right and effects and for disturbance and unexhausted improvements upon the determination of a tenancy of agricultural land comprised in the settlement, the land comprised in such tenancy being required for development as building land; and (ii) the sum of £24 2s., the amount of fees payable to the valuer for making the award on behalf of the tenant for life.

Section 21 of the Settled Land Act, 1882, [s. 73 of the Settled Land Act ,1925,] provided:

> "Capital money arising under this Act . . . shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others of the following modes, namely, . . . (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act."

Section 25 [s. 83 of the Settled Land Act, 1925,] of the same Act provided as follows:

> "Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of the settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely . . . (xvii.) streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land."

Section 20 of the Agricultural Holdings Act, 1908 [now see s. 81 of the Agricultural Holdings Act, 1948], provides that capital money arising under the Settled Land Acts, 1882 to 1890, may be applied in payment (inter alia) of compensation for improvements comprised in part 1 or part 2 of the first schedule thereto, which include only improvements in respect of which either the consent of, or notice to, the landlord is required, and not acts of cultivation.

The summons was adjourned into court and came on to be heard before JOYCE, J., on June 20 and 25, 1912, when his Lordship decided that neither of the sums were payable out of capital. From that decision the plaintiff appealed.

Hughes, K.C., and *C. A. Bennett* for the tenant for life.

Austen-Cartmell for the infant remainderman.

H. Burrows for the trustees of the settlement.

COZENS-HARDY, M.R.—This case is important, because I am satisfied that it would lead to a long series of applications of this kind if we acceded to this one. A scheme for developing Earl De la Warr's estate, included, among other things, the formation of a golf course. I take it that that is an "improvement" within the meaning of the Settled Land Acts. Part of the land—I presume the land which was intended for a golf course—was held by an agricultural tenant as a yearly tenant. Lord De la Warr gave him notice to quit. Of course he would have to go at the end of the notice, and consequently

there was a right on the part of the tenant to obtain from Earl De la Warr compensation for various things which I need not attempt to describe—compensation for various things to which a tenant holding under a lease would be entitled. The scheme for improvements within the Settled Land Acts has been sanctioned in this instance by the trustees of the settlement. No question arises as to the cost of improvements in the ordinary sense under that scheme, but it is said that Lord De la Warr ought to have paid out of "capital money" the sum which, after he had got possession of the land from the agricultural tenant, he had to pay. Under what words could that possibly be done?

Our attention has been called by counsel for the tenant for life, to various sections of the Settled Land Acts, and I will just refer to them. The destination of "capital money" is to be found in s. 21 of the Act of 1882 [now s. 73 of the 1925 Act]. Sub-s. (iii) of that section empowers it to be applied in payment for any improvement authorised by the Act. Sub-s. (x.) empowers capital money to be applied in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of the Act. When one comes to s. 25 [now s. 83 of the 1925 Act] of the same Act one finds "improvements authorised by this Act" which for the present purpose I assume have been properly held to include a golf course. Then s. 26 [see now s. 84 of the 1925 Act] provides that a tenant for life who is desirous that capital money arising under the Act shall be applied in or towards payment for an improvement may submit for approval to the trustees of the settlement, or the court, "a scheme for the execution of the improvement, showing the proposed expenditure thereon." How can it in any fair sense of language be said that the compensation payable to the agricultural tenant holding from year to year or for the time being the holder of that tenancy was a proposed expenditure on the "execution of the improvement." It seems to me that it would be altogether contrary to the language and the scheme of the Act to hold that applications of this kind could be granted for the payment out of capital money of the compensation which is payable to the outgoing tenant. Counsel for the tenant for life did not shrink—and I think that he was right in not shrinking from the proposition I put to him—that if for the completion of the improvement it was desirable to buy out a tenant who might have a lease for seven years, fourteen years or even ninety-nine years, the purchase money of that lease could be paid out of capital money. To hold that in my opinion would be entirely inconsistent with the whole scheme and purpose of the Act. I agree with the judgment of JOYCE, J., and for the reason he assigned. I think, therefore, that this appeal fails and must be dismissed with costs.

FARWELL, L.J.—I agree. The Settled Land Act, 1882 [now repealed], has been in operation now for thirty years, and tenants for life have not been slow to avail themselves of it. But the present is admittedly a perfectly novel application. It is such as I have never, in my experience, heard of before, and it seems to me to be absolutely impossible. Authorised improvements are, by s. 25 of the Act of 1882 [now s. 83 of the 1925 Act], the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works or of any works for any of the following purposes, and any operation incident to, or necessary, or proper in the execution of any of those works. Those are the only works for which the trustees are authorised to expend capital money out of trust funds. It is said that because, before any scheme for the execution of those works can even be considered, you have to get possession of the land, the making or execution of works or operations incident thereto are payable out of capital money. In my opinion they are clearly not. I think that this appeal should be dismissed with costs and the judgment of JOYCE, J., affirmed.

HAMILTON, L.J.—I agree for the same reasons.

Appeal dismissed.

Solicitors: *Bennett & Ferris*; *Norton, Rose, Barrington & Co.*; *Cope & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re TEALE. Ex parte BLACKBURN

[KING'S BENCH DIVISION (Phillimore and Bray, JJ.), April 24, May 7, 1912]
[Reported [1912] 2 K.B. 367; 81 L.J.K.B. 1243; 106 L.T. 893; 28 T.L.R. 415; 56 Sol. Jo. 553; 19 Mans. 327]

Bankruptcy—Receiving order—Ante-dating of order—Effect on interests of innocent third parties accruing between date when order ought to have been made and when in fact made.

The ante-dating of a receiving order does not affect the interests of innocent third parties which have accrued between the date when the order ought to have been made and when it was in fact made.

Notes. Apart from provisions dealing with disqualifications of a bankrupt, the Bankruptcy Act, 1883, has been replaced by the Bankruptcy Act, 1914. Section 49 of the Act of 1883 is now s. 45 of the Act of 1914.

As to the form and date of the receiving order, see 2 HALSBURY'S LAWS (3rd Edn.) 319; and for cases see 4 DIGEST (Repl.) 178–179. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Cohen* v. *Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Mont. 207, C.A.; 5 Digest (Repl.) 787, *6675*.

(2) *Re Montague, Ex parte Ward* v. *London and South Western Bank* (1897), 76 L.T. 203; 45 W.R. 384; 41 Sol. Jo. 352; 4 Mans. 1; 5 Digest (Repl.) 1059, *8552*.

(3) *Re Raatz, Ex parte Carlhian* (1897), 76 L.T. 330; 45 W.R. 480; 41 Sol. Jo. 408; 4 Mans. 50, D.C.; 4 Digest (Repl.) 179, *1624*.

(4) *Re O'Shea* (1911), cited in [1912] 2 K.B. at p. 372, C.A.; 4 Digest (Repl.) 179, *1625*.

Also referred to in argument:

Vernon v. *Hankey* (1787), 2 Term. Rep. 113; Cooke's Bkpt. Laws, 7th Edn., pp. 111, 559; 100 E.R. 62; 5 Digest (Repl.) 974, *7852*.

Re Mason, Ex parte Sharp (1844), 3 Mont. D. & De G. 490; 8 Jur. 1012, Ct. of R.; 4 Digest (Repl.) 359, *3260*.

Re New Land Development Association and Gray, [1892] 2 Ch. 138; sub nom. *Re New Land Development Association, Ltd. and Fagence's Contract*, 61 L.J.Ch. 495; 66 L.T. 694; 40 W.R. 551; 36 Sol. Jo. 446, C.A.; 4 Digest (Repl.) 788, 6678.

Re Clark, Ex parte Beardmore, [1894] 2 Q.B. 393; 63 L.J.Q.B. 806; 70 L.T. 751; 10 T.L.R. 459, 38 Sol. Jo. 492; 1 Mans. 207; 9 R. 498, C.A.; 5 Digest (Repl.) 793, *6718*.

Official Receiver v. *Cooke*, [1906] 2 Ch. 661; sub nom. *Preston's Trustee* v. *Cooke*, 75 L.J.Ch. 757; 13 Mans. 337; 5 Digest (Repl.) 788, *6680*.

Ponsford, Baker & Co. v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444; 75 L.J.Ch. 724; 95 L.T. 333; 22 T.L.R. 812; 13 Mans. 321, C.A.; 5 Digest (Repl.) 690, *6059*.

Appeal from the dismissal of an application by His Honour JUDGE GRAHAM, K.C., by the trustee in bankruptcy of H. G. Teale, solicitor.

Mrs. Teale obtained judgment against her husband H. G. Teale on May 11, 1910, for £118 0s. 11d. H. G. Teale failed to comply with a bankruptcy notice served on him in respect of this judgment and on June 3, 1910, his wife presented a bankruptcy petition against him. At the hearing on July 22, 1910, the registrar dismissed the petition but on Oct. 24, 1910, the Divisional Court allowed an appeal and directed a receiving order to be made and dated back to July 22, 1910. On Dec. 10, 1910, H. G. Blackburn was appointed trustee.

Meanwhile between the date of the dismissal of the wife's petition and the making of the receiving order by the Divisional Court, H. G. Teale continued to practise and

maintained a banking account at the Union of London and Smith's Bank in Leeds; and between July 22 and Oct. 24 he made various payments into that account amounting to £210, and his cheques drawn on that account were honoured by the bank to the extent of £349. The bank had no notice of the commission of the act of bankruptcy nor of the making of the receiving order until after Nov. 25, 1910. On Mar. 25, 1912, the trustee applied to the Leeds County Court for an order declaring him entitled to recover from the Union of London and Smith's Bank the sum of £210 on the ground that the payments into his account by the bankrupt after the date of the receiving order were not protected transactions, and that the sum of £210 formed part of the bankrupt's estate, divisible among his creditors. The application was dismissed and the trustee thereupon appealed to the Divisional Court.

Hansell for the trustee.

Compston for the Union of London and Smiths Bank, Ltd.

Cur. adv. vult.

May 7, 1912. The judgment of the court was read by

PHILLIMORE, J.—If the date of the receiving order in this case is to be deemed for all purposes to be July 22, the payments into the bank by the bankrupt and the corresponding payments made by the bank upon the bankrupt's cheques are not protected by s. 49 [now s. 45, of the Bankruptcy Act, 1914, and which relates to the protection of bona fide transactions without notice], which only relates to transactions made before the date of the receiving order. Nor do they come under the class of dealings made with the bankrupt after adjudication, which may be protected by the doctrine of *Cohen* v. *Mitchell* (1). With regard to transactions taking place between the date of a receiving order and the date of adjudication, there is singularly little authority. We do not mean to decide whether there is any protection for such transactions, but we are inclined to think that there is no protection, although it may often happen that the interval of time between those dates is considerable. The case of *Re Montague* (2), where an application against a bank was refused, might, according to the reports, appear to be a decision that there was protection for dealings after the date of a receiving order. But, in fact, the payments attacked were all made on or after the date of adjudication. The receiving order in that case was made on Sept. 25 and adjudication took place on Oct. 9, and the three sums paid in were paid in on the following dates: £12 on Oct. 9, £200 on Oct. 12, and £4 on Dec. 4.

Putting this question aside, there are two points which have to be considered: (i), is the practice of dating back receiving orders a sound one; and, (ii), if so, what is the effect of it upon third parties? The practice, by which the Court of Appeal, when it makes a receiving order which the court of first instance has refused to make, dates back the order to the date when the court of first instance should have made it, is well established. The practice may have been inaugurated by VAUGHAN WILLIAMS and WRIGHT, JJ., in *Re Raatz* (3), and it has been followed generally ever since, always under the direction of the court. A comparatively recent occasion on which the Court of Appeal followed this practice was in the unreported case of *Re O'Shea* (4), where by an order made on July 14, 1911, a receiving order was made and dated back to June 15 on which date it ought to have been made. We are of opinion that the practice must be taken to be sound. If the debtor ought to have had a receiving order made against him by the court of first instance, any conduct of his, previous to the date of this order, would be punishable, or would be taken into account in considering his discharge, upon the principle that the terminus ad quem in the matter of date should be the date upon which he ought to have had the receiving order made against him. If cases occur where those who have previously dealt with the debtor may be affected by the ante-dating of the order, these cases may have to be considered. The present judgment does not affect to deal with them.

But it is quite another matter when we have to consider the interests of third parties which have accrued in an interval of time which ought never to have come into being—that is, between the date when the receiving order ought to have been made by the court of first instance and that when it actually was made by the Court of Appeal.

Here, the third parties have done nothing wrong; they have not procured this improper interval, and they have had no improper dealings. The man, with whom they have dealt, had not had a receiving order made against him at the date when they dealt with him, and the ex post facto determination that there should have been a receiving order was made in proceedings to which they were not parties, and cannot affect them. It cannot have been intended that these third parties should be affected by the ante-dating of this order, and the order cannot be read as affecting such parties. Therefore this appeal fails.

Appeal dismissed.

Solicitors: *Rossiter & Odell*, for *Postlethwaite & Rutherford*, Leeds; *Warren, Murton & Miller*, for *Dunning, Kay & Armstrong*, Leeds.

[*Reported by* DONALD W. CORRIE, ESQ., *Barrister-at-Law.*]

R. *v.* MARSHAM. Ex parte PETHICK LAWRENCE

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Pickford and Avory, JJ.), April 23, 1912]

[Reported [1912] 2 K.B. 362; 81 L.J.K.B. 957; 107 L.T. 89; 76 J.P. 284; 28 T.L.R. 391; 23 Cox. C.C. 77]

Magistrates—Jurisdiction—Evidence not given on oath—Charge later re-heard by magistrate—Evidence then on oath—Validity of conviction.

The applicant was charged in a magistrate's court with assaulting a police officer in the execution of his duty. Two police officers gave evidence for the prosecution and the applicant called no evidence. The magistrate convicted the applicant and sentenced her to one month's imprisonment. Later, on the same day, the magistrate's attention was called to the fact that one of the police officers had through inadvertence given evidence without being sworn. The magistrate thereupon re-heard the charge, the two police officers, duly sworn, gave evidence for the prosecution, and evidence was given by witnesses for the applicant. The magistrate convicted the applicant and passed the same sentence as before. The applicant contended (i) that the magistrate had no jurisdiction to re-hear the case and was functus officio after he had once convicted the applicant, and (ii), that the applicant had been in peril upon the first hearing and could not be put in peril twice on the same charge. The magistrate in an affidavit stated that he was not influenced by the first hearing in any way.

Held: the first proceeding was a mistrial, the applicant had not been in peril, and, therefore, on the second hearing the magistrate had jurisdiction to deal with the matter.

Notes. Distinguished: *Davis* v. *Morton*, ante p. 369. Applied: *Bannister* v. *Clarke*, [1920] 3 K.B. 598. Referred to: *R.* v. *Middlesex Justices, Ex parte D.P.P.*, [1952] 2 All E.R. 312.

As to procedure at the hearing in magistrates' courts in general, see 25 HALSBURY'S LAWS (3rd. Edn.) 205 et seq.; and for cases, see 33 DIGEST 333 et seq.

Case referred to:

(1) *R.* v. *Gibson* (1887), 18 Q.B.D. 537; 56 L.J.M.C. 49; 56 L.T. 367; 51 J.P. 742; 35 W.R. 411; 3 T.L.R. 442; 16 Cox, C.C. 181, C.C.R.; 14 Digest (Repl.) 636, *6141*.

Also referred to in argument:

St. Andrew's Holborn (*Inhabitants*) v. *St. Clement Danc's* (*Inhabitants*) (1704), 2 Salk. 606; Holt, K.B. 511; 91 E.R. 514; sub nom. *St. Clement's Parish* v. *St. Andrew's Holborn Parish*, 6 Mod. Rep. 287; 33 Digest 389, *1003*.

R. v. *Price* (1805), 6 East, 323; 2 Smith, K.B. 525; 102 E.R. 1310; 14 Digest (Repl.) 377, *3687*.

Jones v. *Williams* (1877), 46 L.J.M.C. 270; 36 L.T. 559; 41 J.P. 614; 33 Digest 357, *669*.

R. v. *James* (1852), 6 Cox, C.C. 5; 14 Digest (Repl.) 369, *3573*.

Rule Nisi calling upon a metropolitan magistrate to show cause why a writ of certiorari should not issue to remove into the High Court a record of conviction of the applicant, Emmeline Pethick Lawrence.

Bodkin for the magistrate.

Henlé for the applicant.

LORD ALVERSTONE, C.J.—In my opinion this rule should be discharged. I do not intend to say anything in my judgment with reference to the practice referred to by the magistrate of doing certain things during the same day. I base my reasons for discharging this rule upon the simple point that there was before the same magistrate upon the same day that which was a mistrial, and which would have compelled any court to quash the conviction on the grounds stated in *R.* v. *Gibson* (1). That being so, and there having been a mistrial, it cannot be said that the applicant was in peril so as to prevent further proceedings on the same day. I am not going to deal with the case where a person has been acquitted on the first hearing; there very different considerations arise. I am only dealing with this simple case. A magistrate who has made up his mind to convict finds out in the course of the same day that some of the evidence was not given upon oath. He does not say that that evidence was not material, but, on the other hand, says he acted on the evidence of the police-constable who was not sworn, and that his evidence ought to be considered. Accordingly the magistrate treats the previous hearing before him as a nullity because it proceeded upon evidence on which the conviction must have been quashed had the conviction been made. He then proceeds de novo and gives the present applicant the opportunity of giving evidence. The magistrate then convicts on proper evidence properly taken before him on the second hearing on the same day. It is now sought to set aside that conviction on a ground which is very difficult to follow. If you work it out logically, it is sought to set aside the first conviction because at one time counsel for the applicant indicated that it might be material. I think he had taken the true view in his rule—namely, that he has only sought to set aside the second conviction. In order to set aside the second conviction, heard upon proper evidence, he must show that the magistrate has done something in the previous hearing which either exhausted his jurisdiction to hear or which made it unjust that the appellant should be put validly on her trial in regard to the offence charged. In my judgment, the magistrate, finding out that, upon the hearing that was just concluded before him, he had had evidence before him that was not admissible, and had not heard and determined the case properly, was entitled in the exercise of his jurisdiction to have the case heard and tried before him upon proper evidence.

PICKFORD, J.—I agree.

AVORY, J.—I agree, and with my Lord I desire to guard myself from giving any decision upon the point which has been raised about the general jurisdiction of magistrates to re-hear a case during the same day. I base my judgment upon this principle only, that the substantial and real ground upon which we are asked to set aside the conviction is the second ground given in the rule—namely, that the conviction is bad in that the applicant at the time of her conviction had already been put in peril in respect of the same offence. That is only another way of saying that she was in a position before the magistrate to plead either res judicata or autrefois convict. It is clearly laid down that

in order to raise such a plea effectually, either a plea of autrefois acquit or autrefois convict, it must appear that the defendant to the proceedings has been legally convicted or legally acquitted. It is laid down in CHITTY'S CRIMINAL LAW (2nd Edn.), vol. 1, p. 453, that "the point in discussion always is whether in fact the defendant could have taken exception to the former indictment, for, if he could, no acquittal will avail him." It is again laid down in the same authority (ibid. at p. 459), and this appears to be directly in point in this case, that "if a judgment in favour of a prisoner be reversed, he may be arraigned and tried de novo." Now, it is admitted here that the first judgment, if in fact there ever was one, was a judgment that must have been reversed if proceedings had been taken for that purpose. I say, in the sense in which I am dealing here with indictments, in this case, it would have been quashed on certiorari as having been a judgment given on evidence which was not sworn, and therefore it was not open to the applicant here to have pleaded any such plea, because the principles applicable to the plea of autrefois convict are the same as those which I have already enunciated. It is laid down again in the same volume of CHITTY ON CRIMINAL LAW, at p. 463, that the plea of autrefois convict,

> "will be of no avail when the first indictment was invalid, and that on that account no judgment could have been given because the life of the defendant was never before in jeopardy."

On these grounds I think it is clear that the conviction earlier in the day, if there was one, must have been quashed, and consequently the applicant never was in peril and, therefore, was not in a position on the second hearing to take any exception to the jurisdiction of the magistrate.

Rule discharged.

Solicitors: *Wontner & Sons*; *Hatchett-Jones, Bisgood & Marshall.*

[*Reported by* G. H. HIGGINS, ESQ., *Barrister-at-Law.*]

Re DEVEREUX. TOOVEY *v.* PUBLIC TRUSTEE

[CHANCERY DIVISION (Eve, J.), July 24, 28, 1911]

[Reported [1911] 2 Ch. 545; 80 L.J.Ch. 705; 105 L.T. 407; 27 T.L.R. 574; 55 Sol. Jo. 715]

Public Trustee—Administration of small estate—Exclusion of execution of trusts—Time for ascertaining value—Gross value more than £1,000 *at time of death, less at time of application—Public Trustee Act,* 1906, (6 *Edw.* 7, *c.* 55), *s.* 3.

By s. 3 (1) of the Public Trustee Act, 1906: "Any person who in the opinion of the Public Trustee would be entitled to apply to the court for an order for the administration by the court of an estate, the gross capital value whereof is proved to the satisfaction of the Public Trustee to be less than £1,000, may apply to the Public Trustee to administer the estate, and, where any such application is made and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee shall administer the estate, unless he sees good reason for refusing to do so."

Held: (i) s. 3 applied throughout to the estates of deceased persons and had no application to trusts created by settlement which were dealt with in Part 3 of the Act; (ii) the date for ascertaining the gross value of a small estate was that of the application to the Public Trustee, not that of the death of the deceased.

Notes. As to the administration of small estates by the Public Trustee, see 33 HALSBURY'S LAWS (3rd Edn.) 339–340; and for cases, see 43 DIGEST 1035. For the Public Trustee Act, 1906, see 26 HALSBURY'S STATUTES (2nd Edn.) 28.

Case referred to in argument:

Re Twigg's Estate, Twigg v. *Black*, [1892] 1 Ch. 579; 61 L.J.Ch. 444; 66 L.T. 604; 40 W.R. 297; 36 Sol. Jo. 231; 24 Digest (Repl.) 941, *9524.*

Adjourned Summons by the administratrix of Caroline Eliza Devereux who died intestate on July 19, 1908, possessed of personal estate of the gross capital value of £1,200 and upwards. Letters of administration to her estate were granted on Oct. 13, 1908, to Arthur Toovey, who, having paid the funeral and testamentary expenses and debts of the intestate and distributed three-fifths of the net estate to such of the next of kin as were competent to give receipts for the same, stood possessed of the remaining two-fifths in trust for four infant beneficiaries. The two-fifths was represented by a sum of £571 11s. 10d. Consols standing in the joint names of the administrator and his bondsmen. In January, 1911, the mother of the infant beneficiaries, who were persons of small means, applied to the Public Trustee to undertake the administration of the estate under s. 3 of the Public Trustee Act, 1906, and on Mar. 6 the Public Trustee undertook by declaration in writing signed and sealed by him to administer the estate. The administratrix was quite willing to facilitate the transfer of the administration to the Public Trustee, but a doubt having been raised whether the case was one which fell within the section above mentioned, this summons was issued for the purpose of determining the question, whether the estate was an estate of which the Public Trustee had power to assume the administration under that section.

Lawrence, K.C., and *Roope Reeve* for the administratrix.

Tomlin for the Public Trustee.

Cur. adv. vult.

July 28, 1911. **EVE, J.,** stated the facts, and continued: Section 3, in my opinion, applies throughout to the estates of deceased persons, and has no application to trusts created by settlement which are dealt with in Part 3 of the Act, commencing with s. 5. The expressions in the section referring to the administration of an estate are used in their strict and proper sense, and the phrase "proceedings for the administration of an estate" in s. 3 (5) and "an order for the administration by the court of an estate" in s. 3 (1) mean proceedings and an order for administration, and not for execution of the trusts. This conclusion disposes of the suggestion somewhat hesitatingly put forward on behalf of the Public Trustee that the section authorises him to assume the administration of any trust where the trust premises are of less value than £1,000 and the beneficiaries are persons of small means.

But the question still remains: what estates fall within the section, and, in this particular case, within s. 3 (1) thereof. Under the combined effect of that sub-section and of s. 2 (4) by which he is prohibited from accepting the administration of any estate known or believed by him to be insolvent, the Public Trustee must be satisfied of three things before he undertakes to administer—(i) that the estate is solvent; (ii) that the gross capital value is less than £1,000, and (iii) that the persons beneficially entitled are persons of small means. No difficulty arises in respect of the first and third of these conditions, but the second raises the point whether in determining the gross capital value of the estate, regard is to be had to the value at the date of the death, or to the value at the date when application is made to the Public Trustee to assume the administration. In the present case the values at the different dates were over £1,200, and under £500 respectively, and the answer therefore to the question—which date determines the value for the purposes of the Act?—concludes the inquiry as to the power of the Public Trustee to assume this administration. On the one hand, it is urged, that what the section is intended to deal with is small estates, that is to say estates which have been throughout of a gross capital value of less than £1,000 and not the balance up to £999 19s. 11d. for the time being remaining undistributed amongst beneficiaries of small means of every estate, however large its original value, and that the proper time

for determining whether any particular estate is or is not a small estate within the section is the date at which the value has first to be ascertained and fixed—that is to say, at the death. On the other hand, reliance is placed, first, on the obvious intention of the legislature to provide by the Act for beneficiaries of small means an easy and inexpensive method of securing the due administration of funds in which they are interested; and, secondly, upon the wording itself of s. 3 (1) which, it is contended, points in terms to a valuation made at a date contemporaneous with the application and not at a date antecedent, and possibly long antecedent, thereto. As tending to support the view of those who would fix the date of death as the determining date, it may be said that the estate of which the gross capital value is to be less than £1,000 is the estate which the applicant could apply to the court to administer, and that this necessarily means the whole estate, and, further, that this construction is confirmed by s. 3 (5), where the words "small value of the estate" must obviously refer to the estate for the administration whereof proceedings have been instituted. Moreover, it is pointed out that in undertaking the administration of an estate already partially administered the duties of the public trustees are not necessarily limited to the administration of that part of the estate which remains to be administered. It may, and often must be, his duty to investigate, and possibly to take the accounts of those whom he supersedes in the administration (see as to this r. 16 of the Public Trustee Rules, 1907), and in such cases he may find himself more or less involved in the administration of an estate of a value out of all proportion to the value of that part of it which remained unadministered when application was made to him to assume the administration.

In such conditions, it is submitted, the administration ceases to be the administration of a small estate altogether. It is impossible not to appreciate the cogency of these agreements, but I think there are these provisions in the section which go to show that they ought not to prevail. First the concluding words of s. 3 (2) clearly contemplate the intervention of the Public Trustee at any stage of the administration, and after it has been proceeding, it may be, for a considerable time; secondly, in s. 3 (1) the expression is "the gross capital value whereof is proved to be," not "to have been"; and, thirdly, by the concluding words of the same sub-section the Public Trustee is authorised, if he sees good reason so to do, to refuse to administer in any particular case. I think the net result of these three provisions is to fix the date of the application as the date for ascertaining the value, and to leave it open to the Public Trustee to refuse to accede to the application in all cases where from the magnitude of the original estate, or from the complexity of the accounts, or from any other cause the administration he is asked to undertake cannot legitimately and fairly be described as the administration of a small estate.

Upon this construction of the section—which I am bound to say is not inaccurately referred to by a text-writer as one giving rise to questions of considerable perplexity—it is admitted no good reason exists why the administration should not be undertaken by the Public Trustee, and accordingly I answer the question raised by the summons by declaring that this estate is a small estate within the section.

Solicitors: *Moodie & Sons*; *L. J. Fulton.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

A

GILBEY *v.* COSSEY

[KING'S BENCH DIVISION (Darling and Bucknill, JJ.), February 20, 1912]
Reported 106 L.T. 607; 56 Sol. Jo. 363]

B

Landlord and Tenant—Rent—Claim for rent—Agreement to let for seven years—Assignment by tenant with consent of landlord—Action for rent commenced by landlord against tenant before end of term, but heard after that date.

The plaintiff agreed to let certain premises to the defendant for seven years, but no lease was granted. The defendant entered into possession, and subsequently, with the plaintiff's consent, assigned his interest in the agreement and premises. Before the expiration of the term the plaintiff commenced an action against the C defendant for rent, the action being heard after the expiration of the seven years provided for by the agreement.

Held: that as specific performance of the agreement could have been granted the action was maintainable.

Notes. As to the landlord's action for rent in general, see 23 HALSBURY'S LAWS D (3rd Edn.) 559–561, and for cases see 31 DIGEST (Repl.) 289–290.

Cases referred to:

(1) *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161; 98 E.R. 1021, Ex. Ch.; affirming sub nom. *Fabrigas* v. *Mostyn* (1773), 2 Wm. Bl. 929; 22 Digest (Repl.) 613, *7067*.

(2) *Walsh* v. *Lonsdale* (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 31 Digest (Repl.) 255, *3905*. E

(3) *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; 70 L.J.Ch. 814; 82 L.T. 347; 16 T.L.R. 299; 31 Digest (Repl.) 114, *2547*.

Also referred to in argument:

Turner v. *Chowes* (1869), 20 L.T. 214; 17 W.R. 274; 25 Digest 358, *89*.

Walters v. *Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629; 25 L.J.Ch. 633; 26 L.T.O.S. 167; 2 Jur.N.S. 1; 4 W.R. 140; 43 E.R. 1015, L.C.; 30 Digest (Repl.) F 433, *757*.

Lever v. *Koffler*, [1901] 1 Ch. 543; 70 L.J.Ch. 395; 84 L.T. 584; 49 W.R. 506; 45 Sol. Jo. 326; 30 Digest (Repl.) 421, *646*.

Appeal from the decision of His Honour JUDGE SCULLY, sitting at the Haywards Heath County Court in an action by the plaintiff against the defendant for arrears of G rent.

By an agreement in writing dated Jan. 20, 1905, the plaintiff agreed to let to the defendant a cottage and farm for a term of seven years from Sept. 29, 1904, at the yearly rent of £70 payable quarterly. The defendant agreed not to assign the lease or part thereof without the consent in writing of the plaintiff. It was also agreed that either party could put an end to the agreement by giving twelve calendar months' notice in H writing. The defendant entered into possession under the agreement. In 1907 he assigned all his interest in the premises with the consent of the plaintiff. In June, 1911, the defendant was in arrear with the rent and the plaintiff commenced an action to recover the amount due.

Atkin, K.C., and *Wardley* for the defendant.
Cababé for the plaintiff. I

DARLING, J.—This case is one of considerable difficulty, and I am not sure that in giving the judgment which we think ought to be given we are not somewhat extending the doctrine which has been expressly laid down. Two points arise for our decision. The first is, for how long was the term for which these premises were demised, and with regard to this counsel for the plaintiff contends that the term granted by the agreement of Jan. 20, 1905, was really a term for at least eight years seeing that no notice to put an end to the period for which the land demised was given. Counsel for the defendant,

on the other hand, contends that it was in the circumstances a term for seven years and no more, although it might possibly have run on. I think that this latter contention is right and that we must look at the reservation in the memorandum which says that the land is to be occupied for the term of seven years from Sept. 29, 1904. That being so, the term would come to an end on Sept. 29, 1911. This was, therefore, intended to be a demise for seven years, but it was not a good demise by reason of the fact that it was not under seal. It was simply an agreement under the hands of the parties, but it was capable of being turned into a good demise by reason of a doctrine of equity by which, it being in writing, but not under seal, a right would be founded upon it to get an order for the specific performance of the agreement—that is to say, that the parties should execute it and then it would be a good lease for seven years.

Before the end of the seven years over which the agreement was intended to extend the landlord, Mr. Gilbert, sued the defendant for rent, but he did not recover judgment until after Sept. 29, 1911. It is contended by counsel for the defendant that it is impossible that specific performance of this agreement could be ordered by the court after the expiration of the agreement itself. Such an order, he says, would be futile, and so it would if all that was wanted was an order of the court, such as an order of the Court of Chancery for the specific performance of an agreement which had expired, and there are cases which show that the Court of Chancery would not make such an order. In the present case it is said that the court ought to take such a course. Speaking frankly, I have no doubt that the Court of Chancery would not have granted specific performance in the present case, but I think that the basis upon which specific performance would be granted has been altered in later times. At one time it was said in the Courts of Chancery that there could not be a decree for the specific performance of an agreement from year to year, upon the ground that it was inconceivable that a case could be heard within a twelvemonth. That idea, however, has now been given up, and the court would make such an order before a tenancy of this kind would have expired. That does not conclude this case, because, in the present instance, by the time the order would have been made the term would have expired. I think the line to take now is this. Regard must be had to the time when the relief was asked for. If at that time an order for specific performance could have been made I think the court should not say: "We will not give this particular form of relief, because, by the time we make the order, the agreement cannot be performed." Speaking plainly, I think the whole of this doctrine of specific performance is nothing less nowadays than a legal fiction. It is exactly on a par, to my mind, with *Mostyn* v. *Fabrigas* (1) decided by LORD MANSFIELD, in which he held that the Island of Minorca might be taken to be in the ward of Chepe. There the court, in order to do justice, solemnly pretended to believe that the Island of Minorca was situated in a place where there was no water at all, and where, therefore, there could not be an island! We are not going to do anything so violent as that. The reason why I think this doctrine has become a fiction is this. It was recognised that justice really demanded that a person should be held to have an interest in land, although the document under which he claimed it had only a signature upon a piece of paper, which made it an agreement for a lease instead of a piece of wax on parchment which would have made it a lease. I should have said boldly: "this is a lease," but the court of equity said, "this is not a lease under seal, but it gives the right to have a lease under seal, and so we decree specific performance of it, and we look at it as if it had been given, and now you may maintain your action of law upon the agreement." The extension given to this doctrine in *Walsh* v. *Lonsdale* (2) is very considerable. Of course, it must be read in connection with what was said by FARWELL, J., in *Manchester Brewery Co.* v. *Coombs* (3), but I do not think he meant to cut down what was said in the earlier case. In *Walsh* v. *Lonsdale* (2) JESSEL, M.R., said (21 Ch.D. at p. 14):

> "There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted."

If the landlord is to be regarded here as if the lease had been granted it is perfectly plain that he must have the same rights as if it had been, and we must look at this case

as if a lease had been actually granted. If it was granted, at what date are we to put it? I think it must have been granted at the date of the agreement for the lease. If it is regarded in that way, then the landlord granted a lease on Jan. 20, 1905, and it would remain a lease until Sept. 29, 1911. Therefore when he came and asked the court in an action for rent for judgment that rent was due to him, he was a person who had granted, for he must be regarded as if he had granted seven years before, a lease, not an agreement for a lease but a lease. That being so, the objection fails that specific performance cannot be granted for an agreement for a lease if the term limited by the supposed lease has expired. Just to put the matter beyond dispute, my reading of *Walsh* v. *Lonsdale* (2) is that the ancient doctrine of specific performance has practically gone. I think that it was nothing but a fiction invented by the courts for the purpose of doing substantial justice. In the present case, therefore, we must regard this agreement as if it were a lease, and the consequences follow that at the time the action was brought in the county court, though not when judgment was given, there was a legal estate which entitled the landlord to sue for his rent. That being so the decision of the learned judge was right and this appeal must be dismissed.

BUCKNILL, J.—I agree. I think that in the present case our judgment will do substantial justice between the parties. There is no doubt that if this agreement had been a valid lease the defendant would have been liable to the plaintiff for the rent, and there would have been no answer to the action. The action was commenced before the expiration of the term contained in the memorandum of agreement, which was to expire in September, 1911. As to the first point, I am satisfied that upon the true construction of the agreement the term was to be for seven years certain. If one may speculate, the parties clearly expected that there might be a holding over by the tenant after the seven years, and so they said in the agreement:

> "Either party may put an end to this agreement by giving to the other of them, or if given by the said landlord by his leaving on the said premises twelve calendar months' notice in writing, such notice to expire on the 29th day of September, 1911, or on any subsequent Michaelmas day."

The justice of the case clearly demands that the defendant should be responsible under this agreement, and he would have been responsible if there had been a lease. In these circumstances the court of equity would have said that it was in its power to make good that which was imperfect under the agreement. Justice demanded that the defendant should be liable for the rent because the land had been occupied, and three quarters rent was due. By the time judgment was given in the case, the term specified in the agreement had ended, and it may well be that in many cases similar to the present the court of equity would have refused a decree for specific performance because no real good could be done thereby. In this case it is everything that specific performance could have been granted, because by its means the plaintiff would be entitled to get what he could not get without it, for if it were not granted the result would be that the land would be occupied by his tenant without the landlord being able to recover the rent. We can get over that difficulty by holding that specific performance could have been granted to the plaintiff so as to enable him to sue upon this agreement. The result is that the decision of the learned judge was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *E. Alston Head*, East Grinstead; *Marchant, Newington & Tipper.*

[*Reported by* Philip B. Durnford, Esq., *Barrister-at-Law.*]

CRUMPLIN *v.* LONDON JOINT STOCK BANK, LTD.

[KING'S BENCH DIVISION (Pickford, J.), November 17, 18, 1913]
[Reported 109 L.T. 856; 30 T.L.R. 99; 19 Com. Cas. 69]

Bank—Cheque—"Not negotiable"—Payment into customer's account—Customer not payee—Forged indorsement—Liability of bank—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 82.

A series of cheques crossed "not negotiable" and drawn in favour of a person other than the customer were paid by the customer into his banking account with the defendants, the indorsements being forged.

Held: the fact that the cheques were crossed "not negotiable" and drawn in favour of a person other than the customer did not impose an obligation on the defendants to make inquiry, and thus, by receiving the cheques and crediting their customer's account therewith, rendering them negligent.

Held also: some of the cheques being signed "per pro." the signature merely operated as a notice that the drawer of the cheques had a limited right to sign them.

Notes. The Bills of Exchange Act, 1882, s. 82, and the Bills of Exchange (Crossed Cheques) Act, 1906, s. 1, are repealed by the Cheques Act, 1957, and replaced by ibid., s. 4, 37 HALSBURY'S STATUTES (2nd Edn.) 54.

Referred to: *Savory & Co.* v. *Lloyds Bank, Ltd.* (1932), 146 L.T. 530.

As to collection of crossed cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 179 et seq., and for cases see 3 DIGEST (Repl.) 266 et seq.

Cases referred to:

(1) *Morison* v. *London County and Westminster Bank, Ltd.*, [1913] W.N. 84; 108 L.T. 379; 29 T.L.R. 342; 57 Sol. Jo. 427; 18 Com. Cas. 137; reversed [1914–15] All E.R.Rep. 853; [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 3 Digest (Repl.) 268, *773*.

(2) *North and South Wales Bank, Ltd.* v. *Macbeth, North and South Wales Bank, Ltd.* v. *Irvine*, [1908] A.C. 137; 77 L.J.K.B. 464; 98 L.T. 470; 24 T.L.R. 397; 52 Sol. Jo. 353; 13 Com. Cas. 219, H.L.; 3 Digest (Repl.) 262, *744*.

(3) *Great Western Rail. Co.* v. *London and County Banking Co., Ltd.*, [1901] A.C. 414; 70 L.J.K.B. 915; 85 L.T. 152; 50 W.R. 50; 17 T.L.R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275, H.L.; 3 Digest (Repl.) 263, *751*.

(4) *Gordon* v. *London, City and Midland Bank, Gordon* v. *Capital and Counties Bank*, [1902] 1 K.B. 242; 71 L.J.K.B. 215; 86 L.T. 98; 50 W.R. 276; 18 T.L.R. 157; 7 Com. Cas. 37, C.A.; on appeal sub nom. *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank, Ltd.* v. *Gordon*, [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; 8 Com. Cas. 221, H.L.; 3 Digest (Repl.) 263, *747*.

Also referred to in argument:

Bevan v. *National Bank Ltd.*, *Bevan* v. *Capital and Counties Bank, Ltd.* (1906), 23 T.L.R. 65; 3 Digest (Repl.) 264, *756*.

Action tried by PICKFORD, J., in the Commercial List.

The plaintiff claimed damages for the wrongful conversion by the defendants of certain cheques belonging to the plaintiff, or, alternatively, the amount of the cheques as money received by the defendants to the use of the plaintiff. The plaintiff was a stockbroker, and employed as his manager one Rands, in whom he had great confidence. The latter introduced to the plaintiff one Davies as a person who desired to sell some shares, and a small transaction was carried through which resulted in a cheque for £3 10s. being drawn in favour of Davies, which was duly paid to him. Rands then proceeded to carry out a number of speculations on his own account, but in the name of Davies, knowing that the plaintiff would not allow him to speculate. From time to time when there were losses on an account, Rands paid such losses sometimes in cash

and sometimes by his own cheque, in order to conceal his operations from the plaintiff, who, in fact, never knew of them. When the account was in credit, Rands placed cheques before the plaintiff drawn in favour of Davies, and such cheques were signed by the plaintiff. Rands forged the indorsement, and paid the cheques into his own account with the defendants at their Fenchurch-street branch. The whole of the cheques were substantially in the same form except two, which were drawn by one Spencer "per pro.," he having authority to draw cheques for the plaintiff. The cheques were crossed "& Co., not negotiable." Rands opened his account on April 19, 1910, with the sum of £406, which represented a legacy received by him. The account remained open until the end of 1912, when the discovery of Rands' fraud was made. During 1910 there were thirteen payments in, three of which represented the cheques in question, and being considerably greater in amount than the other cheques. In 1911, out of eight payments in, there were two cheques in question. In 1912 there were four payments in to the end of June, and five afterwards, and of these there were four of the cheques in question.

The plaintiff by his points of claim pleaded that the defendants had been guilty of negligence in receiving the cheques and crediting Rands' account with the amounts thereof without making any inquiry, although they were put upon inquiry by the fact that the cheques were made payable to a person other than Rands, and were crossed "not negotiable." Alternatively, it was pleaded that the cheques were the plaintiff's property, and that the defendants had wrongfully converted them and the proceeds thereof to their own use. In the further alternative, it was pleaded that the defendants received the proceeds of the cheques to the use of the plaintiff.

By their defence the defendants denied that they had been guilty of negligence, and said they received payment of the cheques from Rands in good faith, and they relied upon the Bills of Exchange Act, 1882, s. 82 (1) and the Bills of Exchange (Crossed Cheques) Act, 1906, s. 1, which provide as follows:

Bills of Exchange Act, 1882, s. 82 (1):

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Bills of Exchange (Crossed Cheques) Act, 1906, s. 1:

> "A banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

Roche, K.C., and *A. Neilson* for the plaintiff.

Schiller, K.C., and *Hogg* for the defendants.

PICKFORD, J.—This action is brought by the plaintiff, who is a stockbroker, against the defendants, who are bankers, to recover certain cheques which are said to have been converted by the defendants, or, in the alternative, the amount of the cheques as money received to the use of the plaintiff. The plaintiff claims the proceeds of these cheques or the cheques back from the defendants. He says that they had no right to take these cheques and collect them and pay the proceeds into Rands' private account without making some inquiries, and that primâ facie they converted the cheques. The defendants, in order to escape from that liability, seek to bring themselves within the provisions of s. 82 of the Bills of Exchange Act, 1882, and they say they collected these cheques for their customer Rands bonâ fide and without negligence. It is admitted that they collected them for their customer, and it is also admitted that they did so bonâ fide, but the question is whether they did so without negligence.

One or two defences have been suggested on behalf of the defendants which I cannot accept. It was suggested that the plaintiff cannot recover the amount of these cheques because he drew them for the purpose of being paid to the person who was operating the account in the name of Davies, whoever that person might be, and therefore, as that

A person turned out to be Rands, it was quite right that Rands should write Davies' name upon the back of the cheques and pay them into his account. The difficulty in the way of that suggestion seems to me to be that it is totally contrary to all the facts of the case. It is true that the plaintiff under the counsel for the defendants' cross-examination did say that he drew the cheques for the purpose of being paid to the person who was operating that account, but he did that because he believed that the person who was B operating the account was Davies, and that the cheques were not drawn in favour of anybody else who might be operating that account. In some ways the case is very like *North and South Wales Bank, Ltd.* v. *Macbeth* (2). What really took place was this. Rands put these cheques before the plaintiff to sign, and in doing so, he made the false pretence that this account was Davies' account, and that that was money due to Davies, and being deceived by that false pretence and acting upon it, the plaintiff signed the C cheques. It seems to be totally contrary to the facts as we know them, whatever phraseology the plaintiff may have used under cross-examination, to say that he intended those cheques to be paid to anybody who might be operating the account of Davies, even though it might be his own manager who was behaving fraudulently towards him. Thereupon I cannot think there is anything in that point. Again, it was at one time suggested that the bankers could not be said to be negligent because these cheques did D not come under the notice of the manager, as owing to the press of business they only came under the notice of clerks who could not be expected to know all about the Bills of Exchange Act and what circumstances ought to put a bank upon inquiry. I cannot accept that contention. Bankers are under certain obligations to take care in their business, and, it is no answer for them to say they have so much to do that they cannot attend to their business, or that they keep such a staff that the persons before whom E these cheques come in the ordinary course of business do not know their business, and therefore do not know whether they are put on inquiry or not. The short answer to that contention is that if bankers have not got the proper staff to handle the cheques and look after them they must get them. I cannot, therefore, accept that suggested defence either.

The question, therefore, comes to this, whether the defendants in this case were F negligent in not having made some inquiries before they received the cheques on behalf of their customer. If they had made inquiries of Rands as to why these cheques were being paid into his account, they might or might not have been satisfied with his explanation; I should think they probably would not have been satisfied, but if they had made inquiries of the plaintiff there is very little doubt that the whole matter would have come out, and an end would have been put to it, but the question is whether the G defendants were negligent in not doing that. It is said the mere fact of the cheque being crossed "not negotiable" made the defendants guilty of negligence in taking these cheques without making inquiries, and a dictum of LORD BRAMPTON in *Great Western Rail.* v. *London and County Banking Co.* (3) in the House of Lords was cited in support of that contention. It clearly is not conclusive evidence of negligence. It was argued in *Gordon* v. *Capital and Counties Bank* (4) in the Court of Appeal that the taking by a H bank of cheques crossed "not negotiable" was conclusive evidence of negligence, but, as the jury in that case had found there was no negligence on the part of the bank in taking the cheque, and the verdict was supported, it is clear the court did not think it was conclusive evidence of negligence. Counsel for the plaintiff did not say that it was conclusive evidence of negligence, but he said it was of itself evidence of negligence—that is to say, that primâ facie it is negligence on the part of a banker to take a cheque I crossed "not negotiable" and collect it for a customer who is not the payee of the cheque. That dictum of LORD BRAMPTON has been commented upon by various text-book writers. I have not seen SIR JOHN PAGET'S book on the LAW OF BANKING which was mentioned to me. Counsel for the plaintiff says that the comment in that book was made in consequence of a misunderstanding by the author as to the effect of the dictum. That may be so, but I do not think the learned author is likely to have misunderstood a dictum of that kind, but as I have not seen the passage I will not pay any attention to it. There is, however, considerable force in the observation to be found in GRANT ON BANKING (6th Edn.) to the effect that as s. 82 applies to "not negotiable" cheques it

is not likely that the mere taking of a "not negotiable" cheque would be held to be evidence of negligence on the part of the bankers. The section applies to cheques crossed "not negotiable" as well as to crossed cheques which are not marked "not negotiable"—that was decided long ago. It would be a remarkable state of things if after the section has provided that a banker is protected if he takes a cheque crossed "not negotiable" in good faith and without negligence, that the law should say if he does so it is negligence on his part unless there is something to rebut that presumption; that is to say, that the mere taking of the cheque is of itself primâ facie evidence of negligence. The dictum of LORD BRAMPTON cannot be supported to that extent. The effect of that dictum is that the taking of a cheque crossed "not negotiable" is one matter which must be taken into consideration along with all the other matters surrounding the transaction, and it does not go higher than that.

The real question is whether under all these circumstances the plaintiff has proved negligence on the part of the defendants, or whether the defendants have been able to prove that they were not negligent with regard to this matter. I have had a good deal of evidence of gentlemen of great experience in the banking world and while it is very natural and quite proper that those gentlemen should hold the opinion they have expressed I do not think I can pay any attention to it; but I attach considerable importance to the facts to which they deposed. All of the witnesses said that transactions of this kind are not at all uncommon. One witness said that as many as twenty to twenty-five per cent. of the cheques that were paid into his bank were cheques of this description —that is to say, "not negotiable" cheques paid into the account of somebody other than the payee, but there were reasons why there should be so large a proportion of this class of cheques at that bank, and I do not suppose that the proportion would apply to banks generally. It is quite clear upon their evidence that the practice is common enough to enable bankers fairly to say that a transaction of that description would not necessarily arouse any suspicion as to the transaction not being an honest one.

The question in this case is whether, having regard to the nature and number of the cheques of this description that were paid into Rands' account, and to the large proportion which the amount of these cheques bore to the amount of other cheques that were paid into the credit of the account, these circumstances were such as ought to have put the bank upon inquiry. This case is very near the line. There are, however, one or two matters which ought to be taken into consideration—namely, that this account extended over a period of nearly three years, and that during that time there were only nine cheques paid in in this way, and those cheques at very considerable intervals. There was an interval of three months between the first and second payments in of these cheques; an interval of a month between the second and third; an interval of between four and five months between the third and fourth; an interval from March to December before the fifth payment in; an interval of two months between the fifth and sixth. Then came the shortest interval, from the end of February to Mar. 14 between the sixth and seventh transaction; there was an interval of about six weeks before the next payment in; and then there was a long interval from April to Aug., 1912, before the last of these cheques was paid in. With the exception of two cheques—namely, of £137 and the last one of £84—all the cheques were for sums under £50, all but one for sums under £30, and all but two for sums under £25. I think that is a matter to be taken into consideration, because if the account had been opened with a very small sum to credit, or with a sum that was very soon drawn down to practically nothing, and then large sums were paid in by cheques of this description in quick succession, I should have no hesitation in coming to the conclusion that that fact ought to have put the banker upon inquiry, and that he ought to have seen that the matter was right. But, having regard to the fact that the cheques were for comparatively small amounts, and that the bankers at one time held some shares belonging to Rands that were worth a fairly substantial sum, and that these cheques were paid into the bank at such long intervals as these, I think it was not negligence for the bankers not to make inquiry. I do not wish by my judgment to diminish in any way the precautions that bankers ought to take, but at the same time they must be judged by the standards of business men, and, looking at the circumstances I have mentioned, the fact of the cheques as a rule being

for small sums, the fact that such transactions are not uncommon in banking, and the fact that the cheques were paid in at considerable intervals, I think that there was no negligence on the part of the bankers in not making inquiries with regard to these cheques. Therefore, except as regards the cheques which were signed "per pro.," as to which, perhaps, somewhat different considerations apply, I think the defendants are entitled to judgment.

LORD COLERIDGE, J., in *Morison* v. *London County and Westminster Bank, Ltd.* (1), has held that the fact that cheques are signed "per pro." should put the banker upon inquiry. The learned judge could not have meant to lay down as a general principle that wherever there is a "per pro." signature the banker is put upon inquiry to see that the transaction is all right. He was only referring to the circumstances of the particular case before him. In that case the person who was signing the cheques "per pro." his principal was paying the cheques with his own account, the business account of his principal being kept at the same bank, and LORD COLERIDGE, J., held rightly that the bankers were by that fact put upon inquiry as to whether he had a right to pay those cheques with his own private account. Section 25 of the Bills of Exchange Act, 1882, provides as follows:

> "A signature by procuration operates as notice that the agent has put a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limit of his authority."

In this case, however, I do not think the fact that two cheques were signed "per pro." was an intimation that there was anything dishonest in the cheques being paid into Rands' account; but it was an intimation to the bank that Mr. Spencer who signed the cheques "per pro." had only a limited authority to sign them, and the bank took their chance as to whether or not the cheques were drawn in accordance with that authority; and although in *Morison* v. *London County and Westminster Bank. Ltd.* (1) LORD COLERIDGE, J., held that that fact ought to have put the banker upon inquiry as to whether the man who signed the cheques "per pro." was entitled to pay the cheques into his own account, in this case, where the cheques were not paid into the account of the person signing the cheques "per pro." but into somebody else's account altogether, the defendants were not put upon inquiry of the fact of the cheques being signed "per pro." Therefore, as regards those cheques also, there was no negligence in what the bank did, and the defendants are, therefore, entitled to judgment.

Solicitors: *Hyman, Isaacs & Lewis*; *Drake, Son & Parton.*

[*Reported by* L. C. THOMAS, ESQ., *Barrister-at-Law.*]

A

GOLDFOOT *v.* WELCH

[CHANCERY DIVISION (Eve, J.), December 1, 1913]

[Reported [1914] 1 Ch. 213; 83 L.J.Ch. 360; 109 L.T. 820]

B

Landlord and Tenant—Demise of "rooms"—Rooms on first and second floors of business premises—Right of landlord to put advertisements on outside walls—Establishment of exception—Admissibility of parol evidence.

By an agreement in writing the defendant demised to the plaintiff "all those rooms situate on the first and second floors of the business premises," No. 41, H. Street, with the exclusive use of the side entrance door, for a year, the plaintiff agreeing to use the premises for the profession of a dental surgeon, to repair the C interior of the demised premises, to permit the landlord to inspect their state of repair, and not to exhibit upon the premises any advertisements other than dental advertisements. After the plaintiff entered under the agreement the defendant let the outside walls for advertisements which covered the external wall of the premises on the second floor. The plaintiff claimed a mandatory injunction.

D

Held: apart from anything in the agreement itself to control the construction which it properly bore, the demise of the rooms included the external walls of the first and second floors; there was nothing in the agreement which limited the effect of the demise; and, therefore, the plaintiff was entitled to the injunction he sought.

Held, further: parol evidence to establish an antecedent reservation or exception giving the defendant the right to use the external walls was not admissible. E

Notes. Referred to: *Phelps* v. *London Corpn.*, [1916] 2 Ch. 255.

As to parcels in a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 482–486 and as to alterations and improvements of leased premises, see ibid, 595–598. For cases concerning premises included in the demise, see 31 DIGEST (Repl.) 25 et seq.

F

Cases referred to:

(1) *Carlisle Café Co.* v. *Muse Bros. & Co.* (1897), 67 L.J.Ch. 53; 77 L.T. 515; 46 W.R. 107; 42 Sol. Jo. 67; 31 Digest (Repl.) 26, *1844.*

(2) *Hope Bros., Ltd.* v. *Cowan*, [1913] 2 Ch. 312; 82 L.J.Ch. 439; 108 L.T. 945; 29 T.L.R. 520; 57 Sol. Jo. 559; 31 Digest (Repl.) 26, *1845.*

Also referred to in argument:

G

Press v. *Parker* (1825), 2 Bing. 456; 10 Moore, C.P. 158; 3 L.J.O.S.C.P. 96; 130 E.R. 382; 44 Digest 607, *4347.*

Doe d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701; 99 E.R. 1330; 17 Digest (Repl.) 281, *887.*

Meres v. *Ansell* (1771), 3 Wils. 275; 95 E.R. 1053; 17 Digest (Repl.) 312, *1192.*

Barton v. *Dawes* (1850), 10 C.B. 261; 19 L.J.C.P. 302; 138 E.R. 106; 17 Digest (Repl.) 292, *978.* H

Henderson v. *Arthur*, [1907] 1 K.B. 10; 76 L.J.K.B. 22; 95 L.T. 772; 23 T.L.R. 60; 51 Sol. Jo. 65, C.A.; 17 Digest (Repl.) 352, *1585.*

Action for an injunction restraining the defendant from interfering with the plaintiff's possession of external walls except for maintenance and repairs, and from advertising on such external walls and for a mandatory injunction for the removal of advertisements I and signs.

By an agreement of Feb 10, 1913, the defendant agreed to let to the plaintiff "all those rooms situate on the first and second floors of the business premises known as No. 41, High Street, Notting Hill Gate," together with the exclusive use of the side entrance door and staircase leading to the demised premises, for one year certain from Mar. 1, 1913, with an option of renewal, at an annual rent. The tenant agreed to repair the interior of the demised premises, to use the premises only for the profession of a dental surgeon, to permit the landlord at reasonable times to inspect the state of repair

of the premises, and, "not to exhibit upon the premises any form of advertisement other than those relative to the profession of a dental surgeon." The defendant alleged that on Feb. 4, 1913, it was verbally agreed between the plaintiff and defendant that the defendant should have the right to let the outside walls of the premises the subject of the agreement of Feb. 10, 1913, for advertising purposes, or, alternatively, the defendant then expressly reserved from the intended demise such advertising rights over the outside walls, but the plaintiff was to have the right to exhibit a dental show case.

The plaintiff, who was in possession under the agreement of tenancy, had affixed adhesive white letters and figures to the windows of the rooms facing High Street, Notting Hill Gate, advertising his practice. In April the defendant let the outside walls to a bill-posting company, who affixed to the outside walls advertisement boards with advertisements covering, with the exception of the windows, the entire external wall of the premises on the second floor.

W. H. Cozens-Hardy, K.C., and *W. F. Swords* for the tenant, the plaintiff in the action.

Edward Clayton, K.C., and *Owen Thompson* for the defendant landlord.

EVE, J.—By an agreement in writing dated Feb. 10, 1913, the defendant demised to the plaintiff "all those rooms situate on the first and second floors of the business premises known as No. 41, High Street, Notting Hill Gate, in the Royal Borough of Kensington, in the county of London, together with the exclusive use of the side entrance door," and so on; I need not read further.

On the authorities, apart from anything in the document itself to limit or control the demise, it includes the external walls of the first and second floors. I say that, because, although in *Hope Bros., Ltd.* v. *Cowan* (2) JOYCE, J., was dealing with an office and not with a "room" so described, in *Carlisle Café Co.* v. *Muse Bros. & Co.* (1) BYRNE, J., had to construe a demise of a studio and a reception room. It is true that in the latter case there were circumstances outside the question of construction which led BYRNE, J., to the decision at which he arrived, but it is clear from the arguments as reported that the point was raised whether the demise of the room included only so much cubic space as the walls inclosed or whether it included also the external walls, and I read the judgment of BYRNE, J., as determining that, in the absence of any contract to the contrary, the demise of a room includes the external walls inclosing the room.

Before considering how far anything outside the agreement itself can be looked at to control the effect of the demise, it must first be ascertained whether there is anything in the agreement itself to limit—I will not say its primâ facie construction—but the construction which it properly bears in the absence of a contrary intention to be gathered from the context. Counsel for the defendant has laid hold of every conceivable point to support his argument that the external walls are not here included—among other observations he says that one cannot conceive the landlord entering upon the external walls to view their condition, or the plaintiff exercising his profession of a dentist upon the external walls. But in my opinion all those arguments are more than counterbalanced by the sixth clause of the agreement, by which the tenant agrees "not to exhibit upon the premises any form of advertisement other than those relative to the profession of a dental surgeon." So far from there being anything in the context to limit or control the demise, it seems to go a long way in support of the contention that the parties throughout intended and contemplated that the external walls would be included.

Two defences are raised on the pleadings: the one that there was an agreement antecedent to or contemporaneous with the demise to the effect that the defendant should have the right to use the external walls and that the tenant should not have the right to use them; the other that there was an express reservation from the demise of the external walls. The evidence, which I thought it better to hear though it was objected to, falls short of establishing either of those two defences. All it amounts to is this—that the defendant some days before the agreement was entered into told the plaintiff that it was then out of his power to let him the front wall, but, seeing that he subsequently

executed a document which includes the wall, this comes to nothing. But had the evidence gone to establish that the walls were reserved out of the demise by parol, could I have properly admitted it? I do not think I could. Having arrived at what I think to be the true construction of the agreement, I am of opinion that no evidence to contradict it was admissible. I, therefore, hold that the plaintiff is entitled to the mandatory injunction which he claims and to the costs of the action.

Solicitors: *Howard & Shelton*; *Harford & Harford.*

[*Reprinted by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LTD.

[Chancery Division (Astbury, J.), November 12, 1913]

[Reported [1914] 1 Ch. 139; 83 L.J.Ch. 226; 109 L.T. 741; 30 T.L.R. 78; 58 Sol. Jo. 173]

Constitutional Law—Diplomatic privilege—Waiver—Entering of unconditional appearance to action—Application for extension of time.

A foreign subject not subject to the jurisdiction cannot be presumed to have knowledge of English law. The entering of an unconditional appearance and asking for an extension of time are not evidence of knowledge of or desire for waiver of diplomatic privilege nor that a foreign government had given its sanction thereto. Such waiver must be strictly proved.

Notes. Followed: *Re Suarez, Suarez* v. *Suarez*, [1916–17] All E.R.Rep. 641. Referred to: *R.* v. *A.B.*, [1941] 1 K.B. 455; *Baccus S.R.L.* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 715.

As to diplomatic privileges of public ministers and their entourage, see 7 Halsbury's Laws (3rd Edn.) 267–274, and for cases see 11 Digest (Repl.) 628–635. For the Diplomatic Privileges Act, 1708, s. 3, see 4 Halsbury's Statutes (2nd Edn.) 591.

Case referred to:

(1) *Taylor* v. *Best* (1854), 14 C.B. 487; 8 State Tr. N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, *517*.

Also referred to in argument:

Magdalena Steam Navigation Co. v. *Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur.N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, *513*.

Musurus Bey v. *Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 42 W.R. 545; 10 T.L.R. 493; 38 Sol. Jo. 511; 9 R. 519, C.A.; 11 Digest (Repl.) 629, *523*.

Fisher v. *Begrez* (1833), 2 Cr. & M. 240; 2 Dowl. 279; 4 Tyr. 35; 149 E.R. 750; 11 Digest (Repl.) 631, *537*.

Mighell v. *Sultan of Jahore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, *435*.

Adjourned Summons. The liquidator of the Republic of Bolivia Exploration Syndicate, Ltd. took out a summons on May 7, 1912, against the directors and auditors charging them with various acts of misfeasance. R. E. Lembeke, one of the directors, was second secretary of the Peruvian Legation. He entered an unconditional appearance on May 15, 1912, and issued a summons for further time to file evidence on Oct. 14, 1912, and

swore an affidavit on Oct 31, 1912, referring to his official position, but raising no objection to the jurisdiction. On June 10, 1913, on an application to fix a time for hearing, R. E. Lembeke first objected to the jurisdiction. A preliminary objection to the summons was taken:

By the Diplomatic Privileges Act, 1708, it is provided:

"Sect. 3. And to prevent the like insolences for the future, be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign prince or State authorised and received as such by Her Majesty, her heirs or successors, or the domestick or domestick servant of any such ambassador or other public minister, may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever."

Cassel, K.C., and *Owen Thompson* for R. E. Lembeke.
Clauson, K.C., and *Mulligan* for the liquidator.
Rankin and *Dodd* for other defendants.

ASTBURY, J.—Undoubtedly both by common law and by statute all proceedings against foreign diplomatic persons are null and void. There may, as decided and to the extent of the decision in *Taylor* v. *Best* (1), be a waiver of that immunity in certain cases and within limited circumstances, particularly where other persons have incurred expenses through the failure to claim the immunity. The question is, however, whether Mr. Lembeke's conduct brings him within the decision in *Taylor* v. *Best* (1). Having regard to the earlier decisions, I think that the waiver must be strictly proved. Mr. Lembeke entered an unconditional appearance, and has invoked the assistance of the court by asking for an extension of time, but there is no evidence that he then knew of and wished to waive his privileged position, and being a foreign subject, not subject to our jurisdiction, it cannot be said that he must be deemed to have knowledge of our law. I have difficulty in believing that a subordinate secretary can waive the privilege, which is the privilege of his Government, without their sanction, and of such sanction there is no evidence. Any judgment against Mr. Lembeke would be abortive and impossible to execute, and for these reasons the plea of privilege must be allowed.

Solicitors: *Castle & Co.*; *Lewis & Lewis*; *Maffey & Brentnall*; *F. L. Vanderpump.*

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

A

ATKINS *v.* AGAR

[KING'S BENCH DIVISION (Ridley, Scrutton and Bailhache, JJ.), October 22, 1913]
[Reported [1914] 1 K.B. 26; 83 L.J.K.B. 265; 109 L.T. 891;
78 J.P. 7; 30 T.L.R. 27; 23 Cox, C.C. 677]

B

Licensing—Offence—Presence on licensed premises during prohibited hours—Guest of bonâ-fide resident—Burden of proof—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 62 (1).

A person staying at a hotel accompanied a party of friends for a motor ride, and, returning to the hotel after closing hours, invited them in and paid for liquor consumed by them. Among the party was the appellant, who was subsequently convicted before the justices for being on licensed premises during prohibited hours.

C

Held: although it was no offence if the person proceeded against was in fact a guest of a resident in the hotel, yet the burden of proof was upon him to prove that fact; and as in the present case the justices had found on the evidence that this was not so their decision must be upheld, and the appeal dismissed.

D

Notes. The Licensing (Consolidation) Act, 1910, s. 62 (1), was repealed by the Licensing Act, 1921. See now the Licensing Act, 1953, s. 2(a), (3), 33 HALSBURY'S STATUTES (2nd Edn.) 232.

For exemptions from the permitted hours for the sale of intoxicating liquor, see 22 HALSBURY'S LAWS (3rd Edn.) 661–663, and for cases see 30 DIGEST (Repl.) 110.

E

Cases referred to:

(1) *Pine* v. *Barnes* (1887), 20 Q.B.D. 221; 57 L.J.M.C. 28; 58 L.T. 520; 52 J.P. 199; 36 W.R. 473, D.C.; 30 Digest (Repl.) 106, *783.*

(2) *Jones* v. *Jones*, [1910] 2 K.B. 262; 79 L.J.K.B. 762; 103 L.T. 41; 74 J.P. 317; 26 T.L.R. 497, D.C.; 30 Digest (Repl.) 110, *801.*

(3) *Cope* v. *Landles* (1896), 13 T.L.R. 18, D.C.; 30 Digest (Repl.) 107, *784.*

F

Case Stated by justices for the county of Leicester, sitting at Loughborough.

An information was preferred by the respondent, Frederick Agar, a superintendent of police, against the appellant, Frank Robert Louth Atkins, for that he, the appellant, on Feb. 16, 1913, at Loughborough, was found unlawfully upon the licensed premises of one John Henry Taylor during a part of the period when the licensed premises were required to be closed—namely, at 11.30 p.m.—under the provisions of the Licensing (Consolidation) Act, 1910.

G

At about 10.40 p.m. on Sunday, Feb. 16, 1913, a party in a motor car, including the appellant and his cousin, Frank Atkins, after a drive, arrived at the King's Head Hotel, Loughborough, where Frank Atkins was a lodger. On arriving and before entering Frank Atkins, knowing that the hotel was required by law to be closed at 10 p.m., invited the appellant and two others to come with him into the hotel to have a drink, as it was a cold night, and he was leaving Loughborough the next morning. The appellant and the rest of the party entered the hotel, and Frank Atkins ordered intoxicating liquors which were supplied by the licensee, charged by him to and subsequently paid for by Frank Atkins. The motor car was left outside in the street whilst the parties were in the hotel. At 11.30 p.m., two police constables, on going to the door of the hotel, met two of the party coming out. They then entered the hotel and found the others there, the appellant at the time being in the act of drinking whisky, whilst the chauffeur was drinking beer. The police officers then asked the licensee for an explanation of the presence of the appellant and the others upon his licensed premises during closing hours, and the licensee replied that they were the guests of Frank Atkins, who was staying at the hotel, and that before he had supplied any intoxicating liquors he had told Mr. Frank Atkins that he could only do so as his (Atkins') guests.

H

I

The justices decided that the appellant had entered and was upon the licensed premises at the invitation of his cousin for the purpose of obtaining intoxicating liquor, and

A further that the appellant had not discharged the onus cast upon him by s. 62 (1) of the Licensing (Consolidation) Act, 1910, of satisfying them that his presence was not in contravention of the provisions of that Act with respect to closing hours. They were of opinion that the appellant was found unlawfully on the said licensed premises at the time in question, and accordingly they convicted him, imposing a fine of 10s. and ordering him to pay 30s. for costs.

B By s. 62 (1) of the Licensing (Consolidation) Act, 1910, it was provided:

> "If, during any period during which any premises are required under the provisions of this Act to be closed, any person is found on those premises, he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on the premises, or a bonâ fide traveller, or that otherwise his presence on the premises
C was not in contravention of the provisions of this Act with respect to closing hours, be liable in respect of each offence to a fine not exceeding forty shillings."

Maddocks for the appellant.
Sir Ryland Atkins, for the respondent.

D **RIDLEY, J.**—The provisions of s. 62 of the Licensing (Consolidation) Act, 1910, make it incumbent upon any person charged under that section with being upon licensed premises during prohibited hours to satisfy the court that he is

> "an inmate, servant, or a lodger on the premises, or that otherwise his presence on the premises was not in contravention of the provisions of this Act with respect to closing hours."

E He must satisfy the court by reasonable and proper evidence on which it ought to come to that conclusion. In a case like the present it is for the justices to arrive at a determination of the matter. The question is one for them, and it is one in which they ought to form their own opinion, although, of course, they must do so in accordance with the principles that have been laid down by this court. And as it is entirely within their province to find that the presence of the person who is charged with being upon licensed
F premises during prohibited hours was not in contravention of the Act, the onus of proof being on the defendant in that matter, so they can find that it was a contravention of the Act, if the defendant fails to satisfy them by his evidence that he had a reasonable excuse for being there. The question in the present case is whether the appellant and those who were with him were the guests of his cousin, who was a lodger upon the premises. It was for the appellant to satisfy the justices that he had a reasonable excuse
G under the circumstances for being there, and he has failed to satisfy them.

Pine v. *Barnes* (1) is distinguishable from the present case. That was a case where a dinner party given by a lodger continued till after closing hours and drinking naturally continued as well, and the question was whether the members of the party were guilty of using the premises in contravention of the Act. It was held that the lodger was not liable to be convicted. He had, in fact, been convicted by the justices, but this court held
H that he had discharged the onus put upon him, and that the proper conclusion was that the presence of the members of the party was not in contravention of the Act. There the party was begun during the hours in which the licensed premises were allowed to be open; here the members of the party did not arrive until after the hotel was closed, and the invitation to drink was given during those hours. As to *Jones* v. *Jones* (2), there it was a case of a bonâ fide traveller entertaining a friend, and for the purpose of
I the section which is now under consideration—namely, s. 62—I can make no distinction between a bonâ fide traveller and a lodger, though in certain points there is a distinction between that case and the present. In that case LORD ALVERSTONE, C.J., said ([1910] 2 K.B. at pp. 266, 267, 268):

> "I am satisfied that the justices have in effect held that the appellant was not in the circumstances lawfully on the licensed premises inasmuch as he went into the inn for the purpose of getting intoxicating liquor. . . . In my opinion the appellant's presence on the premises was in these circumstances in contravention of s. 25

of the Licensing Act, 1872, inasmuch as he was there for the mere purpose of obtaining the liquor under colour of the right of the bonâ fide traveller to order and to pay for the same."

Of course, *Jones* v. *Jones* (2) was decided under s. 25 of the Licensing Act, 1872, but the wording of that section is the same as that of s. 62 (1) of the Licensing (Consolidation) Act, 1910, which has now replaced it. It seems to follow, then, from that decision that the justices were probably correct in the present instance in finding that the appellant had not satisfied them that his presence was not in contravention of the Act, and it is quite within their province to arrive at such a finding if the circumstances of the case permit of their doing so. I do not see how we can interfere with their finding, and, as it is impossible for us to say that they have arrived at a wrong decision, this appeal must be dismissed.

SCRUTTON, J.—I agree.

BAILHACHE, J.—I agree. The real key to the solution of these cases is their answer to the question, for what purpose was the person against whom an offence is alleged upon the premises? If it is a case of spending an evening or dining with a guest, and, the entertainment being protracted, intoxicating liquors are supplied, of course at the cost of the guest, after closing hours, then the decisions in *Pine* v. *Barnes* (1) and *Cope* v. *Landles* (3) apply. On the other hand, if the visit to the licensed premises is not made in the first instance during the time that they are lawfully open, but after the time for closing, and if there is no question of going to dine or to have supper, but merely for the purpose of having a drink, that is a case which comes clearly within the decision in *Jones* v. *Jones* (2). I am altogether of opinion that the present case falls within the latter class.

Appeal dismissed.

Solicitors: *Indermaur & Brown*, for *Clifford* and *Cliffords*, Loughborough; *Field, Roscoe & Co.*, for *Moss & Taylor*, Loughborough.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

A

Re A DEBTOR (No. 14 of 1913)

[KING'S BENCH DIVISION (Phillimore and Horridge, JJ.), May 5, 1913]
[Reported [1913] 3 K.B. 11; 82 L.J.K.B. 907; 109 L.T. 323; 20 Mans. 119; 57 Sol. Jo. 579]

B

Guarantee—Discharge—Time given by creditor to debtor—Judgment previously obtained by creditor against debtor and surety.

The giving of time by a creditor to a principal debtor does not discharge a surety when the time is given after the creditor has obtained judgment against the principal debtor and the surety.

C *Jenkins* v. *Robertson* (1) (1854), 2 Drew. 351, followed.

Notes. As to agreement to give time to a principal debtor, see 18 HALSBURY'S LAWS (3rd Edn.) 508–512, and for cases see 26 DIGEST (Repl.) 181 et seq. For the Mercantile Law Amendment Act, 1856, s. 5, see 4 HALSBURY'S STATUTES (2nd Edn) 661.

Cases referred to:

D (1) *Jenkins* v. *Robertson* (1854), 2 Drew. 351; 23 L.J.Ch. 816; 61 E.R. 755; 26 Digest (Repl.) 190, *1437*.

(2) *Re E. W. A.*, [1901] 2 K.B. 642; 70 L.J.K.B. 810; 85 L.T. 31; 49 W.R. 642; 8 Mans. 250; sub nom. *Re E. W. A., Ex parte Debtor*, 45 Sol. Jo. 638, C.A.; 26 Digest (Repl.) 210, *1610*.

Also referred to in argument:

E *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; 50 L.J.Ch. 355; 43 L.T. 706; 29 W.R. 763, H.L.; 26 Digest (Repl.) 118, *829*.

Appeal by the debtor from the refusal of the registrar of the Birmingham County Court to set aside a bankruptcy notice.

The petitioning creditor issued a bankruptcy notice on Mar. 14, 1913, founded upon a F judgment which he had obtained on Dec. 21, 1910, against one Humpage and the Barton-on-Sea Land Co. and the appellant in respect of a bill of exchange drawn by Humpage, accepted by the company and indorsed by the appellant. The judgment creditor on June 29, 1911, agreed to accept security from Humpage in respect of his judgment debt, and in consideration thereof allowed Humpage a six months' extension of time for payment. In consequence of the agreement between the creditor and Humpage, the G appellant applied to have the bankruptcy notice set aside, contending that he had only indorsed the bill as a surety, and that Humpage was the principal debtor, and that the judgment creditor, by giving time to Humpage, had thereby discharged the surety. But the registrar held that the appellant was a judgment debtor at the time of the agreement with Humpage, and that therefore the granting of time to a co-judgment debtor did not prejudice the rights of the judgment creditor against the appellant, and H he refused to set aside the bankruptcy notice.

Tindale Davis for the appellant.

Zeffert (*G. W. H. Jones* with him) for the respondent.

PHILLIMORE, J.—This appeal fails. The answer given by the registrar to the contention of the appellant is a good one, namely, that as the appellant was himself a I judgment debtor at the date of the agreement by the judgment creditor to give time to his co-judgment debtor, that agreement did not prejudice the creditor's rights against him. For the purpose of my judgment I will assume that it is the fact that the appellant's liability on this bill of exchange was as between him and the other parties to it that of a surety only. But the original debt has now become merged in the judgment and all the defendants against whom judgment has been obtained stand on an equal footing. Each judgment debtor is liable to pay to the judgment creditor the whole of the debt, and the only advantage which one judgment debtor derives from the existence of the other judgment debtors is that, as the judgment creditor is entitled to be paid the

full amount of his debt, but no more, payment by one judgment debtor is pro tanto in favour of the others. A

There is no question as to one judgment debtor being liable to a greater extent than the others; as far as the judgment creditor is concerned they are all equally liable; and, therefore, it is unnecessary to discuss the rights and remedies of the judgment debtors inter se. The law is well and concisely stated in *Jenkins* v. *Robertson* (1), where two persons were indebted, one as principal and the other as surety, and where, the surety having died, the creditor obtained a decree in a creditor's suit against his estate. The creditor afterwards sued the principal debtor, and took a judgment by arrangement, giving time without the knowledge of the surety. It was held that the surety was not discharged, because, as was said by KINDERSLEY, V.C., B

> "the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is, no longer as a surety, but under the decree." C

Consequently the appellant's case here can only be founded on the broad principle that either under the Mercantile Law Amendment Act, 1856, or the general law there is such a right between co-contractors who are co-defendants that a judgment creditor by dealing with one judgment debtor runs the risk of losing all his rights against the other. In my opinion no such principle ever existed, and the Act has not altered the position. The doctrine that the giving of time to the principal debtor releases the surety has no application to the case where judgment has been recovered against several co-defendants, whatever may have been their original rights inter se, either as principal and surety or as co-debtors. D

E

HORRIDGE, J.—I agree. The appellant and Humpage were both defendants on the same judgment. It is contended that because the judgment creditor agreed to give time to Humpage, and because originally Humpage was the principal debtor and the appellant a mere surety, the arrangement between the creditor and Humpage prevents the former now enforcing his judgment against the appellant. The decision in *Jenkins* v. *Robertson* (1) makes it clear that the judgment creates a new liability in respect of which all the judgment creditors are in the same position. The decision in *Re E. W. A.* (2) turned on a different point, because in that case the effect of the agreement between the creditor and one co-debtor was that there was an accord and satisfaction equivalent to a release from the joint and several judgment debt, and therefore there remained no debt against the other defendant to the judgment. F

Appeal dismissed. G

Solicitors: *Edmund Fitzgerald*, for *T. E. Silvester*, Birmingham; *Alfred Doubble & Sons.*

[*Reported by* D. W. CORRIE, ESQ., *Barrister-at-Law.*]

CHALLIS *v.* WATSON

[King's Bench Division (Lush and Rowlatt, JJ.), February 6, 1913]
[Reported [1913] 1 K.B. 547; 82 L.J.K.B. 529; 108 L.T. 505; 29 T.L.R. 271; 57 Sol. Jo. 285]

County Court—Practice—Removal of action to High Court—Absolute discretion—Actions in High Court and county court—Identical issues—County Courts Act, 1888 (51 & 52 *Vict., c.* 43), *s.* 126.

The transfer of an action, commenced in the county court, to the High Court is not restricted to cases in which the only consideration is whether the action is more fit to be tried in the High Court. The High Court has an absolute discretion, and whenever it is thought desirable that the case be tried in the High Court an order for its removal can be made.

Two actions arising out of the same street accident stood for trial—one in the High Court in which the owner of a damaged motor car sued the owners of a taxicab, and one in the county court brought by the driver of the taxicab against the owner of the motor car.

Held: in the circumstances there was no reason why the taxicab driver should be deprived of his right to bring his action in the county court.

Notes. The County Courts Act, 1888, s. 126, was repealed by the County Courts Act, 1934. See now the County Courts Act, 1959, s. 115 (1), 39 Halsbury's Statutes (2nd Edn.) 190.

Referred to: *Lee* v. *Hay's Wharf, Ltd.* (*Proprietors*), [1940] 3 All E.R. 282.

As to removal of cases commenced in the county court into the High Court, see 9 Halsbury's Laws (3rd Edn.) 331, 332, and for cases see 13 Digest (Repl.) 486–489.

Appeal from the decision of Bailhache, J., reversing the decision of the master who had ordered an action commenced in the county court to be transferred to the High Court.

On July 25, 1912, a collision occurred between a motor car and a taxicab, as the result of which damage was sustained by the owners of both vehicles and on Aug. 9, 1912, the owner of the motor car issued a writ in the High Court claiming damages from the owners of the taxicab. On Oct. 5, 1912, the driver of the taxicab, who was not a party to the action in the High Court, commenced proceedings in the Lambeth County Court against the owner of the motor car for damages for personal injuries sustained by him as the result of the same accident.

The plaintiff in the High Court action therefore applied to the master under s. 126 of the County Courts Act, 1888, for an order that the action commenced against him in the county court might be transferred to the High Court and tried together with the High Court action, upon the ground that the issues in both actions were the same and the drivers of the vehicles concerned were the most material witnesses as to the facts in both cases. The master made an order for the transfer of the action, subject to the term that the plaintiff in the county court action should not, if unsuccessful, be liable for more costs than would have been the case if the action had been tried in the county court. From this decision the plaintiff in the county court appealed to the judge who reversed the decision of the master. The defendant in the county court action appealed to the Divisional Court.

Cababé for the appellant.

Thorn Drury for the respondent.

Lush, J.—This appeal must be dismissed. The case is a very special one and a very difficult one, as, indeed, all cases are when there are three litigants and one has to adjust the rights between them so as to be fair to all.

I desire to say a word first as to the meaning of s. 126 of the County Courts Act, 1888. That section is in no way confined to cases in which one has only to consider whether the

action which is the subject-matter of the application is more fit to be tried in the High Court than in the county court. The section is so framed as to give the most absolute discretion to the court and to enable it in any case, if it thinks it desirable that a county court action should be tried in the High Court, to order its removal. The section does not say that an order may be made if the action is one fit to be tried in the High Court, which is the language used in s. 66 of the County Courts Act, which provides for the removal of an action of tort from the High Court into the county court when the person bringing it has no means to pay the costs if unsuccessful. The section says that the action may be removed into the High Court if it is desirable, and I think we must consider not only whether this particular action is more fit to be tried in the High Court, but whether, looking at all the circumstances, it is more desirable that it should be tried in one court rather than the other. In saying that I am not expressing a different view from that taken by BAILHACHE, J. He said, looking at the section, that the question ought to be decided according to the particular circumstances of the county court action, but I do not think that he held that the section did not apply to a case such as the present.

The question we have to decide is, whether in all the circumstances of this case we ought to affirm the order of BAILHACHE, J., allowing the action to proceed in the county court and refusing to remove it into the High Court. The circumstances are these. In August last an action was commenced in the High Court against the owners of this taxicab, the driver of the cab not being a party to the action. In October the driver of the cab commenced an action in the county court against the owner of the motor car, who was the plaintiff in the High Court action. That was a thing which he was perfectly entitled to do, because he was not a party to the High Court action, and it was no concern of his what the result of the High Court action was. I appreciate the force of the observation which has been made to us that it is not desirable, if it can fairly and properly be avoided, to have one action going on in the High Court and another in the county court when the subject-matter of the two actions is substantially identical. We have, however, to see whether the plaintiff in the county court action ought to be permitted to adopt the remedy which the law allows him, in the tribunal in which he is entitled to seek it, or whether we ought to prevent him from going on with his action in the county court, and order his action to be tried in the High Court with a special jury, one consequence of which will be seriously to delay the trial of an action in which he, and he only, is concerned. We cannot shut out from our consideration the position of the defendant to the county court action. We have before us an affidavit which has not been answered, from which it is manifest, that the plaintiff in the High Court action might not be in a position to pay damages and costs if the result of the counter-claim by the defendant in his action and the claim by the plaintiff in the county court action, if we were to transfer it into the High Court, were to be against him. His financial position is such that it might be extremely doubtful if, supposing that the plaintiff were to succeed in the action, he would be able to recover either his damages or costs. That is one material element to be considered in this case. I feel that if we could say in fairness to the plaintiff that all the litigation should be disposed of in one action, that it would be desirable to do so, but I have come to the conclusion that a sufficient case has not been made out to justify us in depriving the plaintiff of the remedy which the law gives him. If he is allowed to proceed with his county court action it will be tried this month or early in next, whereas if we transfer the proceedings into the High Court it may be tried a month later. That may be so or not, but if we transfer it, it will be a more costly action, because an action with three parties tried before a special jury in the High Court must be a more burdensome piece of litigation than a simple county court action where the present respondent is alone the plaintiff. The proper thing to do is to let the two actions go on together, since I am not satisfied that there is any reason why the plaintiff in the county court should be deprived of the remedy which the law has given him. This appeal must therefore be dismissed.

ROWLATT, J.—I agree. We have ample jurisdiction to make the order we are asked to make, and I should be the last to wish to narrow the class of cases in which this

jurisdiction should be exercised where it is reasonably apparent that the removal of the county court action would avoid trying the same issue twice. But this is a very special case. The defendant in the county court action began his action against the owner of a taxicab and did not make the driver of the cab a defendant, and the driver could not make himself a defendant in that action. The owner of the motor car of his own free will and by his own act left the driver of the taxicab, if he had any complaint to make, to pursue his remedy where he liked. He could have brought an action in the High Court, which could have been consolidated with the one which had already been commenced, or he could have brought one in the county court. He found, and I think that it is most material, that he had grounds for supposing that the plaintiff in the High Court action was not altogether satisfactory financially. Therefore, being entirely at liberty to do what he liked, he commenced his action in the county court. In these circumstances I am not prepared to say that the owner of the motor car has made out a sufficiently strong case for us to interfere with the election which the plaintiff has made, and, that being so, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. H. Sturt*; *Ransom & Williams.*

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

BARHAM *v.* LORD HUNTINGFIELD

[COURT OF APPEAL (Farwell and Kennedy, L.JJ.) March 1, 1913]
[Reported [1913] 2 K.B. 193; 82 L.J.K.B. 752; 108 L.T. 703]

Slander—Interrogatory—Publication—Interrogatory as to publication to unknown persons—Request to state names.

The plaintiff, a married woman, in an action for damages for a slander which, she alleged, imputed immoral conduct to her, pleaded by her statement of claim publication to a named person and also to other unknown persons during a period of three years. She then sought leave to administer to the defendant interrogatories asking whether he had in any of the years uttered the words complained of or words substantially to the same effect to any person or persons other than the person named, and also asking him to specify such person or persons to whom the words were uttered.

Held: the interrogatories were oppressive and could not be allowed.

Russell v. *Stubbs, Ltd.* (1) (1908), [1913] 2 K.B. 200, n., 205, n., explained and distinguished.

Notes. Referred to: *Re Whitworth, O'Rourke* v. *Darbishire*, [1919] 1 Ch. 320.

As to the procedure of the High Court regarding discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 17 et seq., and for cases concerning interrogatories in actions for slander, see 18 DIGEST (Repl.) 189–191.

Cases referred to:

(1) *Russell* v. *Stubbs, Ltd.* (1908), [1913] 2 K.B. 200, n., 205, n.; 82 L.J.K.B. 756, n., 108 L.T. 706, n.; 52 Sol. Jo. 580, H.L.; 18 Digest (Repl.) 187, *1617.*

(2) *Frere* v. *Frere* (1912), unreported.

(3) *Elliott* v. *Garrett*, [1902] 1 K.B. 870; 71 L.J.K.B. 415; 86 L.T. 441; 50 W.R. 504; 18 T.L.R. 498, C.A.; 18 Digest (Repl.) 191, *1645.*

(4) *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K.B. 543; 80 L.J.K.B. 1313; 104 L.T. 767; 27 T.L.R. 473; 55 Sol. Jo. 566, C.A.; 18 Digest (Repl.) 195, *1680.*

Also referred to in argument: A

White & Co. v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K.B. 653; 74 L.J.K.B. 419; 92 L.T. 817; 53 W.R. 369; 21 T.L.R. 337; 49 Sol. Jo. 364, C.A.; 18 Digest (Repl.) 187, *1616*.

Appeal by the plaintiff from an order of BUCKNILL, J., at chambers.

The action was brought to recover damages for slander. The plaintiff was the wife of Alfred Barham and lived with her husband at Low Farm in Suffolk. Her husband B was in the employment of John William Le Grys, who was the defendant's tenant of Low Farm, and of another farm called Gothic Farm. The statement of claim, so far as material, was as follows:

"(4) On a day the date of which the plaintiff cannot precisely specify, save that it was at the end of the year 1910 or early in the year 1911, the defendant falsely and C maliciously spoke and published of the plaintiff to John William Le Grys the following words: Those Barhams [meaning the plaintiff and her husband] have kept their place as an improper house, and you [meaning John William Le Grys] have had connection with Mrs. Barham [meaning the plaintiff].

(5) The plaintiff believes and alleges that the defendant during the years 1910, 1911, and 1912, falsely and maliciously spoke and published to various other D persons the statement that the plaintiff and her husband had kept their place as an improper house, and that the plaintiff had had connection with John William Le Grys. The plaintiff cannot give particulars until discovery."

The defendant by his defence denied that he had spoken or published the words complained of and pleaded justification, giving particulars, and in the alternative pleaded E privilege alleging that in or about the year 1910 the constant visits of Le Grys to the plaintiff created a scandal in the neighbourhood, and the defendant received complaints of the conduct of Le Grys and the plaintiff from his son and daughter, and in the circumstances it became the duty of the defendant to speak to Le Grys, which he did, using the words complained of without malice and in the belief that every word he said was true. The plaintiff took out a summons in the Lowestoft District Registry, and F obtained leave to deliver the following interrogatories for the examination of the defendant:

"(1) Did you in 1910 or 1911, and if so when, utter to John William Le Grys the words set forth in par. 4 of the statement of claim herein or words substantially to the same effect? (2) Did you in 1910, 1911, or 1912 utter the said word or words substantially to the same effect to any person or persons other than John William G Le Grys? (3) If the answer to the last interrogatory be Yes, specify the person to whom you uttered the said words and the times at which you uttered them, identifying each occasion. (4) If the answers to the first and second interrogatories or either of them be Yes, when before you uttered the said words or at all did you give to the plaintiff or to John William Le Grys, or either, and if so which of them, an opportunity to be confronted by the son or daughter of John William Le Grys or H any other person for the purpose of enabling the plaintiff to contradict or otherwise deal with the complaints alleged in par. 3 of the defence herein to have been made by the said son or daughter to you? (5) Did the plaintiff at any time, and if so when, verbally deny to you that she had had connection with John William Le Grys? (6) Did you ever invite or afford opportunity to John William Le Grys, and if so when, verbally or otherwise, to deny to you that the plaintiff had been guilty of I misconduct with him? Did John William Le Grys ever verbally or otherwise deny the said matter? (7) If the answers to the fifth and sixth interrogatories or either of them be Yes, what steps, if any, did you subsequently take to contradict the statement that John William Le Grys and the plaintiff had had connection with one another? (8) If the answers to the fifth and sixth interrogatories or either of them be Yes, did you after receiving from the plaintiff or John William Le Grys, or either of them, a denial that either had been guilty of having connection with the other, give notice verbally or otherwise, or cause such notice to be given, to the plaintiff

A or her husband to quit the cottage occupied by them? (9) When if at all during 1910, 1911, or 1912, prior to the delivery of the defence herein, have you ever alleged to the plaintiff or to any person all or any one, and if so which, of the matters alleged in the particulars given under para. 2 of the defence herein? (10) When, if at all, prior to the delivery of the defence herein have you given to the plaintiff any, and if so what opportunity to contradict or otherwise deal with any of the allegations set B forth in the particulars given under para. 2 of the defence herein? (11) Have you ever given to the plaintiff any opportunity to be confronted with any of the persons mentioned in the particulars given under para. 2 of the defence herein?"

The defendant appealed from the district registrar to the judge at chambers that interrogatories 2 to 11 might be disallowed. BUCKNILL, J., having allowed the appeal, C the plaintiff now appealed to the Court of Appeal.

Walter Stewart for the plaintiff.

McCardie for the defendant.

KENNEDY, L.J.—The order of BUCKNILL, J., is quite right. This is an action for slander, and the plaintiff was allowed by the district registrar to deliver certain interro- D gatories for the examination of the defendant. On appeal to the learned judge all these interrogatories were disallowed with the exception of No. 1. By the second interrogatory the plaintiff asks the defendants whether in 1910, 1911, or 1912 he uttered the same words to any other person or persons, and by the third he asks the defendant in the event of his answering the previous interrogatory in the affirmative to specify the persons to whom and the times at which the words were uttered. The plaintiff then E puts a set of question asking (inter alia) whether prior to the delivery of the defence the defendant had given him any opportunity to contradict the allegations contained in the particulars or to be confronted with any of the persons therein mentioned.

All those interrogatories, with the exception of No. 1, are of a fishing nature and directed to ascertain whether from the answers the plaintiff may not be able to set up a cause of action other than the specific one alleged in the statement of claim. I should F have thought it was impossible to find any authority to support the second and third interrogatory or the allegation in the statement of claim of the publication to persons not named, but counsel for the plaintiff has referred us to *Russell* v. *Stubbs, Ltd.* (1) in support of his contention and in defence of these interrogatories, and to an unreported case of *Frere* v. *Frere* (2) in which similar interrogatories were allowed by a judge at chambers. I therefore turn at once to *Russell* v. *Stubbs, Ltd.* (1), which was a decision G of the House of Lords and is reported in a somewhat summary form in the SOLICITORS' JOURNAL. If the effect of that decision is really that for which the plaintiff contends, we are bound to follow it. From the shorthand notes of the judgments delivered in that case in the Court of Appeal with which we have been supplied, we are now able to see what it is that the House of Lords affirmed, and SIR GORELL BARNES makes it quite clear in his judgment that that was an entirely exceptional case. It was an action for H libel, said to have been contained in a report relating to the plaintiffs made by the defendants. The plaintiffs alleged that the report was published to one Staniforth, and to other persons whose names were unknown to them. It was shown by an affidavit filed on behalf of the plaintiffs, which was not contradicted, that the report had been published to other persons, and that it must have been published by the defendants to Staniforth either directly or through such other person, and it was therefore held to be I just that the plaintiffs should know who those other persons were. And it appears plainly from the judgment of SIR GORELL BARNES that he was distinguishing that case from a case like the present one in which the interrogatories sought to be administered are of a fishing nature. The plaintiff here would like by these interrogatories to find out whether at any time during a period of three years the defendant had used the same or substantially the same words to other persons, and this application which she is making is not based on proof of special facts, but it is simply by way of fishing to obtain any information as to such publications. It is said that the interrogatories should be allowed on the ground that para. 5 of the statement of claim has not been struck out,

but whether it is struck out or not, in my opinion, the court ought not to allow fishing interrogatories founded on a statement which the defendant may not care to strike out. But when we see what it was that the House of Lords affirmed by their decision, it becomes abundantly clear that that case must be treated as an exceptional one. It is, I think, somewhat unfortunate that that case has only been very shortly reported in the SOLICITORS' JOURNAL. The result has been that the text-book writers have drawn the inference that that case must be treated as an authority for the general proposition that in an action for defamation the plaintiff may allege a specific publication to one or more persons named, and may then proceed to allege publications to persons unnamed and interrogate the defendant as to whether he has published the words complained of to any other and what persons. I do not think that *Russell* v. *Stubbs, Ltd.* (1) can be treated as an authority for so wide a proposition.

With regard to the further interrogatories, it seems to me that *Elliott* v. *Garrett* (3) went as far as this court ought to go in allowing interrogatories of this kind, especially when we bear in mind the decision of the full Court of Appeal in *Maass* v. *Gas Light and Coke Co.* (4). These interrogatories are oppressive and should not be allowed, and this appeal must therefore be dismissed.

FARWELL, L.J.—I am of the same opinion. This case raises a very important question. The interrogatories sought to be administered here are as bad a specimen of fishing interrogatories as I have ever seen. *Russell* v. *Stubbs, Ltd.* (1) has been misunderstood. One of the reasons set forth by the plaintiffs in that case for affirming the decision of the Court of Appeal is "because upon the particular facts of this case the Court of Appeal exercised its discretion judicially and rightly." It is quite clear to my mind that all that the House of Lords said was that the Court of Appeal was justified in exercising its discretion in the way it did on the special facts of that case which appeared on the uncontradicted affidavit filed on behalf of the plaintiffs? The misunderstanding arising from the shortness of the report has found its way into the text-books. This should be set right.

Appeal dismissed.

Solicitors: *Hatchett-Jones, Bisgood & Marshall*, for *Watson & Everitt*, Lowestoft; *Heywood & Ram*, for *Cross, Ram & Sons*, Halesworth.

[*Reported* by EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re HALSTON. EWEN *v.* HALSTON

[CHANCERY DIVISION (Eve, J.), January 23, 1912]

[Reported [1912] 1 Ch. 435; 81 L.J.Ch 265; 106 L.T. 182; 56 Sol. Jo. 311]

Will—Evidence—Description of legatee—Admission of oral evidence as to testator's intention.

A testator, who died in 1899, appointed his widow sole executrix and devised his freehold property to her for life and after her decease to J. W. H., the son of I. H. A son of I. H., whose name was J. W. H., was born in March, 1874, and died ten days after his birth. The testator's widow entered into possession and died in 1911. Another son of I. H., J. R. H., who was born in 1878, claimed to be entitled to the property as against persons claiming to be co-heiresses of the testator. Her executors issued an originating summons citing J. R. H. and the co-heiresses, to ascertain who was entitled to the freehold property.

Held: (i) it could not be assumed that the testator intended to make a devise to a non-existing person and parol evidence was admissible to ascertain his intention; on that evidence J. R. H., and not the co-heiresses, was entitled.

Re Ely, Tottenham v. *Ely* (1) (1891), 65 L.T.Rep. 452 not followed.

(ii) to give costs out of the real estate in what was in fact adverse litigation would be unfair to the successful party, and the unsuccessful respondent must pay the devisee's costs.

Notes. As to evidence for the purpose of identification of persons named in wills, see 34 HALSBURY'S LAWS (2nd Edn) 170 et seq., and for cases see 44 DIGEST 631 et seq. For the Land Transfer Act, 1897, see 9 HALSBURY'S STATUTES (2nd Edn.) 715.

Cases referred to:

(1) *Re Ely, Tottenham* v. *Ely* (1891), 65 L.T. 452; 44 Digest 629, *4606*.
(2) *Re Ofner, Samuel* v. *Ofner*, [1909] 1 Ch. 60; 78 L.J.Ch. 50; 99 L.T. 813, C.A.; 44 Digest 616, *4437*.
(3) *Re Blackman* (1852), 16 Beav. 377; 51 E.R. 824; 44 Digest 638, *4710*.
(4) *Re Buckton, Buckton* v. *Buckton*, [1907] 2 Ch. 406; 76 L.J.Ch. 584; 97 L.T. 332; 23 T.L.R. 692; 44 Digest 935, *7908*.

Also referred to in argument:

Parsons v. *Parsons* (1791), 1 Ves. 266; 30 E.R. 335, L.C.; 44 Digest 640, *4757*.
Dowset v. *Sweet* (1753), Amb. 175; 27 E.R. 117, L.C.; 44 Digest 612, *4388*.
Drake v. *Drake* (1860), 8 H.L.Cas. 172; 29 L.J.Ch. 850; 3 L.T. 193; 11 E.R. 392, H.L.; 44 Digest 633, *4658*.
Dooley v. *Mahon* (1877), 11 I.R.Eq. 299; 44 Digest 611, k.
Charter v. *Charter* (1874), L.R. 7 H.L. 364; 43 L.J.P. & M. 73, H.L.; affirming (1871) L.R. 2 P. & D. 315; 44 Digest 616, *4432*.
Re Barker, Buxton v. *Campbell*, [1892] 2 Ch. 491; 62 L.J.Ch. 76; 66 L.T. 848; 32 Digest 405, *833*.
Re Peel, Woodcock v. *Holroyd* (1899), 81 L.T. 504; 44 Sol. Jo. 10; 43 Digest 661, *942*.
Stringer v. *Gardiner* (1859), 4 De G. & J. 468; 33 L.T.O.S. 295; 7 W.R. 602; 45 E.R. 182, L.C. & L.JJ.; 44 Digest 638, *4712*.
Coldwell v. *Holme* (1854), 2 Sm. & G. 31; 2 Eq. Rep. 390; 23 L.J.Ch. 594; 18 Jur. 396; 2 W.R. 150; 65 E.R. 288; 8 Digest (Repl.) 418, *1091*.
Re Harriette Clarke, Clarke v. *St. Mary's Convalescent Home* (1907), 97 L.T. 707.
Re Davis, Re Davis, Evans v. *Moore*, [1891] 3 Ch. 119; 65 L.T.Rep. 128; 61 L.J.Ch. 85; 39 W.R. 627; 35 Sol. Jo. 624, C.A.; 23 Digest (Repl.) 299, *3645*.

Adjourned Summons to determine who was, upon the true construction of the will of John W. Halston, deceased, entitled to the property.

By his will dated Sept. 28, 1891, the testator, John William Halston, appointed his

wife, Eleanor Rebecca Halston, sole executrix and devised all his freehold property to his wife, Eleanor R. Halston, during her life and from her decease to John William Halston (otherwise Alston), the son of Israel Halston (otherwise Alston), of Corringham, Essex. The testator died on Nov. 18, 1899, and his widow went into possession of the real estate devised to her for life and so continued down to her death on Jan. 7, 1911.

Israel Alston, the testator's brother, had four sons, John William Alston, James Milet Alston, John Robert Alston, one of the respondents to the present originating summons, and Horace Edward Alston. John William Alston was born on Mar. 5, 1874, and died on Mar. 15, 1874. The respondent, John Robert Alston, was born on Oct. 9, 1878. Israel Alston and John Robert Alston lived at Corringham, Essex.

The applicants, James Ewen and John Brand, the executors of the will of Eleanor R. Halston, the wife of the testator, had in their possession the deeds relating to the testator's freehold property, and they stated that they had formed an opinion as to the person entitled on the facts known to them, and they had communicated such opinion to the daughters of James A. Halston. There was evidence that it was by the testator's request that his brother Israel's son, John William Alston, since deceased, was so named. When John Robert Alston was born the testator desired that he should be named John. Israel Alston promised to consult his wife. She said that she was willing to have the respondent christened John, but did not desire his name should be identical with her son who was dead. Thereupon Israel Alston had his son the respondent christened John Robert, and there was also evidence that the testator did not know that the second name of the respondent John Robert Halston was "Robert." The respondent John Robert Halston had stayed with the testator for several months, and remembered when shooting with the testator that on passing over the testator's land the testator told him that it would be his some day.

The whole of the freehold property of the testator was claimed by the respondemt, John Robert Alston, on the ground that he was the person referred to in the will of the testator as John William Halston (otherwise Alston). Charlotte Jane Went, Kate Smith and Thirza Maria Adlington, daughters of James Ashman Halston, the eldest brother of the testator, claimed as co-heiresses.

Maugham for the applicants.
Lawrence, K.C., and *P. S. Stokes* for the respondent John R. Halston.
Lightwood for the respondent Charlotte J. Went.

EVE, J. stated the terms of the devise, and continued:—In the devise the testator has accurately described a person whose existence had been known to him and whose death, some seventeen years before the date of the will, had also been known to him. In these respects the facts are identical with those in the case of *Re Ely, Tottenham* v. *Ely* (1) where KEKEWICH, J., held that there having been a person in existence known to the testator answering to the exact description of the legatee, there was no such ambiguity on the face of the will as to admit of parol evidence being given for the purpose of identifying the person who the testator meant to take the benefit of the legacy, and he held that in those circumstances the gift could not take effect. If that decision stood alone, it would be my duty, in accordance with the well established practice, to follow it. But I am relieved from the obligation, by the observation on *Re Ely* (1) made by FARWELL, L.J., in the case of *Re Ofner, Samuel* v. *Ofner* (2) where he expressed his opinion in clear and unambiguous language that the decision was wrong. Fortified by that expression of opinion and by the series of relevant decisions to which counsel for the respondent John R. Halston has drawn my attention, and to which apparently the attention of KEKEWICH, J., was not called, I can disregard *Re Ely, Tottenham* v. *Ely* (1) and consider how far the principles embodied in the earlier cases are applicable to the facts of this one.

To begin with, one cannot assume the testator intended to make a devise to a non-existing person; he must have contemplated some person, whom he believed to be alive at the date of his will, as the object of his bounty, and the duty of the court is to ascertain, if practicable, whom he did intend. To do this recourse must be had to evidence to be found outside the will, and the cases show that in pursuing the inquiry it is com-

petent for the court to receive parol evidence. The evidence here proves the death of the nephew named in the will seventeen years before the date of the will, and that his death was well known to the testator, who desired that a second son born shortly afterwards to the same parents should bear one of the same names as his deceased brother. It further proves that the parents were desirous of meeting the testator's wishes, and christened the boy John, but substituted Robert for William as his second name. There is no evidence that the testator knew that the boy had been called "John Robert" and not "John William," but he always took an interest in the boy, who was constantly staying with him, and there is a piece of testimony which, under the decision in *Re Blackman* (3) I hold to be admissible, to the effect that on one occasion when shooting over the property with the boy the testator told him that the land would ultimately belong to him. On the evidence I can entertain no reasonable doubt that the testator intended to devise his real estate to John Robert Halston, the second surviving son of his brother Israel, and I so hold.

Then arises the question how the costs of this application ought to be borne. Those of the executors have been provided for by arrangement, but there remain those of the devisee and the lady who claims adversely to him as one of the co-heiresses of the testator. By the consent of all parties the case has been argued on the footing that the court has jurisdiction to deal on this summons with the question involved, and it has been treated as though it were a summons by executors having the legal estate vested in them under the Land Transfer Act, 1897, asking the opinion of the court as to the person entitled to require a transfer. Even on this footing the case seems to me to fall entirely within the decision of Kekewich, J. in *Re Buckton, Buckton* v. *Buckton* (4). The respondent, John Robert Halston, asserts his right to possession; the other respondents, with one exception, concede his right. He has now established his right. If I give costs out of the estate—that is to say, out of this real estate—I shall be making the successful party in what is really adverse litigation pay the costs of the unsuccessful party; and, if I say no costs, I shall still be imposing on the successful litigant a burden which in justice he ought not to have imposed upon him. I think, therefore, I am bound to order his costs to be paid by the unsuccessful respondent.

Solicitors: *Browne Webb*; *Thorne, Mockridge, Owles, Limmer & Wood*; *C. R. Sawyer & Withall*, for *H. J. Jefferies & Bygott*, Southend-on-Sea.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

A

PUBLIC TRUSTEE *v.* LAWRENCE

[CHANCERY DIVISION (Swinfen Eady, J.), March 25, 26, 27, April 2, 1912]

[Reported [1912] 1 Ch. 789; 81 L.J.Ch. 436; 106 L.T. 791; 56 Sol. Jo. 504]

B

Mortgage—Power of leasing—Counterpart not delivered by mortgagor to mortgagee—Exercise of power of sale—Conveyancing Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 18 (11), (14).

A mortgagor in possession granted a lease, but failed to deliver a counterpart to the mortgagees.

C

Held: the lease was not invalidated, but the statutory power of sale became immediately exercisable.

Notes. The conveyancing Act, 1881, s. 18 (11) and s. 18 (14) have been repealed by the Law of Property Act, 1925, and replaced by s. 99 (11) and s. 99 (14) of that Act respectively. The Bankruptcy Act, 1883, has been repealed and replaced by the Bankruptcy Act, 1914.

D

Referred to: *Lever Finance Ltd.* v. *Trustee of Property of Needleman*, [1956] 2 All E.R. 378.

As to leases by mortgagor or mortgagee under statutory powers, see 27 HALSBURY'S LAWS (3rd Edn.) 252–255, and for cases see 35 DIGEST 331 et seq. For the Law of Property Act, 1925, s. 19 (11), (14) see 20 HALSBURY'S STATUTES (2nd Edn.) 646, 648. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

E

Action for a declaration.

On Aug. 28, 1895, eleven acres of freehold land were, by an indenture of mortgage, conveyed to trustees as security for £4,000. The deed provided:

F

"The power of leasing conferred by law on a mortgagor shall extend to a lease by the mortgagors . . . for any term not exceeding 1,000 years, provided that a counterpart of any such lease duly executed by the lessee . . . be delivered to the mortgagees within one calendar month of the execution thereof, and the consent thereto of the mortgagees shall not be required."

G

On Nov. 20, 1895, the mortgagors conveyed the equity of redemption to W. R. Franklin, who on April 2, 1896, demised six acres to George Franklin for 999 years from Mar. 29, 1895, at the rent of £30. On Jan. 31, 1907, George Franklin mortgaged his lease to Lawrence, who had taken possession, for the residue of the term less one day but, it was said, that no counterpart of the lease had been delivered to the mortgagee within one calendar month of its execution. George Franklin died insolvent on Jan. 31, 1910, and an order was, on May 2, 1910, made for the administration of his estate in bankruptcy under the Bankruptcy Act, 1883, s. 125, and his property was vested in the official receiver who disclaimed all interest in the lease. The plaintiff, who now held the mortgage of Aug. 28, 1895, brought this action for a declaration that the lease of 1896 was not authorised by the power of leasing in the mortgage, and was not binding on the plaintiff.

H

Gore-Browne, K.C., and *Sargant* for the plaintiff.
Russell, K.C., and *Bischoff* for Lawrence.

I

Cur. adv. vult.

April 2, 1912. **SWINFEN EADY, J.,** held that, upon the facts, a counterpart had in fact been delivered and continued: There is, however, the further question whether, even if no counterpart had been delivered the lease would have been invalid against the mortgagees. By the Conveyancing Act, 1881, s. 18, a mortgagor in possession is empowered to grant certain leases. By s. 18 (11) the mortgagor shall within one month

after making the lease deliver to the mortgagee a counterpart executed by the lessee, "but the lessee shall not be concerned to see that this provision is complied with." By s. 18 (14) the mortgage deed may reserve to or confer on the mortgagor any further or other power of leasing

> "and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed."

The mortgage deed in question refers to the power of leasing conferred by law on a mortgagor and confers a further or other power by extending the statutory power of leasing to granting leases for 999 years. It also provides for a counterpart being delivered within one month to the mortgagees, but the provision in s. 18 (11) that the lessee shall not be concerned to see that the provision for the delivery of the counterpart lease is complied with, applies to a lease granted under the extended power as well as to a lease granted under the statutory power. There is not any contrary intention expressed in the mortgage deed on this point, and therefore s. 18 (14) applies, and all the statutory incidents, effects, and consequences are introduced. The result is that failure to deliver a counterpart to the mortgagees would not invalidate the lease, although it would cause the statutory power of sale to become immediately exercisable. The action must be dismissed.

Solicitors: *Morley, Shirreff & Co.*; *Chester, Broome & Griffiths*, for *William Perkins, Hepherd & Winstanley*, Southampton.

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

Re MARSHALL. MARSHALL *v.* MARSHALL

[COURT OF APPEAL (Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), November 10, 17, 1913]

[Reported [1914] 1 Ch. 192; 83 L.J.Ch. 307; 109 L.T. 835; 58 Sol. Jo. 118]

Trust—Trust for sale and conversion—Power to postpone—Shares in company—Right of absolute owner of shares to call for their transfer.

The testator, by his will, devised and bequeathed his residuary real and personal estate (which included shares and stock in the M. company) to his trustees on trust for sale and conversion, and to pay certain legacies thereout. He gave his trustees power to postpone sale and conversion "during so long as to my trustees in their uncontrolled discretion shall seem proper," and power to retain any shares or stock in the M. company "during any period without being liable for any loss arising thereby." They were also authorised to appropriate any part of the residuary estate towards or in satisfaction of any legacy bequeathed. A son and two grandsons of the testator became absolutely entitled to shares of the residuary estate of the testator and requested the trustees to transfer to them in part satisfaction of their shares a proportion of the preference and ordinary shares in the M. company retained by the trustees in their discretion.

Held: the power given to the trustees to postpone conversion and retain the shares amounted to a power to postpone for a reasonable time for the benefit of the

estate, but did not extend to an indefinite power of postponement, and, therefore, the right of the absolute owners to have their shares transferred to them ought to prevail over the discretion of the trustees.

Notes. Considered: *Re Weiner's Will Trusts, Wyner* v. *Braithwaite*, [1956] 2 All E.R. 482. Referred to: *Re Sandeman's Will Trusts, Sandeman* v. *Hayne* [1937] 1 All E.R. 368.

As to conversion of trust property, see 33 HALSBURY'S LAWS (2nd Edn.) 231, 232, and for cases see 43 DIGEST 866 et seq.

Cases referred to in argument:

Taite v. *Swinstead* (1859), 26 Beav. 525; 33 L.T.O.S. 312; 5 Jur.N.S. 1019; 7 W.R. 373; 53 E.R. 1001; 43 Digest 900, *3426*.

Re Crowther, Midgley v. *Crowther*, [1895] 2 Ch. 56; 64 L.J.Ch. 537; 72 L.T. 762; 43 W.R. 571; 11 T.L.R. 380; 13 R. 496; 43 Digest 925, *3638*.

Re Horsnaill, Wormersley v. *Horsnaill*, [1909] 1 Ch. 631; 78 L.J.Ch. 331; 100 L.T. 603; 43 Digest 900, *3433*.

Wharton v. *Masterman*, [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 43 W.R. 449; 11 T.L.R. 301; 11 R. 169, H.L.; 8 Digest (Repl.) 442, *1324*.

Smith v. *Snow* (1818), 3 Madd. 10; 18 R.R. 186.

Appeal from a decision of WARRINGTON, J., reported 108 L.T. 896.

By his will dated Nov. 12, 1902, with a codicil thereto dated Jan. 16, 1903, Henry Dickenson Marshall, of Gainsborough, after appointing executors and trustees thereof and after making certain specific and pecuniary bequests, including an annuity to his wife, devised all his real estate and bequeathed the residue of his personal estate (which comprised certain shares and stock in a company known as Marshall, Sons & Co., Ltd., in which the testator was largely interested) to his trustees upon trust for sale, calling in, and conversion as therein mentioned, and thereout to appropriate a sum for answering the annuity to his wife, Sarah Edith Marshall, and also for payment of legacies. He also directed his trustees to stand possessed of the residue of the trust moneys as to five equal twenty-fifth parts thereof in trust for his son, William Ernest Marshall and his wife and children and otherwise as thereinafter declared; as to five other equal twenty-fifth parts thereof in trust for his son, Percy James Marshall; and as to other twenty-fifth parts thereof in trust for his other children, including his son, Hermann Dickenson Marshall, as therein mentioned. Then followed provisions respecting the share of the testator's son, William Ernest Marshall, and also provisions as to the settlement of daughters' shares. The clause for postponing sale, calling in, and conversion was as follows:

"I empower my trustees to postpone the sale, calling in, and conversion of the whole or any part or parts of my real and personal estate hereinbefore given in trust for sale, calling in, and conversion during so long as to my trustees in their uncontrolled discretion shall seem proper, and in particular to retain any shares, stock, or securities of Marshall, Sons & Co., Ltd., or any other investments held by me at my death during any period without being liable for any loss arising thereby, but my real estate shall for the purpose of transmission be impressed with the quality of personalty from the time of my death."

The testator's two sons, Percy James Marshall and Hermann Dickenson Marshall, were declared to be entitled to take, at par, in satisfaction of their respective legacies and shares of residue not exceeding in value £5,000 of preference shares and £10,000 in value of ordinary shares in Marshall, Sons & Co., Ltd. These shares they had. The will then continued as follows:

"I authorise my trustees (in substitution for the power conferred on personal representatives by s. 4 of the Land Transfer Act, 1897), at any time or times at their discretion to appropriate any part of my estate, whether real or personal, herein-

before given in trust for sale, calling in, and conversion (and particularly any shares or stock in Marshall, Sons & Co., Ltd.) in its then actual condition or state of investment in or towards satisfaction of any legacy (other than the five several legacies of £1,000 each) hereinbefore bequeathed or share in the said trust premises hereinbefore bequeathed or directed to be held in trust, including the legacies of £3,000 and £500 each hereinbefore bequeathed in trust for the benefit of my said daughters and the legacy of £4,000 hereinbefore bequeathed in trust for my said grandson Henry Marshall, with power for that purpose conclusively to determine the value of the said trust premises or any part or parts thereof in such manner as my trustees shall think fit. And I declare that if any such appropriation shall be made towards the share in the said trust premises of my said son William Ernest Marshall or towards the legacy or share in the said trust premises of any daughter of mine all stock, shares, debentures, securities, or debts, or other property so appropriated may be retained by my trustees for such period as they shall in their uncontrolled discretion think fit as authorised investments of or on account of such share or legacy, and my trustees shall stand possessed of such stock, shares, debentures, securities, or debts, or other property upon the trusts and subject to the powers hereinbefore declared and contained of and concerning the investments representing the settled fund of my said son or such daughter."

The testator died on Mar. 8, 1906. The trustees in due course settled a scheme for the division of the estate among the parties beneficially interested therein. In the events which happened, Percy James Marshall, a son of the testator, and Henry Douglas Marshall and Cedric Hewerdine Marshall, two of the grandsons of the testator, became absolutely entitled to certain shares of the residuary estate of the testator. Thus Percy James Marshall was entitled to $\frac{1}{5}$th and $\frac{1}{7}$th part of $\frac{2}{2\,5}$ths (making together $\frac{3\,7}{1\,7\,5}$ths) of the undistributed balance of the testator's residuary estate, and had requested the trustees to transfer to him in part satisfaction of his share a like proportion of the 8,462 preference shares and 82,730 ordinary shares respectively in Marshall, Sons & Co., Ltd., which had been retained by the trustees. Henry Douglas Marshall and Cedric Hewerdine Marshall were each entitled to $\frac{2}{7}$th parts of $\frac{3\,7}{1\,7\,5}$ths of such balance as aforesaid, subject, as in the will of the testator mentioned, to an annuity of £50 payable to Sarah Edith Marshall during her widowhood, and each of them claimed to have transferred to him a like proportion of the said preference and ordinary shares retained by the trustees as aforesaid.

An originating summons was accordingly taken out on behalf of two of the trustees of the will for the determination of the following questions: (i) Whether upon the true construction of the will and in the events which had happened it was the duty of the trustees of the will during the lives of Percy James Marshall and Hermann Dickenson Marshall and the life of the survivor of them, before selling any of the shares in Marshall, Sons & Co., Ltd., then held by the trustees, to offer at par value such of the shares as the trustees should desire to sell to Percy James Marshall and Hermann Dickenson Marshall in equal proportions, or in case one of them should be dead, then to such one of them as should be living. (ii) If so, whether each or either of Percy James Marshall and Hermann Dickenson Marshall would be at liberty under the will to accept the shares so offered to him. (iii) Whether the trustees ought to transfer to Percy James Marshall in or towards satisfaction of his share of the residuary estate of the testator any and, if so, how many of the shares then held by the trustees. (iv) Whether the trustees ought to transfer to Henry Douglas Marshall and Cedric Hewerdine Marshall respectively in or towards satisfaction of their respective shares of the residuary estate of the testator any and, if so, how many of the shares then held by the trustees. (v) Whether the trustees were at liberty to postpone so long as they should in their uncontrolled discretion deem proper the sale of the shares then held by them, except such of them, if any, as they ought to transfer as aforesaid. The summons was adjourned into court and came on to be heard before WARRINGTON, J., when his Lordship decided that the trustees were not bound to transfer the shares to the defendants, the relatives

referred to, but were entitled to exercise their discretion as to postponement of conversion, as such a transfer might affect the interests of others also entitled to shares in the company. From that decision the defendants now appealed.

Clauson, K.C., and *Tomlin, K.C.*, for the defendants.

Peterson, K.C., and *W. M. Cann*, for the plaintiffs.

Cave, K.C., and *John Dixon*, for the trustees of the will.

COZENS-HARDY, M.R.—This is an appeal from a decision of WARRINGTON, J., and it raises a point of some interest, and, at the first view, of some difficulty.

The testator, Mr. Henry Dickenson Marshall, left a very considerable estate, by far the larger portion of which was represented by ordinary and preference shares in the company styled Marshall, Sons & Co., Ltd. He bequeathed certain legacies, and he then directed the residue of his estate to be divided between certain persons. Omitting small fractions, one of the present defendants, the testator's son Percy James Marshall, may be said to be entitled to one-fifth of the testator's residuary estate. That is an interest which he had absolutely vested in him indefeasibly in possession. The other four-fifths, or some of them, are settled by the will upon trusts which may, and probably will, last thirty or forty, or possibly even more, years. The will contains as to the residue the usual trusts for sale and conversion. It then contains a power—and the whole of the case turns upon this—after the investment clause for the trustees to postpone the sale, calling in, and conversion of the whole or any part or parts of the testator's real and personal estate thereinbefore given in trust for sale, calling in, and conversion during so long as to the trustees in their uncontrolled discretion should seem proper, and in particular to retain any shares, stock, or securities of Marshall, Sons & Co., Ltd. or any other investments held by the testator at his death during any period without being liable for any loss arising thereby. The trustees took out a summons asking whether they were bound to comply with the request of the defendants, who asked for a transfer to them of their proportion of these shares, which shares, as I have already said, are practically the bulk of the residuary estate. The summons that the trustees took out did not in form, perhaps, raise the very point which it was desired to raise. But I take it that the trustees did intend to leave their discretionary power to be dealt with by the court. The learned judge in the court below held that the trustees were at liberty to postpone the sale and conversion, so long as they should, in their uncontrolled discretion, think proper, of the shares now held by them. From that order there is the present appeal.

Speaking very generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of personal property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by law, that where real estate is devised in trust for sale and to divide the proceeds between A., B., C., and D.—some of the shares being settled and some of them not—A. has no right to say, "Transfer to me my undivided fourth of the real estate because I would rather have it as real estate than personal estate." The court has long ago laid down that that request for a transfer is not right, because it is a matter of notoriety, of which the court will take judicial notice, that an undivided share never fetches quite its proper proportion of the proceeds of sale of the entire estate. Therefore to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries. But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property. It may apply to a case of a mortgage debt which you cannot easily split up conveniently into shares. But when you are dealing with the case of a limited company with ordinary and preference shares, you want to know a great deal more than that before you can say that the trustees are entitled to deprive an absolute owner of one-fifth of his right to claim a transfer.

When the case was first before us we suggested that we should like to know what are the facts about the company; what is its capital, and the number of its shareholders, and what are the special circumstances of the case. Accordingly the case was ordered

to stand over in order that we might have better information. That information has now been furnished very conveniently and satisfactorily. And it appears that this is not in any sense a "private company" in which the testator held a control by holding the majority of the shares, or anything of that kind. It is a case in which there are more than 300 shareholders. I do not purport to give the actual figures I am referring to, but the list which was furnished to us, and from which the figures were read this morning. There are between three and four hundred other shareholders. The amount of the capital represented by the testator's residuary estate is, substantially, one-sixth of the capital. The testator's son, Percy James Marshall, holds one-fifth of that amount, in regard to which he has said to the trustees that he desires a transfer of his one-fifth of the block of shares which the trustees are now holding; and that in his opinion there is no reason whatever why the trustees should be entitled so to hold the same.

The right claimed by the trustees, to which effect has been given by the learned judge in the court below, seems to me to be dangerous to the last degree. It says that the trustees are at liberty to postpone so long as they shall, in their controlled discretion, think proper the sale of the shares. Can we deprive beneficiaries of their shares until, say, the last of the settled shares becomes vested in an adult in possession? If so, that is a very serious matter. There may be, and I wish to guard myself in saying this, cases with reference to the particular position of a company like this, at a particular time, which may justify the trustees in exercising their discretion, if they can satisfy the court that these special circumstances exist. But their refusal to transfer in the present case is not put upon that ground at all. The trustees do not base it upon any special circumstances in relation to themselves and the company. They simply say that the testator has given them discretionary power—their integrity is not in the least impugned—and that they will not transfer to the beneficiaries. In my opinion such a contention ought not to prevail as between the right of an absolute owner to elect to take and to demand from the trustees his fraction of the shares, on the one hand, and the right of the trustees on the other hand. It seems to me that the former ought to prevail. I wish to say, further, that I am not satisfied that the power to postpone conversion in this will has any bearing whatever on the right of an absolute owner to say, "Transfer me these shares." The object of the power was to justify the retention of those shares as a proper investment of the shares which are settled by the will.

For these reasons I think that the order of the learned judge in the court below was wrong. I do not quite know what the form of order is which is now asked, but in substance the appeal must be allowed, and we will consider the precise form of the words afterwards.

SWINFEN EADY, L.J.—I am of the same opinion.

The testator, by his will, gave the whole of his real and personal estate to trustees "upon trust that my trustees shall sell, call in, and convert into money." Then there was a provision for an annuity for the testator's widow. She is dead. Subject to that, and to certain pecuniary legacies, the testator declared that his trustees should stand possessed of the surplus or residue which should remain of the aforesaid trust moneys after answering and satisfying the several trusts, &c., in certain shares. In substance the testator's son, one of the defendants, Percy James Marshall, takes immediately one-fifth of the residue. The testator died so long ago as Mar. 8, 1906, and his son, Percy James Marshall, says that he, being entitled to one-fifth of his father's estate—and it is now represented in a manner which I will indicate—desires to receive the same, and that he would like his one-fifth to be now transferred to him. The estate, with an immaterial exception, is now represented by certain ordinary and preference shares in the company called Marshall, Sons & Co., Ltd. The issued capital of that company is £250,000 in preference shares, and £500,000 in ordinary shares, the ordinary shares being of £1 each and the preference shares being of £5 each. At present the holding of the testator's estate is 8,462 of the fully paid preference shares and 82,730 of the ordinary shares, so that roughly that is one-fifth of the preference shares and one-fifth of the ordinary shares. Those are held as part of the testator's residuary estate. The other

five-sixths of the shares of the company are held by various other members of the family, or, if held by trustees, they are held by trustees of settled shares. That being so, the defendant Percy James Marshall has asked, as I have already said, to have his one-fifth. This summons was accordingly taken out by the trustees, and they make no case upon the facts that it is expedient that they should be allowed to retain the shares for some longer time, but they rely as their defence upon a matter of law. Their contention is that, as a matter of law, having regard to the true construction of the will, they are entitled to retain the shares as long as they think fit. According to the language of the order of the learned judge now under appeal, they are to be at liberty to retain the shares so long as they in their uncontrolled discretion think proper. And it is said that, although there may be some interests to fall into possession, the persons entitled may not be sui juris for thirty or forty years. At all events, it goes as far as this, that until every person is absolutely entitled under the trusts of the will, the trustees are at liberty to retain the shares under the will. In my opinion the trustees have no such right, and the defendant, Percy James Marshall, is entitled to his one-fifth.

Then there is the power to postpone conversion. In my opinion, according to the true construction of the clause conferring that power, it is a power to postpone for a reasonable time, for the benefit of the estate, any conversion. Then, in addition to the power to postpone in particular, there is power

> "to retain any shares, stock, or securities of Marshall, Sons & Co., Ltd., or any other investments held by me at my death during any period without being liable for any loss arising thereby."

So that if the trustees determine, after they have transferred to the defendants their proper proportion of the shares, and say they will retain, in respect of the settled shares, these investments, they are to be at liberty to do so without being responsible for any loss. In my opinion, according to the true construction of the will, it is a power to postpone for a reasonable time for the benefit of the estate. But it does not extend to an indefinite power of postponement so long as the trustees shall think fit. There has been no attempt to justify such power on any facts peculiar to this case, or any facts relating to it. But merely, as a matter of law, the trustees' claim was to postpone for an indefinite period. In my opinion that claim cannot be upheld. I agree, therefore, that this appeal should be allowed.

PHILLIMORE, L.J.—I do not see my way so clearly as the other members of the court. But I agree in the result.

The case of the trustees and the beneficiaries who oppose the claim of the defendant, Percy James Marshall, to have his, approximately, one-fifth share has been rested on the power to postpone conversion and to retain shares given by the will. I think that this power cannot, per se, be relied upon as an answer to the defendant's request. The right to refuse is not given by this power. If there is such a right it rests upon the duty of the trustees to do their best for all the beneficiaries. It is their consequential duty to keep as large a block of shares as possible together, so as to have large voting power, because it may be for the interests of some of the beneficiaries—such as tenants for life of settled estates—to keep the shares. On the other hand, it is very important that the policy of the company should be wisely directed, else the shares may be valueless. In certain cases I think that this would be a true and sound reason for refusing the transfer of the shares. But in the present case I agree that upon the balance of conflicting rights and interests there is not enough to deprive the defendant, Percy James Marshall, of his primâ facie right.

Appeal allowed.

Solicitors: *Richard F. & C. L. Smith*, for *Bescoby & Williamson*, Retford; *Johnson, Weatherall & Sturt*, for *Broomhead, Wightman & Moore*, Sheffield.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WATERS *v.* BRAITHWAITE

[KING'S BENCH DIVISION (Darling, Rowlatt and Atkin, JJ.), November 19, 1913]
[Reported 110 L.T. 266; 78 J.P. 124; 30 T.L.R. 107; 24 Cox, C.C. 34]

Animal—Cow—Cruelty—Allowing cow to be overstocked with milk—Defence of custom of district—Protection of Animals Act, 1911, (1 & 2 *Geo.* 5, *c.* 27), *s.* 1 (1).

The owner of a cow was summoned under the Protection of Animals Act, 1911, s. 1, for allowing the cow to become overstocked with milk and driving her to the market, a distance of five miles, in that condition thereby causing her unnecessary suffering. The owner raised the defence of an old-established custom in the district to expose cows for sale in the local markets in this condition.

Held: the owner was guilty of the offence of cruelty within the section and the custom of the district to expose cows for sale in such a condition was no defence to the charge.

Notes. As to offences of cruelty to animals, see 1 HALSBURY'S LAWS (3rd Edn.) 707 et seq., and for cases see 2 DIGEST (Repl.) 391 et seq. For the Protection of Animals Act, 1911, see 1 HALSBURY'S STATUTES (2nd Edn.) 905 et seq.

Cases referred to:

(1) *Lewis* v. *Fermor* (1887), 18 Q.B.D. 532; 56 L.J.M.C. 45; 56 L.T. 236; 51 J.P. 371; 35 W.R. 378; 3 T.L.R. 449; 16 Cox. C.C. 176; 2 Digest (Repl.) 401, *701.*

(2) *Ford* v. *Wiley* (1889), 23 Q.B.D. 203; 58 L.J.M.C. 145; 61 L.T. 74; 53 J.P. 485; 37 W.R. 709; 5 T.L.R. 483; 16 Cox. C.C. 683; 2 Digest (Repl.) 400, *700.*

Case Stated by justices for the borough of Banbury in the county of Oxford.

At the court of summary jurisdiction sitting at Banbury on July 11, 1913, an information was preferred by Charles H. Waters, an inspector in the employ of the Society for the Prevention of Cruelty to Animals (the appellant) under the Protection of Animals Act, 1911, s. 1, against Thomas Braithwaite (the respondent) for that he, the respondent, on June 12, 1913, at the borough of Banbury unlawfully did cause to be cruelly ill-treated a certain animal, to wit, a cow by allowing the same to be overstocked with milk. The information was heard by the justices at Banbury on July 11, 1913, when they dismissed the information. Both the appellant and the respondent were represented by solicitors. At the hearing of the information evidence was called by the appellant before the justices to the effect that the respondent was a farmer and a breeder of cattle. On June 12, 1913, he caused to be walked a cow and a calf, which was muzzled, from his farm to the market at Banbury, a distance of five and a half miles. The calf was twelve days old and the cow was a heavy milker and was in full milk. When the cow arrived at Banbury Market at 11 a.m. on June 12, the udder was found to be very much distended, as also were the teats, and they were hard and hot and felt like the skin of a drum. The cow walked with her hind legs wide apart, and when she moved and her legs came into contact with the distended udder, milk was forced from the udder and it spurted from the teats. The back of the cow was arched and she had difficulty in walking and she had to be constantly struck with a stick to make her keep moving. The cow appeared to be in pain and upon the outer side of the udder, where the legs came into contact with the udder when the cow was walking, there were large red inflamed patches the size of the palm of a man's hand, due to the friction of the inside of the hind legs. The cow was overstocked with milk, but was otherwise in good condition. The teats were standing out almost at right angles and the veins extending over the udder were very prominent. The calf was muzzled and had walked into market with the cow. The appellants remonstrated with the person in charge of the cows and the muzzle was then taken off the calf and it was allowed to suckle her. The respondent stated to the appellant that the cow had not been milked since four o'clock in the afternoon on Wednesday, June 11, when her calf was allowed to suckle her, and that she was then turned into a field and the calf was shut up and kept away from the cow and that the cow was a heavy milker.

The evidence of the appellant was corroborated by several other witnesses, and two veterinary surgeons gave evidence for the prosecution that in their opinion this cow having calved twelve days before was in full milk, that cows in full milk should be milked every twelve hours, and that if they are not milked every twelve hours the udder becomes overstocked with milk which causes pain to the cows because the udder is a very sensitive organ and when it is overstocked there is a pressure on the nerve fibres, pressure on the blood vessels and pressure on the veins, which prevents the return of blood to the heart in the usual way, which results in congestion and inflammation later on and possibly the formation of an abscess, that the condition in which this cow was found at the market clearly indicated that she was overstocked, it was the condition in which one would expect to find a cow in full milk if unmilked for nineteen hours, and that for the purposes of sale it is not necessary to overstock the udder and so cause pain to demonstrate to a would-be purchaser that the cow is a good milker. On behalf of the respondent several witnesses, including farmers and two veterinary surgeons, were called, who gave evidence to the effect that the cow in question calved on May 31, 1913, and that to keep the cow unmilked for nineteen hours and drive her five or six miles into market would not cause a cow any substantial pain, and, although it was not advisable to treat a cow in full milk in this manner, it would not necessarily be detrimental to her, but it might cause discomfort, that it is advisable to milk cows in full milk every twelve hours, but the overstocking of the udder with milk would not necessarily be detrimental until the cow had remained unmilked for a period of twenty-four hours, that it is a well-known established custom among farmers throughout the country to keep cows unmilked for a like period prior to their being brought for sale into the open market and to expose them to the view of possible purchasers with their udders distended with milk, and that to interfere with the custom at all would be detrimental to the interests of the farmers unless there was an universal agreement amongst the farmers through the country to put an end to the practice. The justices were of opinion that the udder of the cow in question was overstocked with milk and the cow suffered pain in consequence, but they were satisfied that it was an old established custom in the district to expose cows for sale in the local markets in this condition, and they therefore dismissed the information.

The Protection of Animals Act, 1911, provides:

"Section 1 (1). If any person—(a) shall cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal, or shall cause or procure, or, being the owner, permit any animal to be so used, or shall, by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or being the owner, permit any unnecessary suffering to be so caused to any animal; . . .

Section 15. In this Act, except the context otherwise requires, or it is otherwise expressly provided—(a) the expression "animal" means any domestic or captive animal; . . ."

Stuart Bevan for the appellant.
The respondent did not appear.

DARLING, J. stated the facts and continued:—The owner, who had allowed the cow to be treated in this way, was summoned under s. 1 of the Protection of Animals Act, 1911. [His Lordship read the section.] The words of the section being "wantonly or unreasonably doing or omitting to do any act," what is said here is that the owner did unreasonably omit, or he did unreasonably cause or procure, the commission or omission of an act to cause unnecessary suffering to the cow. The fact that the suffering was unnecessary so far as the cow was concerned, and so far as any benefit to be done to the cow was concerned, is found in the case. He did omit to have the cow milked, which was the one thing which would have given her relief. She ought by the ordinary practice to be milked every twelve hours, and unless the owner had been going to sell her she would have been milked at least seven hours before the time when she was exposed in the market. That he prevented her from being milked is perfectly plain, for the calf

would of its natural instinct have relieved the cow without being instigated to do it by the owner. The owner knew this perfectly well, and therefore he muzzled the calf and drove the cow and calf in this condition to the market. The way that pain was brought about is indicated clearly in the case and is not in dispute; but the justices refused to convict because they said that they were satisfied that it was an old-established custom in the district to expose cows for sale in the local markets in that condition, and they therefore dismissed the information. If it be, as is stated, an old-established custom, it appears to me that it is a custom more honoured in the breach than in the observance, and it is time that it should cease. If it does cease, and if farmers know perfectly well that cows cannot be kept full of milk in order to be exposed for sale, they will find some other means of judging for themselves whether the cow is really a good milker or not. The only result will be that they may be deprived of this one method of judging.

This kind of case has been considered before. A question, not exactly the same but somewhat similar to it, was considered in the case of *Lewis* v. *Fermor* (1). The headnote in that case is:

> "A person who, with reasonable care and skill, performs on an animal a painful operation, which is customary, and is performed bonâ fide for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offence of cruelly ill-treating, abusing, or torturing the animal within the meaning of 12 & 13 Vict. c. 92 [the Cruelty to Animals Act 1849], s. 2 even though the operation is in fact unnecessary and useless."

It may be that that does express correctly the effect of the judgment, but words were certainly used by WILLS, J., who was one of the judges deciding the matter, which appear not to go to that length, because he says this (18 Q.B.D. at p. 536):

> "I think some meaning must be given to the words which will prevent such an application of the statute. In my opinion the proper view is that if the person who performs the operation entertains an honest belief that what is done will benefit the animal, he is not liable to be convicted. The belief may sometimes be erroneous, but we must be careful that we do not try to teach new, though perhaps improved, views on matters within the area of fair scientific discussion by means of the criminal law."

Nobody contends in this case that this treatment could possibly benefit the animal. What was done was found to cause pain, and unreasonably cause pain to the cow. The only justification put forward is that it was an old custom and that it was done for the supposed benefit of the seller. But that case of *Lewis* v. *Fermor* (1), even if it justifies what the headnote says, does not appear to be absolutely binding upon this court. HAWKINS, J., expressed his view of *Lewis* v. *Fermor* (1) in giving his judgment in *Ford* v. *Wiley* (2), in these words (23 Q.B.Div., at p. 225):

> "If the law were that any man or any body of men could in his or their own interests, or for his or their pecuniary benefit, cause torture and suffering to animals without legitimate reason, and could, when charged with cruelty, excuse himself or themselves upon the ground that he or they honestly believed the law justified them, though in fact it did not, it is difficult to see the limits to which such a principle might not be pushed, and the creatures it is man's duty to protect from abuse, would oftentimes be suffering victims of gross ignorance and cupidity."

That is the real point of the matter, cupidity, in this case. LORD COLERIDGE, C.J., in his judgment in the same case of *Ford* v. *Wiley* (2)—having, as he said, read the judgment of HAWKINS, J.—said (23 Q.B.Div. at p. 216):

> "Upon the decision in *Lewis* v. *Fermor* (1), we are not called upon to observe. It is upon a different operation, and is open to different considerations. But if my brother HAWKINS is right in the view which he has taken of the reasoning on that

case, I desire to say that I concur in the observations he has made upon it, and I respectfully dissent from it"

—that is, from the decision in *Lewis* v. *Fermor* (1).

It appears to me, therefore, that we are not bound to follow *Lewis* v. *Fermor* (1), if it goes as far as the headnote that I have read says; but having regard to what I have quoted from the judgment of WILLS, J., I think the headnote goes further than the decision of the court. But there appears to me in this case ample authority, upon the case of *Ford* v. *Wiley* (2), and upon the words of the statute, to enable us to come to the conclusion that, whereas in this case unnecessary suffering was caused by some act or omission of the owner of the animal (such unnecessary suffering being unnecessary in the interests of the animal, unnecessary in order to improve the health of the animal or to save the life of the animal), such act or omission could not be justified on the ground—which is the sole ground put forth here as a justification—that it is an old custom, that it is a custom which is convenient to people going to market, and that, because it is old, and because it is customary, and because it is convenient to commercial persons, the cow is not protected by the statute. I therefore think that the justices were wrong, and that the case should be sent back to them with a direction to convict.

ROWLATT, J.—I am of the same opinion. Whatever view may be taken of the case of *Lewis* v. *Fermor* (1), it certainly does not go beyond this, that it is not cruelty to inflict pain upon an animal with the bonâ fide belief that you are benefiting the animal or improving it. It certainly does not go beyond that. This present case does not present any such feature at all. It is not contended or found that the respondent had any belief that he was benefiting the cow or improving it; he was simply dressing it for market in a customary way, which is extremely cruel. And if that is prevented from being cruelty punishable by law by no other reason than that there is a custom, it would simply come to a mere custom being pleaded as an excuse for a breach of the law. That is really what it comes to. I certainly am of opinion that the case ought to go back to the justices.

ATKIN, J.—I agree.

Appeal allowed.

Solicitor: *Sydney G. Polhill.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

OAKEY *v.* JACKSON

[KING'S BENCH DIVISION (Darling, Avory and Atkin, JJ.), November 14, 1913]
[Reported [1914] 1 K.B. 216; 83 L.J.K.B. 712; 110 L.T. 41; 78 J.P. 87; 30 T.L.R. 92; 23 Cox. C.C. 734; 12 L.G.R. 248]

B

Child—Neglect—Injury to health—Refusal of father to consent to necessary operation—Children Act, 1908, (8 *Edw.* 7, *c.* 67), *s.* 12 (1).

A child under the age of sixteen years was found to be suffering from adenoids which were causing deafness and otherwise injuring her health. Her father, under whose custody, charge or control she was, refused to allow her to have an operation C to remove the adenoids and thereby remedy her condition as he did not consider it necessary and did not believe in operations. On an information being preferred before justices against the father, the justices decided that he was under no legal liability to allow the operation to be performed, and that the refusal to allow it to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Children Act, 1908, s. 12 (1).

D **Held:** as the adenoids were causing deafness (an ailment expressly mentioned in the section), and as the operation was not a dangerous one and the necessity for it had been brought to the father's attention, there was evidence to go to the justices of wilful neglect of the child by the father by not providing adequate medical aid for the child in accordance with the Children Act, 1908, s. 12 (1).

E **Notes.** The Children Act, 1908, s. 12 has been repealed. See now the Children and Young Persons Act, 1933. Section 1 (1), and s. 1 (2) (a) of the 1933 Act correspond to s. 12 of the 1908 Act.

As to cruelty to children, see 10 HALSBURY'S LAWS (3rd Edn.) 759 et seq., and for cases see 15 DIGEST (Repl.) 1033 et seq. For the Children and Young Persons Act, 1933, s. 1 see 12 HALSBURY'S STATUTES (2nd Edn.) 977.

F Case referred to:

(1) *R.* v. *Senior*, [1899] 1 Q.B. 283; 68 L.J.Q.B. 175; 79 L.T. 562; 63 J.P. 8; 47 W.R. 367; 15 T.L.R. 102; 43 Sol. Jo. 114; 19 Cox. C.C. 219, C.C.R.; 15 Digest (Repl.) 958, *9279*.

Case Stated by justices for the county of Leicestershire sitting at Melton Mowbray.

The respondent, Thomas Jackson, was summoned before the justices for the county of G Leicestershire, sitting at Melton Mowbray, upon an information preferred by the appellant, Archibald William Oakey, for that he, the said Jackson, being a person over the age of sixteen years and having the custody, charge, or care of Hilda Jackson, a child under the age of sixteen, did unlawfully and wilfully neglect the said child in a manner likely to cause unnecessary suffering or injury to health, contrary to the provisions of s. 12 (1) of the Children Act, 1908. The following facts were proved or H admitted at the hearing of the information. The respondent, a person above the age of sixteen years, was the father of the child, who was under the age of sixteen years, and he had her in his custody, charge, and care. On Jan. 15, 1913, the child was, and had for some time previously been, suffering from adenoids, which were causing mental dullness, impaired breathing, deafness, and some anæmia, and consequently the child was suffering injury to her health which required to be remedied, and the only possible I remedy was a surgical operation for the removal of the adenoids. The respondent on Jan 15, 1913, had neglected and refused, and did then neglect and refuse, to allow the child to undergo the operation necessary for the removal of the adenoids. The operation was not a dangerous one, though in all probability it would have necessitated the administration of an anæsthetic. The respondent and his wife (the mother of the child) did not consider an operation necessary, and did not believe in operations, and refused to allow the child to go to the infirmary to have the operation performed. Beyond the refusal of the respondent to allow the operation to be performed, there was no evidence of any neglect of the child.

On behalf of the appellant it was contended that the respondent had been guilty of neglect in a manner likely to cause the child unnecessary suffering or injury to its health by refusing to allow the surgical operation to be performed or by procuring proper medical aid for the child. On behalf of the respondent it was contended that the Children Act, 1908, did not contemplate the performance of a surgical operation, that the fact of an anæsthetic having to be administered naturally involved a certain amount of danger to the life of the child, that by reason of the danger involved the respondent was justified in refusing to allow the operation to be performed, and that his refusal to allow the operation or to procure medical aid did not amount to neglect within the meaning of the Act. The justices, upon a consideration of the evidence, came to the conclusion that the respondent was under no legal liability to allow the operation to be performed, and that the refusal to allow the operation to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Act. Section 12 (1) of the Children Act, 1908, provided:

> "If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, a limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable (a) on conviction or indictment, to a fine not exceeding £100, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and (b) on summary conviction, to a fine not exceeding £25, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months, and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodgings for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor."

By the general definition section of the Act, s. 131, it was provided:

> "The expression 'child' means a person under the age of fourteen years. The expression 'young person' means a person who is fourteen years of age or upwards and under the age of sixteen years. [Now seventeen years: Children and Young Persons Act, 1933, s. 107.]"

Sir Rylands Adkins for the appellant.
The respondent did not appear.

DARLING, J.—This Case has been stated by the justices in order to solve a difficulty which has arisen in their understanding s. 12 of the Children Act, 1908. [His Lordship read the material parts of the section, and proceeded:] The respondent was summoned for an offence under that section. He was the father of a child; he had the custody, charge, or care of her; and the child, who was thirteen years of age, was suffering from adenoids. As the justices have found, these adenoids were causing mental dullness, impaired breathing, deafness, and some anæmia, and the child was consequently suffering injury to her health. Deafness is one of the things expressly mentioned in the section as included in the expression injury to health. They have also found that the only possible remedy was a surgical operation for the removal of the adenoids, which operation the respondent refused to allow to be performed. That finding makes it quite clear that the matter was brought to the respondent's notice. It is further stated in the Case that the operation is not a dangerous one, but in all probability it would necessitate the administration of an anæsthetic. It was contended before the justices by the re-

A spondent that the anæsthetic might mean danger to the child's life. That is not so, as anæsthetics are administered at the present time in many quite trivial cases, and it is common knowledge that the adenoid operation is very frequently performed without any danger at all. It is also well known that if the operation is not performed the child's life may be endangered. The fact that the respondent and his wife did not believe in operations shows that their opinions cannot be accepted as carrying any B weight at all.

Since an operation was necessary, did the failure of the respondent to have it done or allow it to be done constitute neglect within the section? Does the section contemplate the performance of a surgical operation at all? When it is seen that a parent is to be deemed to have neglected his child in such a manner as to cause injury to the child's health by failing to provide medical aid, and injury to health includes "injury to or loss C of sight or hearing, or limb, or organ of the body," it is clear that the legislature had in mind certain cases in which the child might have to undergo an operation. The neglect must be "wilful," and it is as well to quote here the words of LORD RUSSELL OF KILLOWEN, C.J., in *R.* v. *Senior* (1). He says ([1899] 1 Q.B. at pp. 290, 291):

> "'Wilfully' means that the act is done deliberately and intentionally, not by D accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps."

It seems, therefore, upon the facts of this case, and applying the dictum of LORD E RUSSELL OF KILLOWEN, C.J., which I have just quoted, the respondent failed to provide, or failed to allow to be provided, adequate medical aid for his child.

We are all of opinion that the justices have not applied their minds to the proper question in the present case. In the Case Stated they say:

> "We came to the conclusion that the respondent was under no legal liability to allow F the operation to be performed, and that the refusal to allow such operation to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Act."

That begs the whole question. If the refusal to allow the operation to be performed was a failure to provide adequate medical aid, the respondent was under a legal liability to allow it to be carried out. Whether such refusal is or is not a failure to provide G adequate medical aid is a question which must depend upon the facts of each particular case, and in arriving at a decision upon this point the justices must consider the nature of the operation and the reasonableness of the parent in refusing to have it performed. On the facts as stated here, the justices might very well have come to a decision that such an operation as the removal of adenoids was one of so simple a character that no reasonable person ought to have objected to it, and that the refusal to allow of its per- H formance, when the non-performance was injurious to the child's health, was such a wilful neglect, by not providing adequate medical aid, on the part of the respondent that they might properly have convicted him. However, as I have already said, the question is one for the justices to decide, and the case must go back to them for further consideration.

I **AVORY, J.**—I am of the same opinion, and I only wish to add that in arriving at their decision the justices must take into consideration who is the person who advises that the operation should be performed; whether he is a properly qualified medical man or merely some irresponsible person.

ATKIN, J.—I agree.

Case remitted to justices.

Solicitor: *W. J. Freer.*

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS

[COURT OF APPEAL (Buckley and Hamilton, L.JJ.), February, 1, 13, 1913]
[Reported [1913] P. 80; 82 L.J.P. 57; 108 L.T. 397; 29 T.L.R. 288]

B

Restitution of Conjugal Rights—Charge of adultery against respondent—Relevance—Right of respondent to have charge struck out.

A wife petitioned for restitution of conjugal rights. The husband in his answer denied that he had withdrawn from cohabitation without just cause, and alleged that the wife had committed adultery, but he did not ask for relief. In her reply the wife denied the allegation of adultery and counter-charged the husband with adultery. The husband took out a summons asking that the paragraphs in the wife's reply relating to the allegation of adultery against him should be struck out as being irrelevant.

C

Held: the allegation of adultery contained in the wife's reply was not an allegation in support of her case as she had no greater right of restitution by reason of the husband's adultery, nor was it by way of rebuttal of the husband's case as the canon law doctrine of paria crimina mutuâ compensatione did not apply; and, therefore, the paragraphs in the wife's reply charging the husband with adultery were irrelevant and should be struck out.

D

Seaver v. *Seaver* (1) (1846), 2 Sw. & Tr. 665, overruled.

Notes. The Matrimonial Causes Acts, 1857, and 1884, have been repealed. See now the Matrimonial Causes Act, 1950. Section 15 of the 1950 Act gives the court power to make a decree for restitution of conjugal rights and by s. 14 (1) failure to comply with such a decree is one of the grounds on which a decree of judicial separation may be pronounced.

E

It is relevant to note that prior to the Matrimonial Causes Act, 1923, a wife was only able to obtain a divorce a vinculo matrimonii on proof of adultery by her husband coupled with another matrimonial offence; desertion without cause for two years was one of these offences and by s. 5 of the Matrimonial Causes Act, 1884, failure to comply with a decree of R.C.R. was deemed to be desertion without reasonable cause and was of itself a ground for granting a decree of judicial separation.

F

Considered: *Herod* v. *Herod*, [1938] 3 All E.R. 722. Referred to: *Wickins* v. *Wickins* (No. 2), [1918] P. 282; *Welton* v. *Welton*, [1927] P. 162.

As to the effect of adultery on decree of restitution, see 12 HALSBURY'S LAWS (3rd Edn.) 311, and for cases see 27 DIGEST (Repl.) 440–441. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

G

Cases referred to:

(1) *Seaver* v. *Seaver* (1846), 2 Sw. & Tr. 665.

(2) *Kirby* v. *Kirby* (1801), 2 Curt. p. 214, n.; 163 E.R. 389; 27 Digest (Repl.) 485, *4241.*

H

(3) *Hope* v. *Hope* (1859), 1 Sw. & Tr. 94; 27 L.J.P. & M. 43; 31 L.T.O.S. 138; 22 J.P. 308; 4 Jur.N.S. 515; 6 W.R. 585; 164 E.R. 644; 27 Digest (Repl.) 440, *3709.*

(4) *Proctor* v. *Proctor* (1819), 2 Hag. Con. 292; 161 E.R. 747; 27 Digest (Repl.) 440, *3699.*

I

(5) *Wilson* v. *Glossop* (1888), 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707; 52 J.P. 246; 36 W.R. 296; 4 T.L.R. 239, C.A.; 27 Digest (Repl.) 193, *1527.*

(6) *Russell* v. *Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 213; 11 T.L.R. 579; 39 Sol. Jo. 722, C.A.; on appeal, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 356, *2948.*

(7) *Covier* v. *Hancock* (1796), 2 C. & P. 25, n.; 6 Term Rep. 603; 101 E.R. 726; 27 Digest (Repl.) 193, *1518.*

(8) *R.* v. *Flintan* (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest (Repl.) 233, *255*.

Appeal from an order made by BARGRAVE DEANE, J. in chambers.

On Dec. 27, 1911, a wife filed a petition for restitution of conjugal rights. The husband filed an answer alleging that he had not withdrawn from cohabitation with his wife without just cause, and alleged that she had been guilty of adultery, but he himself did not ask for any relief. The wife in paras. 1 and 2 of her reply denied the allegation of adultery, and alleged by paras. 3 to 7 that the husband had been guilty of adultery, and prayed the same relief as before. The husband took out a summons asking that the paragraphs which alleged that he had been guilty of adultery might be struck out as being irrelevant. The registrar dismissed this summons, but on appeal to the judge, BARGRAVE DEANE, J., allowed the appeal and made an order striking out the paragraphs to which the objection was taken. The wife appealed.

P. Wippell for the wife.

Le Bas for the husband.

Cur. adv. vult.

February 13, 1913. **BUCKLEY, L.J.**—In this case the wife presented her petition for restitution of conjugal rights. The husband pleaded the wife's adultery in bar, but claimed no relief based upon the allegation. The wife replied by alleging the husband's adultery. The allegations are contained in paras. 3 to 7 of the reply. The order under appeal is one striking out those paragraphs. The question is whether that order was right.

The allegation of the husband's adultery ought to be allowed to remain in the reply if it be relevant, and ought to be struck out if it be irrelevant. The question is whether it is relevant or not. It will be relevant only if it be either, first, an allegation in support of the wife's case, or, secondly, an allegation by way of rebuttal of the husband's case. An allegation of the husband's adultery is no ground in support of the wife's petition for restitution of conjugal rights. She has no greater right of restitution by reason of the fact that the husband has committed adultery. The allegation is, therefore, not one in support of her case. Neither is it relevant by way of rebuttal of the husband's case unless the doctrine of the canon law is admissible as expressed in the words paria crimina mutuâ compensatione debentur or mutuâ compensatione ambo adulteria abolentur.

I have nothing here to do with connivance or condonation. The question is whether the guilt of the wife is to be considered as abolished by the guilt of the husband so as to restore the wife to the condition of an innocent person with reference to her conjugal rights. Can a wife guilty of adultery say that she is recta in curiâ because her husband also is guilty? In 1801, in *Kirby* v. *Kirby* (2), the wife having brought her suit for restitution of conjugal rights, the husband pleaded adultery by the wife in bar, and also prayed separation. The wife replied denying the adultery and recriminating adultery against him. The allegation was allowed to stand. But the case does not assist in the solution of the present case. The husband had there prayed relief, and to that relief the allegation was relevant. In *Seaver* v. *Seaver* (1), in the year 1846, the point to be decided in the present case arose in Ireland. The matter was carried to the Court of Delegates, and they held that the doctrine of the canon law was incorporated into our law. The grounds of the decision I think were that, inasmuch as the law as it stood at that time knew no middle term between legal separation by divorce and the continuance of the matrimonial duties with all their consequences, it followed that if both parties had been guilty of adultery, so that neither could obtain a divorce against the other, there remained the duty of consortium vitæ, and it was this obligation which the wife was by her petition seeking to enforce. If this were so, the recrimination by the wife of the husband's adultery was relevant. The Irish court gave the wife a decree for restitution of conjugal rights where both parties had been guilty of adultery, and did it upon the footing that no mutual crime or mutual compact could release or suspend the obligation of the marriage vow; that, inasmuch as neither could obtain a divorce against the other, there existed an obligation enforceable in law to give conjugal rights.

In *Hope* v. *Hope* (3), in the year 1858, the same point was decided the other way in England by CRESSWELL, J. At that date *Seaver* v. *Seaver* (1) had not been reported, and is not referred to in *Hope* v. *Hope* (3). The decision in *Hope* v. *Hope* (3) was that the husband's adultery was no ground for enabling a guilty wife to sustain a suit for the restitution of conjugal rights. In other words, *Hope* v. *Hope* (3) decided that in a case such as the present the allegation of the husband's adultery was irrelevant. The Judge Ordinary, after referring to the decision of LORD STOWELL in *Proctor* v. *Proctor* (4), where LORD STOWELL pointed out that the canon law acknowledged no intermediate state between a cohabitation and a formal separation, and therefore presumed when it withheld its divorce of separation that the parties will return to cohabitation, went on to say that, if the canon law bound the courts of this country, the passages which he had cited would show that the wife in such a case as the present was entitled to a decree, but he holds expressly that under such circumstances as exist in *Hope* v. *Hope* (3), and as exist in the present case, a decree for restitution of conjugal rights could not at any time have been obtained, and he states the result of his investigation of the question as follows (1 Sw. & T. at p. 108):

> "I find in a decretal of Gregory IX, an assertion that an adulterous wife was entitled to be received by her husband, if he also had been guilty of a similar offence, and this is mentioned as the law by several canonists: LANCELLOTTUS; SANCHEZ, DE MATRIMONIO; and AYLIFFE (in his PARERGON). I do not find any instance in which the law so laid down has been adopted and acted upon as part of the ecclesiastical law of this land."

Hope v. *Hope* (3) is an express decision against the contention of the wife in the present case without the addition of the ground presently stated. In *Wilson* v. *Glossop* (5) the subject is dealt with in a judgment of CAVE, J., but that case turned upon connivance of the husband. In *Russell* v. *Russell* (6) LOPES, L.J. ([1895] P. at p. 330), discusses *Seaver* v. *Seaver* (1) at some length; but *Hope* v. *Hope* (3) seems not to have been drawn to the attention of the court. I cannot find that it was cited or mentioned at all. As regards *Seaver* v. *Seaver* (1), the lord justice points out that the Matrimonial Causes Acts, 1857, and 1884, have introduced the middle state whose non-existence at the date of *Seaver* v. *Seaver* (1) was the ground of the decision in that case. Section 15 of the Act of 1857 had for the first time made desertion a ground for judicial separation, and s. 5 of the Act of 1884 had introduced as a consequence of a decree for restitution of conjugal rights a right in the petitioner to institute a suit for judicial separation. Whatever might have been the disposition of the court in England towards the decision in *Seaver* v. *Seaver* (1) before those Acts, the ground of the decision itself seems to me to be by the decision in *Russell* v. *Russell* (6) recognised as being now removed, and whether in choosing between *Seaver* v. *Seaver* (1) and *Hope* v. *Hope* (3) the former would have been regarded as good law in England before those Acts, it cannot, in my opinion, be so regarded now.

If I am right in the above respects, it follows that the wife's allegations in paras. 3 to 7 of her reply are not relevant and the order striking them out is right. In my judgment the decision under appeal is right and this appeal should be dismissed.

HAMILTON, L.J.—I am of the same opinion. The wife alleges that if her reply stands, she can at the hearing prove adultery against the husband, and can thereby in law answer his allegation of adultery against herself and remove the bar which her adultery would constitute to her claim for restitution of conjugal rights. The competence of her reply admittedly rests on the applicability of the Irish case of *Seaver* v. *Seaver* (1) as a decision which should be followed in an English court. We cannot prevent her from raising this case by striking out this part of her reply, unless it is clear that in law her allegations of adultery against her husband are in these proceedings immaterial. The whole question accordingly is: Does the rule laid down in *Seaver* v. *Seaver* (1) apply to English divorce law since the statutory changes of 1857 and 1884?

It is unnecessary on this occasion to discuss the soundness of the rule laid down in that case or the relative authority of *Hope* v. *Hope* (3), which, following *Govier* v.

Hancock (7) and *R.* v. *Flintan* (8), laid down a contrary rule. *Seaver* v. *Seaver* (1), after being referred to without question in the Divisional Court in 1887 in *Wilson* v. *Glossop* (5), was in this court in 1895 expressly treated as rightly decided in *Russell* v. *Russell* (6). But the decision of that case, by the unanimous judgment of this court upon the wife's claim for restitution of conjugal rights, proceeded upon the ground that since the Matrimonial Causes Act, 1884, supervening upon the changes produced by the Matrimonial Causes Act, 1857, the reasoning adopted in *Seaver* v. *Seaver* (1), and therefore the rule laid down in it, have no longer any application in England. I think we must follow the view expressed in *Russell* v. *Russell* (6). It is true that, in his opinion in the House of Lords on the husband's appeal from the Court of Appeal, LORD HALSBURY expressed his dissent from the view taken in this court of the Act of 1884, but, as the wife had abandoned her appeal, the matter was not before the House, and the decision of this court remains binding upon us.

Seaver v. *Seaver* (1) decided that the wife is permitted in proceedings for restitution to recriminate her husband's adultery, because, as the law sanctions no alternative to cohabitation short of a divorce a mensâ et thoro, it must, in a case where the husband has committed a matrimonial offence and therefore cannot be so divorced, find some means whereby it can properly decree to the wife restitution of her conjugal rights. It does so by applying to restitution the canonists' doctrine of compensatio criminis, and by allowing the wife to reply by alleging adultery against her husband and so cancel his proof of adultery against her, and place herself in as good a position to claim restitution as if she had remained chaste. Having no discretion to refuse restitution, when it cannot decree separation a mensâ et thoro, a court Christian exercising jurisdiction in a matrimonial cause must allow the wife thus to answer the husband's charge.

Russell v. *Russell* (6) decided that legislative changes have since 1857 removed the exclusive opposition of restitution and of judicial separation, and since 1884 have given the court a discretion, which enables it to refuse restitution to the one spouse, even though it also refuses judicial separation to the other. It accordingly decides that the reasoning of *Seaver* v. *Seaver* (1) is no longer sound in England, and, by consequence, where the husband charges adultery, not as a ground for divorce which he does not claim, but as an answer to his wife's claim for restitution, that issue is independent of his own misconduct. Even in a case where, as here, he does not ask, or as in *Russell* v. *Russell* (6) cannot get, substantive relief, he can bar her claim by proof of her misconduct, and recrimination of his adultery on her part is irrelevant, because it leads to nothing. The court will not now treat a wife as innocent who is proved to be guilty, because it is no longer constrained to do so by the inexorable alternative of restitution of conjugal rights to a wife whom her husband cannot divorce. Hence this reply alleges matter that is not material to any issue in this proceeding. It may be added that the introduction of such a reply might in itself be much abused. In my opinion the decision of BARGRAVE DEANE, J., was right and the appeal must be dismissed.

Solicitors: *De la Chapelle & Co.*; *Milner & Bickford.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

R. *v.* RODLEY

[Court of Criminal Appeal (A. T. Lawrence, Bankes and Atkin, JJ.), June 30, July 19, 1913]

[Reported [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69]

B

Criminal Law—Burglary with intent to commit felony—Rape—Evidence of subsequent immoral conduct—Application of proviso to Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

C

The appellant was indicted for burglary with intent to commit rape and raised the defence that he was admitted to the house by the prosecutrix, whom he was courting. At the trial evidence was given by a woman living nearby that the appellant gained access to her bedroom by way of the chimney later the same night, and had intercourse with her with her consent. The prisoner contended that this evidence was inadmissible as not being relevant to the facts in issue.

D

Held: (i) at the point in the trial at which the evidence was tendered the defences put forward by the appellant were that the appellant did not break into the prosecutrix's house, that he had no intent to commit rape, and that the prosecutrix's account of what happened in the house was untrue; the evidence objected to was not relevant to any of those issues; and, therefore it was wrongly admitted: (ii) the court would not act on the proviso to s. 4 of the Criminal Appeal Act, 1907, and say that in spite of the admission of the evidence there had been no substantial miscarriage of justice in any case in which it appeared that the jury might have been influenced by the evidence wrongly admitted; in the present case the jury might have been influenced by the evidence which should not have been admitted; and, therefore, the proviso would not be applied.

E

F

Notes. The Larceny Act, 1861, s. 54 has been repealed. See now the Larceny Act, 1916, s. 25 (1).

Considered: *R.* v. *Buresion* (1914), 11 Cr. App. Rep. 39; *R.* v. *Kurasch*, [1915] 2 K.B. 749. Referred to: *R.* v. *Jones* (1922), 127 L.T. 160.

As to evidence of similar acts, see 10 Halsbury's Laws (3rd Edn.) 443 et seq., and for cases see 14 Digest (Repl.) 416 et seq. For the Larceny Act, 1916, s. 25 (1) see 5 Halsbury's Statutes (2nd Edn.) 1026.

G

Cases referred to:

(1) *R.* v. *Mean* (1904), 69 J.P. 27; 21 T.L.R. 172, C.C.R.; 14 Digest (Repl.) 443, *4300*.

(2) *R.* v. *Fisher*, [1910] 1 K.B. 149; 79 L.J.K.B. 187; 102 L.T. 111; 74 J.P. 104; 26 T.L.R. 122; 22 Cox, C.C. 270; 3 Cr. App. Rep. 176, C.C.A.; 14 Digest (Repl.) 420, *4095*.

H

(3) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(4) *R.* v. *Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, *4091*.

I

(5) *R.* v. *Ball*, *R.* v. *Ball*, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P.* v. *Ball* (*No. 2*), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, *4138*.

Also referred to in argument:

R. v. *Cruse* (1838), 8 C. & P. 541; 2 Mood.C.C. 53; 14 Digest (Repl.) 71, *326*.

R. v. *Tucker* (1844), 1 Cox, C.C. 73; 15 Digest (Repl.) 1131, *11,325*.

A *R.* v. *Rhodes*, [1899] 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 62 J.P. 774; 47 W.R. 121; 15 T.L.R. 37; 43 Sol. Jo. 45; 19 Cox, C.C. 182, C.C.R.; 14 Digest (Repl.) 438, *4245*.

Appeal against a conviction at Caermarthen Assizes before LORD COLERIDGE, J., for burglary with intent to rape. The appellant was sentenced to seven years' penal
B servitude.

The material facts in the case were that on the night of the occurrence the prosecutrix heard a noise in the house between 1 and 2 a.m. and found the appellant coming upstairs with his boots off. On her shouting he went downstairs into the kitchen. She struck at him with a stick and, on recognising him and calling him by name, he violently assaulted her and attempted to have connection with her against her will, but on her father, an old
C man, coming downstairs, the appellant ran away. There was evidence of a forcible entry into the house. The appellant was arrested a few days after the alleged occurrence, but denied having been to the house in question at all. Before the magistrates, a woman who lived near gave evidence to the effect that about 2 a.m. on the same morning the appellant gained access to her bedroom by coming down the chimney, and then had connection with her with her consent. The defence put forward by the appellant at
D the trial was that he was admitted into the house by the prosecutrix, whom he was courting.

T. W. Langman for the appellant.
E. M. Samson for the Crown.

Cur. adv. vult.

July 19, 1913.—The following judgment of the court was read by

E **BANKES, J.**—The appellant was tried at Caermarthen Assizes before LORD COLERIDGE, J., upon an indictment which charged him with having on April 20 last, in the night time, broken and entered the dwelling-house of John Jones with intent to commit a felony—i.e., with intent to ravish one Annie Gwendoline Jones.

[HIS LORDSHIP stated the facts and continued:] The appellant was arrested a few days after the alleged occurrence, when he denied that he had been at the house at all.
F Before the magistrates the appellant stated that he called no witnesses and that he had nothing to say. Before the magistrates a woman was called as a witness, who gave evidence that about two o'clock on the same morning as that deposed to by Annie Gwendoline Jones the appellant came to her house, where she lived alone, and gained access to her bedroom by coming down the chimney, and that he then had connection with her with her consent. Her house was about three miles distant from that of
G Annie Jones.

At the trial before LORD COLERIDGE, J., the appellant was defended by counsel. The first witness called was Annie Gwendoline Jones. She was cross-examined with a view of establishing that the appellant came into the cottage by her permission, and that nothing of the kind suggested by the witness had taken place, and that the appellant had merely "courted" her, and that whatever took place in the kitchen was consented
H to by her. After the father had been called to corroborate his daughter's evidence, the woman to whose house the appellant subsequently went was called and deposed to the facts stated above. The appellant's counsel now contends that this woman's evidence ought not to have been admitted, and that the conviction cannot stand.

In recent years the question as to the admissibility upon a criminal trial of evidence of the commission by the accused of a previous or a subsequent offence has been fre-
I quently before the courts, and as these decisions have a direct bearing upon the present case it may be convenient to collect together in one report the various rules which have been formulated by which the admissibility of such evidence may be tested. In *R.* v. *Mean* (1) WILLS, J., called attention to a rule which is sometimes overlooked—that the laws of evidence are the same in civil and in criminal cases. In *R.* v. *Fisher* (2) CHANNELL, J., says ([1910] 1 K.B. at p. 152):

> "The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a

person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence."

As there pointed out by CHANNELL, J., the governing rule must always be that any evidence to be admissible must be relevant to the issue. The most recent decisions which lay down rules by which the relevancy of evidence tending to prove offences other than those covered by the indictment, may be tested, are the following: In *Makin* v. *A.-G. for New South Wales* (3) LORD HERSCHELL, L.C., lays down the rule in these words ([1894] A.C. at p. 65):

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *R.* v. *Bond* (4), both DARLING and BRAY, JJ., call attention to the fact that LORD HERSCHELL, L.C.'s, last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words should be read with that limitation. In the same case BRAY, J., says that a careful examination of the cases where such evidence has been admitted show that they may be grouped under three heads: (i) Where the prosecution seeks to prove a system or course of conduct; (ii) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; (iii) Where the prosecution seeks to prove knowledge by the prisoner of some fact. In their judgments in this case it is pointed out by several of the learned judges who formed the majority of the court, that a single prior act of a like criminal nature would, in general, not be admissible as evidence of a system. In the more recent case of *R.* v. *Ball* (5) the Lord Chancellor, in speaking of the grounds upon which he held that the evidence there objected to was admissible, says ([1911] A.C. at p. 71):

"Further evidence was then tendered to show that these persons had previously carnally known each other and had a child in 1908. The object was to establish that they had a guilty passion towards each other, and that, therefore, the proper inference from their occupying the same bedroom and the same bed was an inference of guilt or—which is the same thing in another way—that the defence of innocent living together as brother and sister ought to fail."

The first ground given by the Lord Chancellor for the admissibility of the evidence suggests an extension of the rules indicated in the cases above referred to, but the second ground comes within the rule previously indicated that the evidence is admissible to rebut a defence really in issue.

In summing up to the jury in the present case the learned judge, in referring to the evidence which is now objected to, puts the case in this way. He says:

"Then he [the appellant] goes away, and the next thing that is heard is, that hardly a stone's throw off the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he is raging with lust, and that being foiled as regards the prosecutrix, Miss Jones, he immediately went to

gratify his passion upon the woman whom he knew would not be unwilling to yield."

Is the evidence objected to admissible upon the ground thus indicated by the learned judge, or under any of the rules formulated in the cases above referred to? This court is of opinion that the evidence is not admissible. At the point in the trial at which the evidence was tendered, the defences put forward were: (i) that the appellant never broke into the house at all; (ii) that the appellant did not break into the house with any intention of committing a rape; (iii) that the story of the prosecutrix as to what occurred in the house was not true. The evidence which was objected to was not, in the opinion of this court, relevant to any of these issues, and was not, therefore, admissible to rebut any of the above defences. If the jury believed the evidence of the prosecutrix, the only issue was whether, in the opinion of the jury, the acts of the appellant amounted to an attempt to rape, and whether from his acts the jury would infer that the appellant broke into the house with the intention of committing a rape. In the opinion of this court, upon neither of those issues was the evidence objected to relevant. The conclusion, therefore, arrived at by this court is that the evidence objected to was not admissible on any ground, and ought to have been rejected.

The question then arises whether this is a case in which this court can take advantage of the proviso to s. 4 of the Criminal Appeal Act, 1907, and say that in spite of the admission of the evidence, there has been no substantial miscarriage of justice. Upon this question the Court of Criminal Appeal is always at somewhat of a disadvantage compared with the judge who heard the case and who saw the witnesses, and was acquainted with the impression made by those witnesses upon the jury. The rule adopted by this court, however, has been that it will not act upon the proviso in any case in which it appears to them clear that the jury may have been influenced by the evidence wrongly admitted. The court is unable in the present case and upon the materials before it to say that the jury may not have been so influenced, and their decision, therefore, is that the conviction must be quashed.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

A

Re WEST. WESTHEAD *v.* ASPLAND

[CHANCERY DIVISION (Warrington, J.), July 4, 1913]
[Reported [1913] 2 Ch. 345; 82 L.J.Ch. 488; 109 L.T. 39]

B

Will—Legacy—Interest—Contingent legacy—Provision for maintenance out of legacy—Other property available under will for maintenance of legatee—Date from which interest payable on contingent legacy.

The rule that where a legacy is given contingent upon a future event, with a provision for maintenance of the legatee out of it, the legacy carries interest as from the death of the testator does not apply in a case where other property has been given by the will not contingent upon a future event, which is available for the maintenance of the legatee. Consequently, in such a case the contingent legacy bears interest only from the date on which it is payable.

C

Notes. As to legacies to infants, see 16 HALSBURY'S LAWS (3rd Edn.) 324 et seq., and for cases see 23 DIGEST (Repl.) 459 et seq.

Cases referred to:

D

(1) *Pett* v. *Fellows* (1733), 1 Swan. 561; 36 E.R. 505, L.C.; 23 Digest (Repl.) 464, *5364.*
(2) *Leslie* v. *Leslie* (1835), L. & G. temp. Sugd. 1; 23 Digest (Repl.) 463, **1170.*
(3) *Re Churchill, Hiscock* v. *Lodder*, [1909] 2 Ch. 431; 79 L.J.Ch. 10; 101 L.T. 380; 53 Sol. Jo. 697; 23 Digest (Repl.) 465, *5376.*

Adjourned Summons to determine inter alia the date from which a certain legacy should carry interest.

E

By her will, made in 1907, Martha Ellen West, of Croydon, who died in February, 1912, after appointing executors and an executrix, bequeathed to the executrix a legacy of £100 to be paid to her immediately after the testatrix's decease, and to be applied in or towards the maintenance and education of the testatrix's grandnieces, Alice E. F. Aspland and Amy Aspland. By cl. 5 the testatrix bequeathed £450 free of legacy duty to each of these grandnieces, if they should respectively attain the age of twenty-one years, but so that the executors should be at liberty in their discretion to apply the whole or any portion of the legacies in or towards the maintenance and education of the grandnieces. By cll. 6, 7, and 8 she bequeathed various pecuniary legacies to other persons, declaring that, if any of the legatees named in cl. 8 should die in her life-time, the legacy of such person should go to the above-mentioned grandnieces in equal shares, if they should respectively attain the age of twenty-one years, and should be subject to the same direction and discretion as declared in cl. 5 concerning the legacies of £450. By cl. 13 the testatrix devised and bequeathed her real and personal estate not otherwise disposed of to trustees upon trust for sale and conversion, and to hold the net proceeds thereof, after payment of funeral and testamentary expenses and debts, upon trust for a niece of the testatrix and her said grandnieces equally, the shares of the grandnieces to be subject to the same directions and discretions as declared in cl. 5 concerning the legacies of £450. By a first codicil made in December, 1909, after reciting that Alice E. F. Aspland had died, the testatrix declared that cl. 5 of her will should be varied as follows:

F

G

H

"I bequeath the sum of £900 free of legacy duty unto Amy Aspland, if she shall attain the age of twenty-one years, but so that my executors shall be at liberty in their absolute discretion to apply the whole or any portion of the said legacy in or towards the maintenance and education of the said Amy Aspland with power either themselves so to apply the same or to pay the same to the person or persons in whose custody or power she shall be for the time being, whether such person or persons shall be the legal guardians of the said Amy Aspland or not, without being bound to see to the application thereof, and so that, in the event of the said Amy Aspland dying before the age of twenty-one years, the legacy hereby bequeathed to her, or such part thereof as shall not have been applied in or towards her maintenance and education, shall go into and form part of my residuary estate."

I

By a third codicil, dated April 11, 1911, the testatrix revoked the gift of residue contained in cl. 13 of her will, and in lieu thereof she directed her trustees to stand possessed of the residue of the proceeds of sale of her residuary estate upon trust for Amy Aspland if she should attain the age of twenty-four years, but so that until she attained that age the trustees should be at liberty to apply the whole or any portion of the income thereof in or towards the maintenance or education of Amy Aspland. And in the event of Amy Aspland dying under that age the proceeds of sale were to be divided among certain persons mentioned. By a fourth codicil, dated Jan. 22, 1912, the textatrix bequeathed to Amy Aspland the money standing at the testatrix's decease to her credit at her bankers, and also devised to Amy Aspland and her heirs a freehold messuage at North Croydon. Alice E. F. Aspland and Amy Aspland had lived with the testatrix, the former till her death in 1909, the latter till the death of the testatrix; but this fact was not relied on on her behalf at the hearing. Amy Aspland was thirteen years old at the death of the testatrix. There was some doubt whether the residuary estate would be sufficient to pay all the legacies in full.

The summons, taken out by one of the executors and trustees (the others being defendants), asked, inter alia, whether the legacy of £900 carried interest from the death of the testatrix, or only from the end of one year after her death, or from what other date.

W. M. Hunt for the summons.

E. M. Winterbotham for the defendant Amy Aspland.

Clauson, K.C., and *R. Wright Taylor* for one of the pecuniary legatees.

WARRINGTON, J.—The question in this case is whether a particular legacy which is contingent on the legatee attaining twenty-one years carries interest from the date of the death of the testatrix or from the date when the legatee attains twenty-one years. Primâ facie such a legacy would not carry interest until the legatee attains twenty-one years. But the testatrix in this case has added to the gift of the legacy this provision,

> "but so that my executors shall be at liberty in their absolute discretion to apply the whole or any portion of the said legacy in or towards the maintenance and education of the said Amy Aspland"

(the legatee).

The question is whether interest is payable at once, notwithstanding that the legacy itself is not payable until a future date, by reason of the discretion given to the executors to apply the legacy for the benefit of the legatee. If it were not shown that there was other provision made by the will for the maintenance of the legatee, there would be an expression of intention that the legatee was to be maintained out of the legacy, and consequently the legacy would carry interest from the death. I think that follows from *Pett* v. *Fellows* (1), as explained by SUGDEN, L.C., in *Leslie* v. *Leslie* (2), and from *Re Churchill, Hiscock* v. *Lodder* (3). But that is not the same question as that which arises here, because in those cases no other provision was made for the maintenance of the legatee, and the testator consequently showed an intention that the legatee should be maintained out of the particular legacy, and out of the particular legacy alone. But in the present case the testatrix has made other provisions for the maintenance of the legatee—for example, the gift of the bank balances of £3,709 19s. 1d., which is not dependent on her attaining the age of twenty-one years. That, I think, distinguishes the present case from the cases I have mentioned. The real question is, Can the intention that the legacy should carry interest, which is presumed where a testator merely gives a future legacy with a power to the executors to maintain the legatee out of the legacy, also be presumed in a case where a testator, in addition to such a future legacy, makes provision for the maintenance of the legatee out of some other fund? I think not.

I hold, therefore, that the legacy only carries interest from the time when the legatee attains the age of twenty-one years.

Solicitors: *Terrell & Varley*; *Official Solicitor*; *Peacock & Goddard*, for *Rowland & Hutchinson*, Croydon.

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law.*]

A

SHAW *v.* TATI CONCESSIONS, LTD.

[CHANCERY DIVISION (Swinfen Eady, J.), January 30, 1913]
[Reported [1913] 1 Ch. 292; 82 L.J.Ch. 159; 108 L.T. 487; 29 T.L.R. 261; 57 Sol. Jo. 322; 20 Mans. 104]

B

Company—Meeting—Voting—Postponement of poll—Need for lodgment of proxies before original meeting.

Where a poll is demanded at a meeting of a company and is fixed at a future date there is no adjourned meeting, but the original meeting continues for the purpose of taking the poll until the poll is closed. Proxies which have not been obtained and lodged within the prescribed time before the original meeting are not available. C

Notes. Applied: *Jackson* v. *Hamlyn*, [1953] 1 All E.R. 887. Considered: *Holmes* v. *Lord Keyes*, [1958] 2 All E.R. 129.

As to proceedings at meetings, see 6 HALSBURY'S LAWS (3rd Edn.) 337 et seq., and for cases see 9 DIGEST (Repl.) 598 et seq.

Cases referred to in argument: D

R. v. *Wimbledon Local Board* (1882), 8 Q.B.D. 459; 51 L.J.Q.B. 219; 46 L.T. 47; 46 J.P. 292; 30 W.R. 400, C.A.; 42 Digest 702, *1187*.

Re Caratal (New) Mines, Ltd., [1902] 2 Ch. 498; 71 L.J.Ch. 883; 87 L.T. 437; 50 W.R. 572; 18 T.L.R. 640; 9 Mans. 414; 9 Digest (Repl.) 608, *4035*.

Motion that the defendant company and its directors might be restrained from using at a poll of the shareholders of the company to be held at the forthcoming meeting any proxy which was not lodged at the registered office of the company pursuant to art. 82 of its articles of association for at least forty-eight hours before the time fixed for holding the annual general meeting of the company which was held on Dec. 20, 1912, and from soliciting or obtaining for use at the said poll any further proxies from shareholders of the defendant company and from acting on any resolution passed by the use of proxies not so lodged. E F

The articles of association of Tati Concessions, Ltd. provided:

"74. If a poll is demanded . . . it shall be taken in such manner and at such time and place as the chairman of the meeting directs, and either at once or after an interval or adjournment, or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. G

75. The chairman of a general meeting may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

76. The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded. H

82. The instrument appointing a proxy and the power of attorney (if any) under which it is signed shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting (as the case may be) at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution." I

On Dec. 11, 1912, notice was given that the eighteenth ordinary general meeting would be held on Dec. 20, at 11 a.m., to receive the accounts, elect directors in place of those retiring by rotation, and to transact the ordinary business. A report was annexed, stating that after this business the meeting would be adjourned to a date to be announced later for the purpose of hearing the views of Mr. Temby, the director in charge of the company's property, upon his return. No opposition to the proposed resolutions had

A been anticipated, and the directors had not obtained any proxies. The plaintiff and Frederick Walker lodged proxies representing 58,000 shares more than forty-eight hours before the meeting, and, when the resolution to adopt the accounts was moved, Walker moved an amendment that the accounts be received and not adopted. The amendment was defeated by twelve votes to nine, but a poll was demanded and fixed by the chairman for Jan. 31. The question of adjournment was discussed, but not put B to the meeting. The plaintiff and Walker could have prevented an adjournment. Five of the directors treated fixing the poll for Jan. 31, 1913, as an adjournment ad hoc, and obtained and lodged proxies representing 99,245 shares.

Russell, K.C., and *H. E. Wright* for the plaintiff.
Gore-Browne, K.C., and *Sheldon* for the defendant.

C **SWINFEN EADY. J.**—The statement of the chairman that the meeting had been adjourned for the purpose of taking a poll was an erroneous view of the legal position. There had not in fact been any adjournment. Since the meeting it had come to the plaintiff's knowledge that the directors were obtaining proxies to be used at the poll; hence the present motion for injunction. The question is, having regard to art. 82, did the appointment of a future date for taking a poll constitute an adjournment of the D meeting? It is contended that the board had from Dec. 20 until forty-eight hours before eleven o'clock on Jan. 31 in which to secure proxies in their favour. The chairman has said that the meeting was adjourned for taking the poll only, but that is not accurate; there was no adjournment, and I am satisfied that there was no resolution for adjournment. The true position is this: The original meeting continued for the purpose of taking the poll until the poll was closed. Therefore the proxies obtained later E were not available and the plaintiff succeeds. In my opinion on the construction of art. 82 a proxy to be valid must be deposited forty-eight hours before the time originally appointed for holding the meeting, unless the meeting was duly adjourned by its consent, in which case more proxies might be lodged. Fixing a date for the poll is not an adjournment, but the original meeting continues until the close of the poll. It follows that proxies lodged since the date of the original meeting are invalid, and there must be F an injunction against their use as prayed.

Solicitors: *Frederick Walker & Co.*; *Flux, Leadbitter & Neighbour.*

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

Re J. AN INFANT

[CHANCERY DIVISION (Sargant, J.), April 10, 15, 1913]
[Reported 108 L.T. 554; 29 T.L.R. 456; 57 Sol. Jo. 500]

Contempt of Court—Ward of court—Removal out of the jurisdiction—Removal at solicitation of ward—Ignorance that girl was ward of court and of meaning of that expression.

It is no answer to a motion for committal to prison for contempt of court in removing a ward of court out of the jurisdiction to say that the act was done on the solicitation of the ward, and that, although there was knowledge that the girl was a ward of court, there was not full knowledge of the meaning of that expression. Where there was no knowledge that the girl was a ward of court that ignorance did not altogether exonerate the ignorant parties, but constituted an alleviation of their contempt.

Notes. As to residence of wards of court, see 21 HALSBURY'S LAWS (3rd Edn.) 218, and for cases see 28 DIGEST (Repl.) 709 et seq.

Cases referred to:

(1) *Richardson* v. *Merrifield* (1850), 4 De G. & Sm. 161; 64 E.R. 779; 28 Digest (Repl.) 718, *2306*.

(2) *Seaward* v. *Paterson*, [1897] 1 Ch. 545; 66 L.J.Ch. 267; 76 L.T. 215; 45 W.R. 610; 13 T.L.R. 211, C.A.; 28 Digest (Repl.) 892, *1218*.

Motion on the part of an infant and one of the guardians and next friend of the infant that Richard Holland and his wife and Lilian Matinsky (commonly known as Lilian Morris) might be committed to prison for a contempt of the court in removing, or aiding and abetting the removal, of the infant plaintiff out of the jurisdiction of the court, and removing, or assisting or abetting in removing, her from the custody of Louisa S. Tate, with whom she had been placed under the direction of the court, in concealing the whereabouts of the said infant from the said L. S. Tate and the guardians of the infant, and that the respondents might be ordered to pay the costs of the application.

Methold, Dighton Pollock, Alexander Grant, K.C., and *L. W. Byrne* for the various parties concerned.

The case was heard in camerâ, but in view of the importance of the matter his Lordship delivered judgment in open court.

SARGANT, J., read the notice of motion, and continued:—The ward is between twenty and twenty-one years of age. Her father died in 1901, and she has a fortune in possession of some £3,000, and also receives a voluntary allowance from her mother, and is entitled to a considerable fortune in expectancy. After her father's death her mother married again and was again left a widow. In 1908 a summons was taken out to make provision for the infant out of her fortune in possession, and an order was made accordingly. In 1909 her mother again re-married, and on Nov. 26 1909 an order was made, which is still in force, under which the ward was allowed to reside with a Mrs. Tate. This she has since done, but she has from time to time paid visits to friends, and in the course of last year she was allowed to tour for a few months with a theatrical company under the charge of a Mr. and Mrs. Holland, two of the respondents to the motion. She appears to have been acquainted for some two or three years with the respondent Mrs. Matinsky, or Morris, who lived in the same neighbourhood with Mrs. Tate. Mrs. Morris knew that the infant was a ward of court, though no doubt she may not have been aware of the consequences of this position; and, according to Mrs. Tate (whom I believe on this point and generally), Mrs. Morris also knew that Mrs. Tate did not approve of the acquaintanceship.

On Sunday morning, Jan 26, the infant left Mrs. Tate to stay with Mr. and Mrs.

A Holland for a week at Ipswich and a week at Bath, these being the places where Mr. and Mrs. Holland were staying. And it was further arranged that at the expiration of the second week—namely, on Sunday, Feb. 9—the infant should proceed on a visit to private friends of position near Southampton. During the fortnight Mrs. Tate received two letters from the infant, one posted at Ipswich and one at Bath, and there was nothing to arouse any suspicion until on Monday, Feb. 10, Mrs. Tate heard from the private B friends I have referred to that the ward had not arrived at their house. Mrs. Tate then made inquiries of Mr. and Mrs. Holland, but was first put off with a series of deliberate falsehoods to the effect that the ward had been with them at Ipswich and Bath, and had only left them at the latter place on Sunday, Feb. 9, and was subsequently met with an absolute silence on their part. Soon afterwards, however, she discovered for herself, as the facts were, that the ward had in fact left Ipswich two days after her C arrival there—namely, on Tuesday, Jan. 28—and had on Wednesday, Jan. 29, sailed from Southampton for the United States in company with Mrs. Morris. Mrs. Morris's story is (and I am inclined to believe her here) that the initiative in the transaction rested with the ward, and that Mrs. Morris was adverse to going, but for a desire to see a grown-up son of hers who was settled in New York. And it seems clear that the expenses of the journey were paid by the ward. But there is no doubt that Mrs. D Morris went with the ward to purchase the tickets for the voyage, and that she took the ward's luggage down to Southampton in advance to meet the ward there on her subsequent arrival.

Mrs. Morris says that had she not gone the ward would have found someone else to accompany her. But I doubt whether this would have been so, at any rate if any proposed companion had been informed of what Mrs. Morris knew already—namely, E that the infant was a ward of court. And in any case the fact that other persons might have done wrong had not Mrs. Morris herself been sufficiently complaisant can be no excuse for her conduct from any reasonable standpoint. I need hardly add that Mrs. Morris well knew, as also did Mr. and Mrs. Holland, that the infant was going to the United States without Mrs. Tate's leave, and that Mrs. Tate had to be kept in the dark as to the project. And they all did in fact attempt to conceal the matter from Mrs. Tate. F Mrs. Morris and the infant arrived in New York on Feb. 7, and took rooms in an hotel that had been recommended to them by the Travellers' Aid Society, but afterwards the ward was allowed by Mrs. Morris to go elsewhere without any sufficient chaperonage or protection, though for the week or so that Mrs. Morris remained in New York the infant appears to have spent most of the time with her. Five days after the arrival the ward intimated to Mrs. Morris that she did not intend to return to England until G July, when she would attain her majority, and told Mrs. Morris that she could not pay her expenses of living there any longer, and requested her to return to England, leaving the ward practically to care for herself, for I cannot think that some sort of vague care or charge that appears to be suggested on the part of a lady referred to in Mrs. Morris's affidavit was of any real value. According to Mrs. Morris she had not sufficient funds to enable her to stay there, and her son could not afford to keep her H in New York, and accordingly she left New York on Feb. 15 and returned to England in the following week. Neither before nor after leaving New York does Mrs. Morris appear to have attempted to communicate either with Mrs. Tate or with the ward's mother, or to have taken any effective steps to provide for the proper protection of the ward.

On these facts, or the greater part of them, becoming known to my predecessor, I LORD PARKER, he gave directions that the present motion should be launched, and it originally came before me on Mar. 14, and has been adjourned more than once in order to give an opportunity to the respondents of using such influence as they possessed over the ward to induce her to return to England. Further, Mrs. Tate travelled out to America for the express purpose of seeing the ward and inducing her to return. All the respondents to the motion or their solicitors have in fact communicated with the ward and urged her to come back, and she has now returned with Mrs. Tate to England; and I am assured by the latter lady that the ward has not suffered by reason of her very regrettable escapade. I have still, however, to consider the conduct of the respondents,

and to determine how to mark my very strong disapprobation of the part which they have respectively taken in the matter.

In the first place, as regards Mr. and Mrs. Holland, I have on the whole come to the conclusion that I ought to accept their assurance that they did not know that the infant was in fact a ward of court. It is not the law, and was not contended before me, that this ignorance altogether exonerated these respondents from the charge of contempt, but it undoubtedly constitutes an alleviation of the contempt: (SIMPSON ON INFANTS (3rd Edn.), p. 277; *Richardson* v. *Merrifield* (1)). On the other hand, it would be difficult to characterise too severely the conduct of Mr. and Mrs. Holland in conniving at such an enterprise as this on the part of a young lady who had been temporarily intrusted to their care by Mrs. Tate, and in subsequently concealing the truth by deliberate falsehood and subsequent silence. Some defence was attempted on behalf of these respondents on the ground that a promise had been given by them, or one of them, to the infant which it would have been dishonourable to break. But this appears to me an altogether inadmissible excuse. Persons in such a position have no right to give any promise which would prevent them from fulfilling the plain and obvious duty which they owe to one who has intrusted them with the temporary custody and charge of a young lady under age. With much hesitation, and having regard particularly to the fact that Mr. and Mrs. Holland were originally unwilling that the ward should go abroad, and rendered assistance in inducing her to return to England, I have come to the conclusion that, so far as they are concerned, it is not necessary to make any order for actual committal. But they must join in bearing the costs of the motion as hereinafter mentioned.

As regards Mrs. Morris, I cannot take so favourable a view, in spite of the impression imposed on me by the earnest advocacy of her counsel. In my judgment she committed two very grave offences—the first at the time when she assisted the infant in the journey to the United States, the second at the time when she left her in the United States without any proper protection and without any communication with her friends in England. Mrs. Morris was well aware that the infant was a ward of court, though she professes to have been ignorant of the full nature of the wardship, and no doubt was ignorant of the consequences that might ensue from that fact. For the fact that the journey to New York and the residence there did not end in disaster there are no thanks due to Mrs. Morris, although I recognise and take into account in her favour the fact that she has recently, through her solicitors, aided in inducing the ward to return to this country, and has of course apologised most humbly to the court for her conduct.

It is most important that the jurisdiction of the court over wards should be fully maintained, and that they should not be allowed to go out of the jurisdiction except under carefully considered conditions. Mrs. Morris' conduct in assisting the infant to deceive and evade those having the proper custody of her and to go to the United States, and in subsequently leaving the ward there, appears to me as indefensible morally as it is legally. I think it is impossible to mark my sense of Mrs. Morris' conduct by anything short of actual committal. But I make the period of imprisonment a short one, and follow the form in *Seaward* v. *Paterson* (2) by directing that she be released, without any application for the purpose, at the expiration of a period which I fix at a fortnight from the date of her being taken into custody.

Solicitors: *R. S. Taylor, Son & Humbert*; *Collyer-Bristow, Curtis, Booth, Birks & Langley*; *Percy Robinson & Co.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

R. v. MORETON

[Court of Criminal Appeal (Channell, Bray and Lord Coleridge, JJ.), March 11, 1913]

[Reported 109 L.T. 417; 23 Cox, C.C. 560; 8 Cr. App. Rep. 214]

Criminal Law—Obtaining goods by false pretences—Goods obtained under contract induced by false pretence—Continuing false pretence—Larceny Act, 1861, (24 & 25 *Vict.*, *c.* 96), *s.* 88.

Though goods are obtained under a contract, if the contract is induced by a false pretence, and the false pretence is a continuing one and operates on the mind of the prosecutor, the goods so obtained are obtained by false pretences.

R. v. *Martin* (1) (1867), L.R. 1 C.C.R. 56, followed.

Notes. The Larceny Act, 1861, s. 88 has been repealed. See now the Larceny Act, 1916, s. 32

As to obtaining property by fraud, see 10 Halsbury's Laws (3rd Edn.) 819 et seq., and for cases see 15 Digest (Repl.) 1160 et seq. For the Larceny Act, 1916, s. 32 see 5 Halsbury's Statutes (2nd Edn.) 1031.

Cases referred to:

(1) *R.* v. *Martin* (1867), L.R. 1 C.C.R. 56; 36 L.J.M.C. 20; 15 L.T. 541; 31 J.P. 164; 15 W.R. 358; 10 Cox, C.C. 383, C.C.R.; 15 Digest (Repl.) 1164, *11,757*.

(2) *R.* v. *Kenrick* (1843), 5 Q.B. 49; 1 Dav. & Mer. 208; 12 L.J.M.C. 135; 1 L.T.O.S. 336; 7 J.P. 463; 7 Jur. 848; 114 E.R. 1166; 15 Digest (Repl.) 1167, *11,787*.

(3) *R.* v. *Gardner* (1856), Dears. & B. 40; 25 L.J.M.C. 100; 27 L.T.O.S. 144; 20 J.P. 309; 2 Jur.N.S. 598; 4 W.R. 526; 7 Cox, C.C. 136, C.C.R.; 15 Digest (Repl.) 1177, *11,895*.

(4) *R.* v. *Abbott*, *R.* v. *Dark*, *R.* v. *Garlick* (1847), 1 Den. 273, 276; 2 Car. & Kir. 630; 2 Cox, C C. 430, C.C.R.; 15 Digest (Repl.) 1171, *11,825*.

(5) *R.* v. *Bryan* (1861), 2 F. & F. 567; 15 Digest (Repl.) 1171, *11,828*.

Appeal against a conviction for obtaining goods by false pretences and credit by fraud at the Manchester City Sessions. The appellant was sentenced to fifteen months' imprisonment with hard labour. The indictment contained counts charging the obtaining of goods by false pretences and alternative counts under s. 13 of the Debtors Act, 1869, for obtaining credit by false pretences or other fraud.

The false pretences were alleged to have been made on Nov. 26, 1912, when the appellant stated to a Mrs. Finch that he was working for one Nuttall; he was supplied with board and lodging, and, after being at Mrs. Finch's house for four days, paid for the first week. After being there for ten days he left without paying for the last few days.

W. H. Aggs for the appellant.

T. G. R. Dehn, for the Crown, was not called upon to argue.

The following judgment of the court was delivered by

LORD COLERIDGE, J.—This case furnishes an interesting point with regard to the law of false pretences. The question has arisen whether on the facts of this case the conviction can be sustained, having regard to previous decisions which appear to differ. It is clear that if there is a false pretence made by the accused, and continuing at the time when the goods are supplied, that will operate as evidence that the goods were obtained by such false pretence. There are cases where the facts show that what was obtained by the false pretence was a contract, and that in pursuance of the contract the goods were obtained, but on such facts a conviction for obtaining goods by false pretences was held to be good: *R.* v. *Kenrick* (2). The case of *R.* v. *Gardner* (3) has been the subject of discussion. In that case the prisoner pretended to be a naval officer, and by reason of that false pretence obtained lodging. After he had been there for some time he entered into a contract with the prosecutrix for a supply of meat and drink

on specified terms. It was held that it was in pursuance of the contract, and not of the false pretence, that the goods were obtained. The indictment was for obtaining the goods by false pretences, and in the circumstances the court held that there had been no continuing false pretence, and that the goods had been obtained, not by means of the original false pretence, but by means of the contract. The decision in *R.* v. *Kenrick* (2) was followed in *R.* v. *Abbott* (4) in which case a strong court of ten judges held that a false pretence knowingly made to obtain money is indictable, though the money be obtained by means of a contract induced by the false pretence of the prisoner; therefore the mere fact that the money was obtained by means of a contract does not seem to prevent the operation of law on the ground that the money was obtained equally by the false pretence as by the contract. *R.* v. *Gardner* (3), which followed *R.* v. *Abbott* (4), and cannot be said to overrule it, since two judges were parties to the two decisions, was clearly decided on the ground that there was no continuing false pretence, and therefore, though at first sight the two cases do not quite seem to agree, this is not so when the facts are looked at. The next case in order of date is *R.* v. *Bryan* (5) where HILL, J., held that the facts of the case did not distinguish it from *R.* v. *Gardner* (3). Then came *R.* v. *Martin* (1), decided after all the cases to which I have referred, and in that case BLACKBURN, J., said:

> "In the case of *R.* v. *Gardner* (3) I should have thought it was a question for the jury whether the food was supplied on the false pretence"

—a remark which, coming from that learned judge, carries great weight. *R.* v. *Martin* (1) leaves the law in no doubt. It was held in that case, following other decisions, that the intervention of a contract does not necessarily prevent a conviction for obtaining by false pretences if the false pretence is a continuing one and operates on the mind of the person supplying the goods. Applying the law so laid down, it is obvious in the present case that there was evidence on which the jury could find a continuing false pretence operating on the mind of the person supplying the goods, and on these grounds the conviction must be upheld.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

A

R. v. CHAINEY

[Court of Criminal Appeal (Sir Rufus Isaacs, C.J., Darling and Atkin, JJ.), November 3, 1913]

[Reported [1914] 1 K.B. 137; 83 L.J.K.B. 306; 109 L.T. 752; 78 J.P. 127; 30 T.L.R. 51; 23 Cox, C.C. 620; 9 Cr. App. Rep. 175]

B

Criminal Law—Child—"Causing or encouraging" unlawful carnal knowledge of girl under sixteen—Neglect of child—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 17 (1) (2) *as amended by Children Act* (1908) *Amendment Act*, 1910 (10 *Edw.* 7, *c.* 25), *s.* 1.

The appellant was convicted under ss. 17 (1) and 17 (2) of the Children Act, 1908, as amended by the Children Act, 1908 (Amendment) Act, 1910, of causing or C encouraging the unlawful carnal knowledge of his daughter, a girl under the age of sixteen years, and of knowingly allowing her to consort with persons of known immoral character. The appellant was an engine-driver and was obliged to be away from home at night. His wife, the girl's stepmother, was a drunkard and made no attempt to discourage immorality in the daughter, but the appellant remonstrated with the girl and had called her indoors when he became aware that D she was consorting with soldiers. At the trial of the appellant the jury returned a verdict that he had been guilty of criminal neglect.

Held: mere negligence did not amount to an offence under ss. 17 (1) and 17 (2) of the Act of 1908, and, therefore, the verdict of criminal neglect did not amount to a verdict of guilty of causing or encouraging the unlawful carnal knowledge of the daughter.

E

Notes. The Children Act, 1908, s. 17, as amended by the Children Act (1908) Amendment Act, 1910, has been repealed. See now the Sexual Offences Act, 1956, s. 28.

As to seduction of girl under the age of sixteen, see 10 Halsbury's Laws (3rd Edn.) 675, and for cases see 15 Digest (Repl.) 1022–1023. For the Sexual Offences Act, 1956, s. 28 see 36 Halsbury's Statutes (2nd Edn.) 231.

F

Appeal against a conviction at the Salisbury City Sessions for causing or encouraging the unlawful carnal knowledge of a girl under sixteen years of age and a sentence of three months' imprisonment with hard labour.

The appellant was an engine-driver and obliged to be constantly away from home, especially at night. His second wife was a woman of very drunken habits. A daughter of the appellant, a girl of fifteen years of age, was in the habit of going about with G persons of known immoral character. Ultimately she was seduced and gave birth to a child. At the trial both the stepmother and father of the girl were charged with the offence of causing or encouraging the unlawful carnal knowledge of a girl under sixteen years of age. The recorder directed the jury that the Act of Parliament placed on the father the responsibility of taking due care to prevent his daughter from consorting with persons of known immoral character, and that if he failed to exercise such care he H was guilty of criminal neglect, and therefore guilty of an offence under s. 17 of the Act of 1908.

The first verdict returned by the jury was one of criminal neglect against the woman, and negligence against the man with a strong recommendation to mercy. On a further direction from the recorder, and after reconsideration, the jury returned a verdict of criminal neglect against the man with the same recommendation. This was taken I as a verdict of guilty under s. 17 of the Act of 1908, and the appellant was sentenced to three months' imprisonment with hard labour. The woman received a sentence of eight months' imprisonment with hard labour and did not appeal.

J. E. Y. Radcliffe, for the appellant.

T. H. Parr for the Crown.

The following judgment of the court was delivered by

SIR RUFUS ISAACS, C.J.—The appellant was charged together with his wife with causing or encouraging the seduction, prostitution, or unlawful carnal knowledge of his

daughter, a girl under the age of sixteen years. The wife was found guilty and sentenced to eight months' imprisonment with hard labour. She does not appeal. The first verdict of the jury drew a distinction between the case of the appellant and that of his wife; after reconsideration, following upon a further direction from the recorder, the verdict of "criminal neglect" against the man was treated as one of guilty under the terms of the section, which I will refer to, and the appellant was sentenced to three months' hard labour.

By s. 17 (1) of the Children Act, 1908, it is provided that if a person has the custody, charge, or care of a girl under sixteen years of age and causes or encourages the seduction or prostitution or (under an amending Act of 1910) the unlawful carnal knowledge of that girl he shall be guilty of a misdemeanour. It seems to the court that Parliament thought that as the words creating the offence were "causes or encourages" it might be doubtful whether an offence was committed in cases where the person charged took no active steps. Therefore s. 17 (2) was passed, which, as amended by the Act of 1910, reads as follows:

> "For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge (as the case may be) of a girl who has been seduced or become a prostitute or been unlawfully carnally known if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character."

The offence under the section is still that of causing or encouraging unlawful carnal knowledge, but no active step is necessary. If it is proved that the father knew that the girl consorted with prostitutes or persons of known immoral character, and stood by and allowed it, he may be convicted of "causing or encouraging." There is a very important difference between allowing it and knowingly allowing it within the meaning of the section I have quoted.

With regard to the evidence in support of the charge, it is not necessary to go through the whole of it, as counsel for the Crown has told us the parts on which the prosecution rely. It is enough to say that in our opinion there was insufficient evidence on which the jury could be asked to find the appellant guilty. The appellant, an engine-driver, and often away at night, unfortunately had for his second wife a woman strongly addicted to drink. She would seem to have taken no steps whatever to discourage immorality in the daughters. It is contended that though the wife was responsible in the first place, the appellant, her husband, can nevertheless be convicted because of his omission to do something. In considering cases of this kind the circumstances of the home must be taken into account. Evidence was adduced to show the state of the home and that the appellant was often obliged to be away, and there was also evidence that the appellant did call his daughter indoors and did reprove her when he became aware that she was talking to soldiers. Counsel was asked by DARLING, J., what were the steps which the appellant could have taken. It was suggested, though not strongly, that he might have had the girl committed to the care of some fit person under s. 59 of the Children Act, 1908. Clearly he was not made aware of any facts which would show that the omission to take such a step amounted to "causing or encouraging." Then apparently the lady superintendent of the Salisbury Diocesan Refuge made an offer, which, it is said, ought to have been accepted, to take charge of the girl. This offer was made to the wife, but there is nothing to show that it was ever made to the appellant. It was also said that the appellant should have employed a respectable woman to look after the girl, with the mother already in the house; and that a conviction should follow because he did not do so. The statement of this proposition is enough to refute it.

The opinion of the court is that there was not enough evidence on which the case could be submitted to the jury, and that the evidence in proof of the crime, on which the appellant could be convicted, was insufficient. In addition to this, the court is not satisfied that the jury really meant to convict the appellant of causing or encouraging

the unlawful carnal knowledge of his daughter. They drew a distinction between criminal negligence on the part of the woman and negligence, with a recommendation to mercy, on the part of the man. There is a vital distinction between the two cases. Section 17 does not make it a criminal offence to neglect; you may have neglect which is not knowingly allowing the girl to consort with prostitutes or persons of known immoral character. No direction appears to have been given on this particular point, and the jury do not appear to have found the appellant guilty. Even in the last direction given to the jury by the recorder a confusion seems to have been made between neglect and the offence defined in the sub-section referred to. On these grounds the court is of opinion that the appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Church, Rackham & Co.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

CALDWELL *v.* LEECH

[King's Bench Division (Ridley, Pickford and Avory, JJ.), April 16, 1913]

[Reported 109 L.T. 188; 77 J.P. 254; 29 T.L.R. 457; 23 Cox, C.C. 510]

Criminal Law—Brothel—Use of premises by one woman only for purposes of prostitution—Liability of occupier for "keeping or managing"—Criminal Law Amendment Act, 1885, (48 & 49 *Vict.*, *c.* 69), *s.* 13, (1).

Premises were occupied by a husband and his wife (the respondent). A sister of the respondent, who was also living at the same premises, was a prostitute, and frequently took different men to the premises for purposes of prostitution. The respondent on several occasions admitted her at night, when accompanied by a man, and knew for what purpose her sister was using the premises. No other woman used the premises for the purposes of prostitution.

Held (by Pickford and Avory, JJ., Ridley, J., dissenting): as only one woman was using the premises for the purposes of prostitution the premises were not a "brothel," and, therefore, the respondent could not be convicted of managing a brothel.

Singleton v. *Ellison* (1), [1895] 1 Q.B. 607, followed.

Notes. The Criminal Law Amendment Act, 1885, as amended by the Criminal Law Amendment Act, 1912, has been repealed. See now the Sexual Offences Act, 1956. Section 13 of the 1885 Act corresponds to ss. 33, 34 and 35 of the 1956 Act.

Considered: *Strath* v. *Foxon*, [1955] 3 All E.R. 398.

As to keeping disorderly houses, see 10 Halsbury's Laws (3rd Edn.) 671 et seq., and for cases see 15 Digest (Repl.) 902 et seq. For the Sexual Offences Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 215.

Cases referred to:

(1) *Singleton* v. *Ellison*, [1895] 1 Q.B. 607; 64 L.J.M.C. 123; 72 L.T. 236; 59 J.P. 119; 43 W.R. 426; 18 Cox, C.C. 79; 15 R. 201, D.C.; 15 Digest (Repl.) 904, *8715*.

(2) *Durose* v. *Wilson* (1907), 96 L.T. 645; 71 J.P. 263; 21 Cox, C.C. 421, D.C.; 15 Digest (Repl.) 904, *8719*.

Also referred to in argument: A

R. v. *Peirson* (1706), 2 Ld. Raym. 1197; 92 E.R. 291; sub nom. *R.* v. *Peirson*, 1 Salk. 382; 15 Digest (Repl.) 902, *8703.*

Jenks v. *Turpin* (1884), 13 Q.B.D. 505; 53 L.J.M.C. 161; 50 L.T. 808; 49 J.P. 20; 15 Cox, C.C. 486, D.C.; 25 Digest 423, *260.*

Case Stated by the stipendiary magistrate for the city of Liverpool. B

An information dated Oct. 31, 1912 was preferred by Francis Caldwell, head constable of the city of Liverpool (the appellant) against Annie Leech (the respondent) for that she the respondent on Oct. 23, 1912, and on diverse other days thereafter, at No. 131, in Park Street, in the city of Liverpool aforesaid, did manage a brothel, contrary to the Criminal Law Amendment Act, 1885. The information was heard and determined by the magistrate sitting at a court of summary jurisdiction in Liverpool on Nov. 13, 1912, C when he dismissed the same. On the hearing of the information the following facts were proved: The respondent was the wife of Robert Leech, and Robert Leech was the occupier of the premises No. 131, Park Street, in the city of Liverpool, where he and his wife, the respondent and family lived. A woman named Ethel Woods, who was a sister of the respondent, and was also living at the said premises, was a prostitute, and frequently took different men to the premises which she used for the purposes of prostitution. D The respondent admitted Ethel Woods to the premises at night on several occasions when she was accompanied by a man and knew for what purpose Ethel Woods had used the premises. The respondent herself never acted as a prostitute, and no woman other than Ethel Woods used the premises for the purposes of prostitution.

On behalf of the appellant it was contended that this case did not fall within the principle of *Singleton* v. *Ellison* (1), as the prostitute using the premises for the purpose of E prostitution was some person other than the occupier, and that it was not necessary for more than one woman to use premises for the purposes of prostitution in order to constitute a brothel; and thirdly, that if these premises were a brothel the respondent ought to be convicted for managing the same. On behalf of the respondent it was contended that this case was governed by *Singleton* v. *Ellison* (1), and that there must be more than one woman using the premises for the purposes of prostitution in order F to constitute a brothel. The magistrate was of opinion that *Singleton* v. *Ellison* (1) was a binding authority for the respondent that premises cannot be held in law to be a brothel unless there were at least two women using such premises for the purposes of prostitution, and in coming to that conclusion he also considered *Durose* v. *Wilson* (2), especially that part of the judgment of A. T. LAWRENCE, J., where he said (71 J.P. at p. 264): G

> "I think that a brothel is such a place as that described in the case, that is, premises used by more than one woman for prostitution."

The magistrate also considered that such a meaning must have been intended by the legislature when the Criminal Law Amendment Act, 1885 was passed, because in s. 13 (2) a distinction is made between premises used as a "brothel," and premises used H "for the purposes of habitual prostitution." He further pointed out that if the respondent had been herself the occupier of the premises, and if she had been summoned under s. 13 (2) for knowingly permitting the premises to be used for the purposes of habitual prostitution instead of under s. 13 (1) for managing a brothel, he would have convicted her.

I

The Criminal Law Amendment Act, 1885, provided:

> "Section 13. Any person who (1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof, to be used as a brothel, or for the purposes of habitual prostitution, or (3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used

A as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable [to the penalties prescribed by the section]."

Section 13 of the Act of 1885 was amended by the Criminal Law Amendment Act, 1912 as follows:

B "Section 4 (1). Section thirteen of the Criminal Law Amendment Act, 1885, shall, so far as it relates to brothels, be amended by inserting after the word "occupier" the words "or person in charge."

Rigby Swift, K.C., (*Wimpfheimer* with him) for the appellant.
The respondent did not appear.

C

RIDLEY, J.—In this case I regret that the court differ in opinion.

In my opinion, there was evidence on which the magistrate might have found that this house was a brothel. The facts of the case are these, that the woman who was summoned kept in one sense the house. She was the wife of Robert Leech, the occupier of the premises, and a woman named Ethel Woods who was her sister, was living in D the premises and was a prostitute, and she frequently took men to the premises for the purposes of prostitution. This was known to the respondent, who knew that her sister came to the house at night with men for the purpose of prostitution. The magistrate said that he was of opinion that this house could not in law be held to be a brothel, because there was only one woman who resorted to it. He would have held, as I understand it, the other way if there had been two women who used it for the purpose of E prostitution, and he based his decision on *Singleton* v. *Ellison* (1). I do not think that *Singleton* v. *Ellison* (1) is an authority for that proposition. In that case there was one woman on the premises, and one woman only, and she occupied the house. There was no one who kept the premises as distinguished from the person who was the prostitute. It was the case of a woman, who was a prostitute, living in a house as far as it appears of her own, and the court said that that house was not a brothel. The F learned judge, WILLS, J., said:

"A brothel is the same thing as a 'bawdy-house'—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men."

G

I should agree if that were the description of this case, but it is not. This is a case in which one woman receives a number of men at a place kept by another woman. That makes a great deal of difference. It is a place kept as a brothel, and it cannot make any difference to say, "There are two women resorting to this house, and therefore it is a brothel; there is only one woman resorting to the house next door, and therefore that H house is not a brothel." I do not think it is possible to maintain such a proposition.

It is in regard to the word "keeping" that the difficulty has arisen. There was no "keeping" of the house as a brothel in *Singleton* v. *Ellison* (1), according to the meaning of that word "keeping" in the Act of Parliament. It was not a "keeping" of the house for that purpose; it was the case of a woman herself only who was concerned in that case, and it occurs to me that that is where the distinction lies. Then there is the I subsequent case of *Durose* v. *Wilson* (2), where there were some flats and a number of women were using the flats for the purposes of prostitution. It was there held by the court upon the facts of that case the flats were used as a brothel. DARLING, J., in giving his judgment referred to the definition of a bawdy-house given in STEPHEN'S DIGEST OF THE CRIMINAL LAW (6th Edn.), p. 142: "A house or room, or set of rooms, in any house kept for purposes of prostitution," is a bawdy-house. Those are the words used by STEPHEN, J. He did not carry the definition further by saying that there must be at least two people who were women using the house for the purpose of prostitution. That not being a portion of the definition we are entitled, I think, to say that so long as

a house or a set of rooms in any house is kept for the purpose of prostitution it becomes a brothel. Then, that being so, DARLING, J., goes on to say (71 J.P. at p. 264): A

> "It is true that in *Singleton* v. *Ellison* (1) a particular woman who lived in a house and who took men there and who was a prostitute, was held not to keep a brothel. It may be that there was no prostitute there but herself [that is so according to the facts of the case as I understand them] but we do not know what would have happened if the person who let the house to her, supposing he knew what she was doing, had been prosecuted." B

It seems to me on reading that sentence that DARLING, J., thought that the house might have been a brothel, although there was only one woman using it actually for the purpose of prostitution.

I therefore come to the conclusion that the case of *Singleton* v. *Ellison* (1) is not an C authority on this matter. I think that A. T. LAWRENCE, J., when giving his judgment in the case of *Durose* v. *Wilson* (2), did not intend to say more than I have stated as to the meaning of *Singleton* v. *Ellison* (1) as he says—

> "I think that a brothel is such a place as that described in the case, that is, premises used by more than one woman for prostitution." D

As I have already said, in the case of *Singleton* v. *Ellison* (1), there was one woman and one woman only, not one woman who kept the house and another who used it for this purpose. That seems to me to be the distinction. I understand that my learned brethren do not agree with me; but I must say I see a great deal of mischief in allowing it to be said that a woman who keeps an infamous house of this kind, is not to be held to be keeping a brothel. E

PICKFORD, J.—I regret that I cannot take the same view, and I do so not only because I regret differing from my Lord, but also because I think that if the matter had stood by itself apart from authority I should have come to the same conclusion. But I cannot come to the same conclusion, because I think I am bound by authority not to do so. I should have thought, speaking for myself personally, that if any person kept a house in which there was one woman, or more than one woman, who took men habitually there for the purpose of prostitution that house might well be described as a brothel. F

The respondent had one sister living with her and that sister was a prostitute. She took men to the house for the purposes of prostitution. I cannot think that the definition of a brothel can depend upon such a narrow distinction as to whether the woman had one sister or two sisters living with her who were prostitutes, and if she had one sister a prostitute living with her then it was not a brothel, but that if she had two sisters living with her who were prostitutes it was a brothel. But I regret to say that I think I am bound by the case of *Singleton* v. *Ellison* (1), to come to that conclusion. If I could take the same view of the judgment of WILLS, J., in that case as was taken by my Lord, that the decision turned entirely upon the question of "keeping" a brothel, I should probably take a different view from the one I have taken; but reading that judgment I do not think it turns upon that. WILLS, J., does not mention in his judgment the word "keeping" at all from beginning to end. His judgment proceeds upon the definition of a brothel. He says ([1895] 1 Q.B. at p. 608): G H

> "A brothel is the same thing as a 'bawdy-house'—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men." I

He does not qualify that by saying where one woman receives a number of men in a room of which she is tenant, or in a room in a house in which there is no other woman who is a prostitute, and which house is not kept by anybody else as a brothel. If I

A am bound by that judgment, as I think I am, to say that one woman living in this house who takes a number of men to the house does not make that house a brothel, it seems to me to follow inevitably that in such a case a person cannot be convicted of keeping a brothel, because if the house is not a brothel a person cannot be convicted of "keeping" it as a brothel.

For this reason, although I say I regret, I feel bound to hold that the magistrate's B decision is right. I am glad to think that it is not so serious a decision in its results as it might have been before recent legislation, because the section which made it an offence for a tenant or occupier of a house to allow it to be used for habitual prostitution is now extended, as counsel for the appellant has told us, to anybody assisting in the management of that house, and this house undoubtedly was being used for habitual prostitution. Therefore there are other provisions under which the state of things C existing in this case might be punished, but under the circumstances I feel myself compelled to hold that this house was not a brothel.

AVORY, J.—I agree with my brother PICKFORD that the magistrate was right in the conclusion to which he came in this case.

It appears to me that there were two questions which he had to consider. The D first was whether the premises in question were a brothel; and the second was whether the respondent was managing those premises. While differing from my Lord, I also have the misfortune to differ from my brother PICKFORD in one respect—namely, that I should have decided *Singleton* v. *Ellison* (1) just the same as it was decided by those learned judges. Apart from the authority of *Singleton* v. *Ellison* (1), I should have held that the evidence in this case did not constitute these premises a brothel. WILLS, E J., said—and I thoroughly agree with it—that a brothel is the same thing as a bawdy-house. It is only necessary to look at the form of indictment against a person for keeping a bawdy-house, which has been in force from time immemorial, where we find that the words are:

> "Did keep and maintain a certain house and in the said house for filthy lucre and gain divers evil-disposed persons, women as well as men, upon the times and days F aforesaid as well in the night as in the day unlawfully and wickedly did receive and entertain," &c.

In my opinion the whole fundamental idea of a bawdy-house is that it is a house to which persons of both sexes indiscriminately make resort for the purposes of prostitution. I therefore thoroughly agree with the decision in *Singleton* v. *Ellison* (1), which I think G governs this case.

I also wish to add that in the more recent case of *Durose* v. *Wilson* (2), where it was found by the magistrate that the defendant was managing a block of flats, and that the whole block of flats looked at as one building was being conducted as a bawdy-house, each flat being occupied by a different woman, that two members of the court, LORD ALVERSTONE, C.J., and A. T. LAWRENCE, J., had considerable hesitation even in up- H holding the decision of the magistrate in that case, and upon that finding of fact, LORD ALVERSTONE, C.J., said (71 J.P., at p. 264):

> "Para. 6 of the Case states that there was no evidence to show which flat was occupied by which woman, nor whether there were other tenants as well as the said women, nor was it proved that any one flat was used by more than one woman. I understand that to mean that in view of the nature of the structure, though the I twelve flats in question were separate houses for some purposes, the magistrate came to the conclusion that in fact this nest of rooms were really used as a brothel."

And he also says:

> "I think that it was quite open to the magistrate on this evidence, if he was so convinced, to find as a fact that this was not the case of each single flat being used for prostitution by the woman who was the tenant of it, but the case of the appellant being a party to the use of these premises in such a way as amounted to a great deal more than each individual woman residing in her own flat and being immoral."

A. T. LAWRENCE, J., with whose judgment I also entirely agree, in that case said this: A

"I think that a brothel is such a place as that described in the case, that is, premises used by more than one woman for prostitution, but I think that the magistrate has really found that these premises were so used."

He goes on to say that there was no evidence whether there were other tenants as well as the women, nor was it proved that any one flat was used by more than one woman; but he says that there was evidence that all these women went into these flats, and that it was quite consistent with those findings that there was a use of these flats by more than one woman, that there was no strict observance of the rights of occupation by each particular woman of her own flat. So both those learned judges expressed a doubt whether, if in that case it had been clear that each woman was merely using her own flat for this purpose, there could properly have been a conviction. B C

I am myself quite unable to follow the distinction which is suggested between the present case and that of *Singleton* v. *Ellison* (1). If I understand the argument it is this: that although the premises are not a brothel according to the evidence, and although the evidence of the use of them does not constitute them a brothel, still if somebody is found keeping them, that person must be held to be keeping a brothel. I am quite unable to follow that, I regret to say, and I also observe that the definition of a brothel or common bawdy-house, given by SIR JAMES FITZJAMES STEPHEN in his DIGEST OF THE CRIMINAL LAW (6th Edn.), p. 142, which has been relied upon in this case, was also relied upon in *Singleton* v. *Ellison* (1). The argument put before the court in that case relied upon that definition, and the court refused to adopt it. For these reasons, I agree that the magistrate was right. D

Appeal dismissed. E

Solicitors: *F. Venn & Co.* for *Edward R. Pickmere*, Town Clerk, Liverpool.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

F

LORD ASHBURTON *v.* PAPE G

COURT OF APPEAL (Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), June 30, 1913]

[Reported [1913] 2 Ch. 469; 82 L.J.Ch. 527; 109 L.T. 381; 29 T.L.R. 623; 57 Sol. Jo. 644] H

Evidence—Document—Privilege—Letters from client to solicitor—Admissibility in evidence—Injunction.

The defendant was an undischarged bankrupt, and his application for discharge was opposed by the trustee and also by the plaintiff who was a large creditor. The defendant wrongfully obtained letters written by the plaintiff to his solicitor, and, therefore, privileged, copied them, and retained the copies which he intended to use as evidence in the bankruptcy proceedings. The plaintiff brought an action for an injunction to restrain the defendant from disclosing the letters or the copies, and an order was made restraining such disclosure except for the purposes of the bankruptcy proceedings. I

Held: the fact that the copies, although wrongfully obtained, could be used as secondary evidence in the bankruptcy proceedings made no difference to the plaintiff's right to an injunction restraining the defendant from divulging their

contents; and, therefore, the plaintiff was entitled to an unqualified injunction and the exception would be struck out.

Lamb v. *Evans* (1), [1893] 1 Ch. 218, applied.
Calcraft v. *Guest* (2), [1898] 1 Q.B. 759, distinguished.

Notes. As to evidence wrongfully obtained, see 15 HALSBURY'S LAWS (3rd Edn.) 266, and for cases see 22 DIGEST (Repl.) 210 et seq.

Cases referred to:

(1) *Lamb* v. *Evans*, [1893] 1 Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 41 W.R. 405; 9 T.L.R. 87; 2 R. 189, C.A.; 1 Digest (Repl.) 526, *1573*.

(2) *Calcraft* v. *Guest*, [1898] 1 Q.B. 759; 67 L.J.Q.B. 505; 78 L.T. 283; 46 W.R. 420; 42 Sol. Jo. 343, C.A.; 22 Digest (Repl.) 211, *1976*.

(3) *Morison* v. *Moat* (1851), 9 Hare, 241; 20 L.J.Ch. 513; 18 L.T.O.S. 28; 15 Jur. 787; 68 E.R. 492; affirmed (1852), 21 L.J.Ch. 248; 16 Jur. 321, L.JJ.; 28 Digest (Repl.) 854, *849*.

(4) *Tipping* v. *Clarke* (1843), 2 Hare, 383; 67 E.R. 157; 18 Digest (Repl.) 217, *1864*.

Appeal by the plaintiff from the decision of NEVILLE, J.

Jenkins, K.C. (with him *A. à Beckett Terrell*), for the plaintiff.
H. M. Giveen, for the defendants.

COZENS-HARDY, M.R.—This is a curious case, and in some respects it raises rather an important question.

The action was commenced by Lord Ashburton against Mr. Pape, Messrs. Langford and Redfern, who are solicitors, and Mr. Nocton, who is also a solicitor. Lord Ashburton wrote a good many letters to Mr. Nocton, who was acting as his solicitor, and it is, of course, quite plain that they were primâ facie confidential communications and that Mr. Nocton had no right to publish them or to part with them in any way. There is litigation going on between Mr. Pape and Lord Ashburton, not litigation at the present moment in the High Court, but proceedings of a highly hostile and litigious character in the Bankruptcy Court. Mr. Pape is a bankrupt and is seeking to obtain his discharge, and Lord Ashburton, among others, is opposing it. These letters were the subject matter of a subpœna duces tecum which was served, not upon the solicitor who held them, but upon a clerk, whose name I think was Brooks. Brooks took the originals, not in obedience to any subpœna duces tecum, because the time to produce them had not arrived, and he went somewhere into the building, and not being as it was suggested, very well, he handed the documents over to Mr. Pape. The subpœna duces tecum is altogether out of the question, because the time for the operation of that subpœna had not arrived. It is simply a case in which the documents were, I am bound to say by collusion between Mr. Pape and the clerk, obtained from their proper custody and handed over to Mr. Pape, who had nothing to do with them. Mr. Pape is not a solicitor, and there is no direct confidential relation between him and Lord Ashburton. That being so, Lord Ashburton commenced this action, and he claimed by his writ:

> "An injunction restraining the defendants and each of them from publishing, circulating, disclosing, divulging, or parting with, otherwise than to the plaintiff or by deposit in court, and from allowing to be published, circulated, disclosed, or divulged any correspondence, letters or other documents received by or communicated to the defendant Nocton as solicitor of the plaintiff or the effect thereof or copies thereof or extracts therefrom, and from informing any person or persons of their or any of their contents."

The plaintiff also claimed delivery up to the defendant Nocton of all such correspondence, letters, and documents. A motion was subsequently made for an interlocutory injunction in the terms of the writ. It came on to be heard before the learned judge, NEVILLE, J., who made an order that the defendant Pape do forthwith hand over to the defendant Nocton all original letters from the plaintiff to the defendant Nocton, or his firm, in the defendant Pape's possession or control. The latter obviously said that he did not object

to that, and that he would deliver up the originals because he had got copies. But then the order goes on in this way: A

> "And it is ordered that the defendants Edward James Pape, Charles William Langford, and Thomas Howard Redfern, their servants and agents, be restrained until judgment or further order from publishing or making use of any of the copies of such letters or any information contained therein, except for the purpose of the pending proceedings in the defendant Edward James Pape's bankrupty, and subject to the direction of the Bankruptcy Court." B

The question now raised is that that exception is wrong, and that the injunction ought to go to the full extent until the trial of the action—namely, from publishing or making use of any of the copies of letters or information contained therein. In my opinion the contention of the plaintiff is right. Mr. Nocton's clerk, of course, had no right whatever C to hand over the originals of the letters to Mr. Pape, nor to make any copies of any sort or kind, and Mr. Pape, who was really a party to this transaction, was quite clearly under the same obligation, and liable to precisely the same jurisdiction as has long been exercised by this court. I do not go back to *Morison* v. *Moat* (3) which, although not the first, is probably the leading authority on the present point. But I will refer to a passage from *Lamb* v. *Evans* (1) ([1893] 1 Ch. at p. 235) in a judgment of KAY, L.J., D who relied upon *Morison* v. *Moat* (3). That passage states briefly and, I think, with perfect accuracy what the true law is upon this subject. He says, referring to *Morison* v. *Moat* (3):

> "Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which E came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it."

Apart, therefore, from these pending or threatened proceedings in bankruptcy, it seems F to me to be perfectly clear that the plaintiff can obtain the unqualified injunction which he asks for.

Can it make any difference that Mr. Pape says that he wants by means of these copies of the letters to give secondary evidence in the bankruptcy proceedings? In my opinion that is no ground for making any distinction. The rule of evidence as explained in *Calcraft* v. *Guest* (2) merely amounts, I think, to this: If a litigant who wants to prove a G particular document which by reason of privilege or some circumstance he cannot furnish production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case, and the court simply says: "Here is this document produced. If it be an original it may have been stolen; it H may have been picked up in the street; it may have improperly got into the possession of the person who proposes to produce it. But that is not a matter which the court on the trial of the action can go into." That, however, does not seem to me to be a case where the whole subject-matter of the action such as we have here is the right to retain or keep the originals or copies of certain documents which were privileged. It seems to me that if Mr. Pape has the good luck to obtain a copy of these documents which I he can produce without a breach of this injunction, there is no ground whatever in principle why we should decline to give Lord Ashburton that which in my view is his right as between him and Mr. Pape. That is no reason whatever why we should not say to him in pending or future proceedings, "You shall not produce these documents which you have acquired from a party surreptitiously, or from his solicitor, who plainly stood to him in a confidential relation." Therefore, for these reasons, doing what I think NEVILLE, J., would himself have been very glad to do, the appeal ought to be allowed so far as it asks, and only so far as it asks, to strike out the exception.

KENNEDY, L.J.—I think that that must be right, and I agree with the conclusion the Master of the Rolls has come to.

It is a peculiar case. So far as I know it stands alone. We have had no authority cited to us in which anything like the same facts have been stated. The principle which has been referred to by the Master of the Rolls upon which a person would be restrained from dealing with documents or using information in documents which he has obtained wrongly, and knows he has obtained wrongly, is clear. The only question is, and that is the difficulty my brother NEVILLE felt, that it is also quite clear that if the ground for secondary evidence has been properly established at the trial it is no objection to using that secondary evidence in the shape of a copy of a document that that copy ought not to have been obtained in the way that it was.

There being here unquestionably legal proceedings in which the question of the production of an original or the use of a copy being a copy which had been wrongfully obtained may be material, NEVILLE, J., has thought he ought to hold his hand. I agree as to that the better view seems to be. It may be true, and no doubt is true, that the principle which is laid down in *Calcraft* v. *Guest* (2) must be followed. At the same time, if before the occasion of the trial when a copy of a document may be used, notwithstanding that it is a copy improperly obtained, you can successfully promote proceedings against the person who has improperly obtained or got or made the copy, you may stop his using it. You are, none the less, entitled to do so, because before such proceedings a question of proof had arisen on the trial, and he had the document at that time. He would not be prevented from using it on account of the illegitimacy of its origin.

If that is so, it is the present case. At the hearing in bankruptcy of the issue these copies of the letters are sought, or may be sought to be used by Mr. Pape. The proceedings have been brought to a stage in which he may be required by the court not to use in any shape or form the copies which he has improperly got. I think, therefore, that the plaintiff is entitled to have the injunction granted. I think so, none the less, because if those proceedings in which the injunction is sought had not taken place there would have been possibly no difficulty in using the documents which would in that case have remained in Mr. Pape's hands. There is no question here as to the facts, and if those facts are taken it is quite clear these copies ought never to have got into Mr. Pape's possession in any shape or form.

SWINFEN EADY, L.J.—I am of the same opinion. The facts here are not in the least in dispute. Lord Ashburton wrote letters to his solicitor, Mr. Nocton, which certainly are privileged primâ facie. Mr. Nocton had in his employ a clerk named Brooks. The clerk of a solicitor is in a confidential position. His duty is not to disclose his master's business nor the client's business, and certainly to carefully guard his master's papers. Brooks the clerk, in this case, apparently having regard to a subpœna duces tecum served upon him personally—why it came to be served upon him instead of on his employer in whose legal custody the letters were does not appear—took the letters written by Lord Ashburton to Mr. Nocton, attended the Bankruptcy Court with them, and gave up possession of the letters to Mr. Pape. Such an act on the part of Brooks is perfectly indefensible, it was a gross breach of his duty. Mr. Pape, having thus obtained possession of the letters, has proceeded to copy them, and still retains in his possession copies of the letters.

The principle upon which the Court of Chancery has acted for very many years has been to restrain the breach by publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain confidential information being divulged but to restrain copies being made of any record of that information. If copies have already been made the court will restrain the matter being further copied, and restrain persons into whose possession that confidential information has come from themselves in turn divulging or propagating it.

Not the first case, but one of the early cases is *Tipping* v. *Clarke* (4), which came before

WIGRAM, V.C. It was a case where a factor had had dealings with a merchant and disputes had arisen between them, and the merchant, the defendant, in some way had obtained copies of certain entries in the factor's books, not only with regard to the dealings of the factor and the merchant himself, but with other persons. The merchant threatened to make the copies of the entries public, said that he had a copy of the accounts of the plaintiff's Irish friends and that he intended to call a meeting, his object being to make a public exhibition of the plaintiff's books. That matter was the subject of the litigation in *Tipping* v. *Clarke* (4). The matter came before the court in form on an exception to the answers to interrogatories. But the learned judge dealt with the matter on principle, and he said (2 Hare, at p. 393):

> "It is clear that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learned in the execution of his duty as clerk."

That exactly applies to a solicitor's clerk as well as to a merchant's clerk. If the defendant has obtained copies of books I think he could not be permitted to avail himself of that breach of contract. That is exactly Mr. Pape's position here. If he is allowed to retain possession of these copies or to divulge the contents, it is availing himself of the breach of contract by Brooks the clerk, by means of which these letters have come into Mr. Pape's hands.

The Master of the Rolls has already referred to *Lamb* v. *Evans* (1), and to KAY, L.J.'s, judgment there. KAY, L.J., said this ([1893] 1 Ch. at p. 235):

> "Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else [and then this is the next stage] and anybody who has obtained that secret from him has also been restrained from using it."

There are many similar cases to the like effect. Sometimes the facts giving rise to the case have been where a list of a merchant's customers has been made, the names and addresses of his customers. Sometimes it has been a secret manufacture. There are many instances of that sort where the use of information so obtained can be restrained, and the parties into whose possession it has come can be restrained from using or divulging it. Down to that point I understand there can be no dispute as to the law.

Then objection was raised in the present case, by reason of the fact that it is said that Mr. Pape, who now has copies of the letters, might wish to give them in evidence in certain bankruptcy proceedings, and although privileged he has possession of the documents, and could give secondary evidence of the contents of the letters. Therefore, he ought not, it is said, to be ordered either to give them up or to be restrained from divulging their contents. It appears to me that there is a confusion between the right to obtain an injunction against a person to restrain him from divulging confidential information, and the right to obtain from him a document which contains that information and the other class of cases where, if he has it in his possession, although privileged, he may be able to give it in evidence. The cases are entirely separate and distinct. It may well be that if a person were feloniously to steal and take and carry away a deed, nevertheless, in any dispute to which it was relevant the original deed might be given in evidence by him at the trial. It would be no objection to the admissibility of the deed in evidence to say that he ought not to have possession of it. That would not affect the admissibility of the deed in evidence. So again with regard to any copy he had. If he was unable to obtain or compel production of the original because it was privileged if he had a copy in his possession it is admissible in evidence, although he cannot compel the production of the original by reason of privilege. That is quite a different case from a case where a person to whom the document belongs, or with whom the confidential relation exists, seeks the assistance of the court either to compel the delivery up, or to

A restrain the information being divulged. In my opinion, it is no answer to such an application to say: "If I am left in possession of it it will be useful to me hereafter in some other proceedings, because, although I cannot compel production of the original I shall be able to give evidence by the copy I have." In these circumstances I think that the injunction ought to be allowed in the form which the Master of the Rolls has indicated.

B *Appeal allowed.*

Solicitors: *H. S. Knight-Gregson*; *Langford & Redfern.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

C

D

R. *v.* HYDE JUSTICES. Ex parte ATHERTON

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Hamilton and Bankes, JJ.), December, 13, 14, 1911]

[Reported [1912] 1 K.B. 645; 81 L.J.K.B. 363; 106 L.T. 152; 76 J.P. 117]

E *Licensing—Licence—Transfer—Old beerhouse licence—Jurisdiction of justices—Inquiry into fitness of transferee—Terms of agreement between transferee and landlord—Method of conducting premises—Licensing (Consolidation) Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 23 (2) (b).

Licensing justices **held** to have jurisdiction under s. 23 (2) (b) of the Licensing (Consolidation) Act, 1910, to inquire, on an application for the transfer of an old F beerhouse licence, into the question whether the proposed transferee was a fit and proper person to be the holder of the licence, but no jurisdiction to inquire into the terms of any trading agreement between the transferee and his landlords or to attempt to regulate the terms on which the transferee was to conduct the business, unless the only inference from the terms of such an agreement was that the transferee could not carry out his trade without infringing the law.

G **Notes.** The Licensing (Consolidation) Act, 1910, has been repealed. For s. 23 of that Act, see now the Licensing Act, 1953, s. 21, as amended by the Licensing Act, 1961. Section 21 (b) of the Act of 1953 (replacing s. 23 (2) (b) of the Act of 1910) is unaffected by the Act of 1961.

Considered: *R.* v. *Monmouthshire Justices, Ex parte Nevill* (1912), 108 L.T. 797. H Applied: *R.* v. *Holborn Licensing Justices, Ex parte Stratford Catering Co., Ltd.*, [1926] All E.R.Rep. 279. Considered: *R.* v. *Newington Licensing Justices, Ex parte Conrad*, [1948] 1 All E.R. 346.

As to transfer of a justices' licence, see 22 HALSBURY'S LAWS (3rd Edn.) 562 et seq., and for cases, see 30 Digest (Repl.) 40 et seq. For the Licensing Act, 1953, s. 21, see 33 HALSBURY'S STATUTES (2nd Edn.) 169.

I Case referred to in argument:

R. v. *Lancaster Justices* (1891), 55 J.P. 580; 7 T.L.R. 428, C.A.; 30 Digest (Repl.) 18, *102.*

Rule Nisi for a mandamus to justices of the peace for the borough of Hyde, in the county of Chester, commanding them to hold a transfer sessions, and at such transfer sessions to hear and determine pursuant to the statutes in that behalf, of an application by Joseph Atherton for the transfer to him of a licence formerly held by one James Sidebottom in respect of the house and premises known as the Mechanics Arms in the

borough of Hyde, enabling him to hold excise licences to sell by retail beer or cider to be consumed on the premises. The rule was obtained on the ground that the justices had refused the application on grounds on which they could not within their jurisdiction refuse it, and that they had taken into consideration matters which it was not within their jurisdiction to consider.

In the affidavit made by the licensing justices in opposition to the rule, the following facts were set out: The licence in respect of the Mechanics Arms was an ante-1869 beer on-licence. On Jan. 27, 1910, James Sidebottom had the licence transferred to him. The owners of the premises were then Showells (Stockport) Brewery Co., Ltd. An agreement of tenancy was produced to the licensing justices. The rent paid by Sidebottom was £38 a year, and he also paid rates on an assessment of £35 15s. The prices charged for the two qualities of beer supplied to the house were 28s. and 38s. a barrel respectively. The brewery company, which had the exclusive right of supplying the house with beer and other liquors sold, paid the whole of the extra excise duties imposed by the Finance (1909–10) Act, 1910. Sidebottom paid the tenant from whom the licence was transferred to him £150 for the goodwill and fixtures of the premises, and the brewery company's agreement with Sidebottom was considered by the justices to be fair and met with the approval of the bench. After Sidebottom had held the licence some time, the business of Showells (Stockport) Brewery Co., Ltd. was taken over by Walker and Homfrays, Ltd. of Salford, and the Mechanics Arms, amongst other houses in the borough, became their property. On July 6, 1911, an application was made to the licensing justices by the applicant, Joseph Atherton, for a protection order enabling him to sell on the licensed premises until the next transfer sessions to be held on Aug. 10, 1911, which application was granted. On the latter date, application was made by Atherton for the transfer of the licence. The agreement between the brewery company and the applicant had been previously forwarded in accordance with the practice to the clerk to the justices. The latter reported to the justices the terms of this agreement, which differed considerably from the agreement with Sidebottom. The applicant was examined on oath by the licensing justices as to his position with the brewery company, and as to his interest in the premises. The justices were not satisfied, and adjourned the hearing of the application to the special sessions held on Sept. 28, 1911, for further information, and to enable the applicant to be represented by counsel or a solicitor. On Sept. 28 a solicitor appeared on behalf of the applicant and for the owners of the premises. The application was opposed on behalf of the Hyde licensed victuallers and beer-sellers association. The applicant informed the justices that he had never kept a licensed house before, that he had been a cellarman in the employ of the brewery company, that he had deposited £50 with the brewery company as a guarantee for the proper conduct of the house and that he had no other means, that he was charged £26 a year rent and that the rates were to be paid by the brewery company. The goodwill, fixtures, and effects of the business belonged to the brewery company, and he understood that the outgoing tenant had received from the brewery company £160 for the goodwill, fixtures, and effects of the business without the stock of liquors; he had paid nothing to the outgoing tenant, and had had no negotiation with him. He had no advice as to the effect of the proposed agreement, but he had read it and understood that he was compelled to buy all his stock from the brewery company; the cheapest beer he could purchase cost 37s. a barrel, and he was compelled to retail this quality of beer at 2d. per pint in competition with all other licensees who were selling a similar quality of beer at 3d. per pint; practically the whole business of the house was the sale of beer of this quality and the beer sold by other licensees in the district at 2d. per pint was purchased by them at from 27s. to 28s. per barrel. He had no voice in the regulation of the price to be charged to the customers. The applicant further stated that he would have a balance of £3 a week on the trade he was doing, out of which he would have to pay rent, wages of servant, excise duties and other outgoings, but he was unable to show to the justices how the amount of £3 per week was arrived at. The applicant was also taken through various clauses in the agreement, and it was ascertained that he was not aware of many of the provisions of the agreement. The justices intimated generally that they were satisfied that the applicant was not a bonâ fide tenant, that he was not a fit and

proper person to hold the licence, and that he would be unable under the conditions imposed to properly carry on the business. On the application of the applicant's solicitor, the justices agreed to adjourn the hearing of the application until the next transfer day to enable the applicant and the brewery company to consider the position. On Nov. 23, the application was renewed, the applicant and the brewery company being represented by counsel. Counsel contended that, as this was an ante-1869 licence, the licensing justices were confined to the specified grounds in the second part of Sched. II to the Licensing (Consolidation) Act, 1910, that the justices could not require the production of the agreement between the brewery company and the applicant, as s. 25 (2) of the Act of 1910 did not apply to an old beer on-licence, and that the justices could not interfere with the conditions between the brewery company and the tenant. He also contended that the justices had no right to inquire whether the applicant was a fit and proper person to hold the licence. No agreement was tendered to the justices on this occasion. The justices further stated in their affidavit that they objected to certain clauses in the agreement, but they gave no instructions for preparation of any particular clauses, and, on the hearing on Nov. 23, they informed counsel that it was open to him to submit any alterations for their consideration which would carry out their views. The agreement, however, was not the sole or even the chief ground of refusal.

In dealing with the application, the justices found as facts (i) that the applicant was not duly qualified as by law is required; (ii) that the applicant was not a bonâ fide tenant and was not a fit and proper person to hold the licence; and (iii) that the terms of he agreement of tenancy submitted to the justices were such that the applicant could not properly carry on the business of the licensed premises, and that his interest was such as to render him indifferent whether he conducted the premises properly or not. The justices considered that it was their duty to inquire whether the applicant was a fit and proper person to hold the licence in accordance with s. 23 (2) (b) of the Licensing (Consolidation) Act, 1910, and to inquire into the conditions of tenancy under s. 25 (2) of that Act, and refused the application.

By the Licensing (Consolidation) Act, 1910:

"18 (1). The power to refuse the renewal of any such justices' on-licence as is described in the first part of Sched. II to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the second part of that Schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act."

"23 (1). For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence. (2) An application for the transfer of a justices licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows: (a) A transfer can only be authorised in the cases mentioned in the first column of Sched. IV to this Act and to the persons set opposite thereto respectively in the second column of that Schedule. (b) The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision. (c) The special provisions of this Act affecting the renewal of an old on-licence shall apply to the transfer of an old on-licence as they apply to the renewal."

"25 (2) In the case of an application for the transfer of a justices' licence . . . the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices. . . ."

"Second Schedule: First Part, Description of old on-licences—Justices' on-licences which were in force on Aug. 15, 1904, including —(a) licences granted by way of renewal of a licence so in force; and (b) licences which, though not in force at that date, had been before that date provisionally granted and confirmed under s. 22 of the Licensing Act, 1874, in cases where the provisional grant and order for confirmation was subsequently declared final, whether the licence continues to be held

by the same person, or has been or may be transferred to any other person or persons. For the purpose of the foregoing description of old on-licences, the expression 'on-licence' does not include licences for the sale of wine alone or sweets alone. Old on-licences for the sale of beer or cider, with or without wine, which were granted, in respect of premises for which a corresponding excise licence was in force on May 1, 1869 (including licences granted by way of renewal of such a licence, whether the licence continues to be held by the same person, or has been or may be transferred to any other person) are in this Schedule referred to as old beerhouse licences.

"Second Part, Specified Grounds.—(A) In the case of old on-licences which are old beerhouse licences—(1) the ground that the applicant has failed to produce satisfactory evidence of good character; (2) the ground that the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the applicant is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character; (3) the ground that the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles; (4) the ground that the applicant, or the house in respect of which he applies, is not duly qualified as by law is required. (B) In the case of any old on-licences other than old beerhouse licences— . . . (2) grounds connected with the character or fitness of the proposed holder of the licence; . . ."

Sankey, K.C., and *R. M. Montgomery* in support of the rule.

The respondent justices did not appear, but an affidavit by them was read to the court.

LORD ALVERSTONE, C.J.—I do not intend to decide anything more than is absolutely necessary for the decision of this case.

There was an application for a transfer to a new holder of an old ante-1869 beerhouse licence and there are undoubtedly certain limits to the questions which may be inquired into by the justices when they are dealing with such a licence, either as a question of renewal or as a question of transfer. I do not quite agree with the contention that the Licensing (Consolidation) Act, 1910, is not an amending Act. I agree that it was to a great extent a consolidation Act, but I think that the law as it now stands, under the Act of 1910, cannot be said to be exactly the same as it stood before. I do not make that observation as having any material bearing on this case; I only refer to it because junior counsel in support of the rule in the course of his argument said that certain parts of the Act are undoubtedly consolidation, which is true, and that only certain parts are amendment. On this particular question which we are now discussing, although I do not think there is any material difference so far as the argument is concerned, I do not wish to express a considered opinion that there is no amendment of the law even in regard to ante-1869 licences. The first section of the Act of 1910 which it is important to consider is s. 18:

"The power to refuse the renewal of any such justices' on-licence as is described in the first part of Sched. II to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the second part of that Schedule shall be vested in the compensation authority and not in the licensing justices. . . ."

It was contended by senior counsel in support of the rule that, if any question arose as to the person applying for the renewal or the transfer of the licence not being a fit and proper person, the justices had no jurisdiction under that section to deal with such a question, but that it must go to the compensation authority. I cannot assent to that argument. The consequence of it would be most dangerous, and I cannot conceive of the legislature having said that, if the only reason for refusing a renewal or a transfer of the licence is that the person is not a fit and proper person, that ought to be a ground for compensating the licence holder on taking away the licence. It seems to me to be in contradiction of the whole spirit of the Act. Therefore, in my judgment, it was

never intended to send to the compensation authority the question of the fitness of the person who is applying for either a renewal or a transfer. Section 23, after describing in sub-s. (1) what the transfer of a justices' licence means, says, in sub-s. (2):

> "An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows:—(a) A transfer can only be authorised in the cases mentioned in the first column of Sched. IV to this Act and to the persons set opposite thereto respectively in the second column of that Schedule. (b) The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence."

It is not seriously disputed by senior counsel in support of the rule, and it is in fact admitted by junior counsel, that that part of Sched. IV which is referred to in para. (a) applies to transfers. Junior counsel in support of the rule very conveniently called it the occasion for the transfer of the licence, and it is not an inaccurate way of describing it, the occasion for the transfer being death, incapacity, bankruptcy, and occupation of the premises given up. I need not refer to the remaining two cases, but, in the four cases I have mentioned, the transfer may be made to the representatives, the assigns, the trustee of the bankrupt, or the new tenant or occupier, or the person to whom the interest in the premises has been sold, which last case does not arise here. Therefore, it seems to me to be self-evident that s. 23 (2) (a) must apply, and there is a reason why it should apply, because, as has been pointed out, it is a reproduction of the classes of persons who became transferees or holders of a licence under s. 4 and s. 14 of the Alehouse Act, 1828, which has been repealed by the Act of 1910.

Then comes the second condition, in s. 23 (2) (b):

> "The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision."

Common sense would seem to say that the justices ought at least to see that the transferee is a fit and proper person, and, subject to what I have to say as to there being a distinction between ante-1869 beerhouse licences and licences granted since that date from the point of view of the character of the holder, it seems to me that that condition must apply. Therefore, I do not accept the contention that the justices dealing with transfers or renewals of these licences have nothing to do with the question of the person being a "fit and proper person"; and it follows from what I have already said in expressing my opinion on s. 18, that that question was not intended to be referred to the compensation authority, but was intended to be left to the licensing justices. Section 23 (2) (c) contains a re-enactment of the provisions with regard to the renewals of old on-licences:

> "The special provisions of this Act affecting the renewal of an old on-licence shall apply to the transfer of an old on-licence as they apply to the renewal."

That brings us again to the second part of Sched. II. The conditions as to the old on-licences which are old beerhouse licences, are those mentioned under the head (A) clauses (1), (2), (3) and (4) in the second part of that Schedule, and they were all to be found verbatim in s. 8 of the Wine and Beerhouse Act, 1869. Those clauses are a consolidation and a keeping alive of those conditions, limited as they were.

I can see nothing in those conditions which are there enumerated and which are re-enacted and applied to transfers by para (c) of s. 23 (2), inconsistent with the view that the matters mentioned in para. (b) as to the transferee being a fit and proper person were intended to be inquired into by the justices. The second part of Sched. II provides:

> "(A) In the case of old on-licences which are old beerhouse licences—(1) the ground that the applicant has failed to produce satisfactory evidence of good character."

The reason that that was put in was because it is rather narrower with regard to the question of good character than the corresponding condition in the case of other old on-licences in (B). Then clause (4) specifies the ground:

"that the applicant, or the house in respect of which he applies, is not duly qualified as by law is required." A

I agree with the argument of counsel that the question of whether the person is a fit and proper person was not intended to be brought into consideration under the words in that clause "not duly qualified as by law is required." I think that that clause does refer to the qualifications or the absence of the disqualifications required by law before B a person can obtain a licence; but it really would not make any difference in the result if I thought that the question of fitness did come in under the words "the applicant is not duly qualified as by law is required," because it might be said that, under s. 23 (2) (b), the question of the fitness of the transferee does come in as a qualification by law. But in whichever way it may be taken, there is nothing in clause (4) of head A which is inconsistent with the view that the justices may consider the question of fitness under C s. 23 (2) (b).

When we look at the other old on-licences in head (B)—licences other than old beer-house licences—as far as the special grounds are given they are rather wider than those given in head (A), because we have, in clause (2), the words "grounds connected with the character or fitness of the proposed holder of the licence." That again is a re-enactment of old provisions. So that s. 23, though not quite consolidation only, is D really keeping alive the old conditions in respect of the different classes of licences.

One other point requires to be noticed, but I do not intend to express a final opinion on it, as it does not bear on the question before us. A question was raised and may be raised hereafter, as to the effect of the repeal in s. 1 of the Beerhouse Act, 1840, of the words

"to any person who shall not be the real resident holder and occupier of the E dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted"

by s. 2 of the Finance Act, 1910, an Act passed in the same session, though after the passing of the Licensing (Consolidation) Act, 1910. I do not think it is very material for the present purpose to consider it, nor do I intend to express any opinon as to F what the result of that repeal is. It is obvious that it may give rise to important questions, and it would seem at first sight that it had struck out the necessity for residence. All I say as to that is that it does not arise in this particular case, because no question of that kind was raised as an objection. Therefore, I merely say that the excision of those words is not an argument against the person who is moving for the rule in this case. G

Having endeavoured to express what my view of the law is, I have now to consider what happened in this particular case. When we look at the affidavit of the justices, I think it must be taken that the justices did, while inquiring into the question of "fit and proper person," practically consider the terms of the agreement under which the applicant was holding the premises. On the affidavits on which the rule was moved, the applicant and I think his solicitor, stated that there were certain grounds supplied H to the solicitor as being the grounds of refusal: that the applicant was not duly qualified, that he was not a bonâ fide tenant, that the terms of tenancy submitted to the justices were such that the applicant could not properly carry on the business of the licensed premises, and that his interest was such as to render him indifferent whether he conducted the premises properly or not. Some question was raised whether that last ground was really a ground of the justices' decision, and I am satisfied that it was. I It seems to me, therefore, that, whether we are considering s. 23 (2) (b), or the special provisions in the second part of Sched. II which contain the words "fail to produce satisfactory evidence of good character," primâ facie what is meant is an inquiry whether the person is a fit and proper person to hold a licence and carry on the business of a licence-holder. They do not mean any inquiry into the special financial terms or the special arrangement as to the method in which the trade is going to be conducted. Taking the justices' own affidavit, it seems to me that they have considered the questions of the price of beer, how far the applicant would have succeeded in making a profit, and

whether the beer supplied to him was not too expensive a beer; and in other ways they went much further than personal considerations of fitness and properness. In dealing with the question whether they should grant or refuse the transfer, they did consider the business terms as between the brewers and the licence-holder. That, in my judgment, goes a great deal further than inquiring, in respect of an old on-licence, whether an applicant is a fit and proper person within s. 23 (2) (b), and a great deal further than anything that is authorised by the specified grounds in the second part of Sched. II.

I think, therefore, that, under the jurisdiction given to the justices to inquire into the question whether this applicant was a fit and proper person, they were considering the question of the conditions of his trade, and whether he could carry it on successfully. The words in their final reason, which they themselves admit, are: "That the applicant could not properly carry on the business of a licensed premises and that his interest was such as to render him indifferent whether he conducted the premises properly or not." Those words are not meant to suggest that the applicant was not a fit and proper person, but they are intended to indicate that the justices thought that he could not carry the business on properly, having regard to the business relations between him and the brewers. That seems to me to be going too far. While I agree that they could inquire as to his being a fit and proper person, they allowed considerations beyond their jurisdiction to influence their judgment to a substantial extent.

I only wish to say this further. I do not wish to express any opinion that the terms of tenancy may not in some cases be relevant in considering whether a person is a fit and proper person to hold a licence. It is not necessary to put hypothetical cases, but one can imagine cases in which the terms of tenancy were such that the licensee would have no proper control and would not really be the effective licence-holder and might be somebody who really ought not to have a licence given to him. That would be a circumstance which the justices would be entitled to take into consideration. In my opinion, in this case the justices have gone much further than they were entitled to go. They have really not decided this case with regard to the applicant not being a fit and proper person. They have not decided that he is not duly qualified as required by law; but they have decided that the conditions of his tenancy were such that, from a business point of view, he would not be a successful licence-holder. For these reasons, the rule for a mandamus must be made absolute.

HAMILTON, J.—I am of the same opinion. Mr. Atherton made an application for the transfer of a justices' licence, and, therefore, his application was within the plain words of s. 23 (2) of the Licensing (Consolidation) Act, 1910; and his application was subject to paras. (a) and (b) of that sub-section—it was doubtless also subject to para. (c) As it was subject to para. (b), the justices were to exercise their discretion on the question of his being a fit and proper person to be the holder of a licence.

The argument is that the primâ facie application of para. (b) to this case is excluded on the true construction of para. (c) which says that

> "The special provisions of this Act affecting the renewal of an old on-licence [this was an old ante-1869 beer on-licence] shall apply to a transfer of an old on-licence as they apply to a renewal."

Those words are plainly not words of exclusion, taking old on-licences out of the operation of the sub-section; they are words of inclusion, bringing to bear on old on-licences not only paras. (a) and (b) of s. 23 (2) but also the special provisions of this Act affecting the renewal of old on-licences. It appears to me that the natural and obvious meaning of para. (c) is to apply the words "the special provisions of this Act" to s. 16 (5), to s. 18, and in some respects to s. 19 and s. 20. That would amply satisfy the language of para. (c). The contention, however, is that para. (c) has the effect of taking the application in question out of s. 23, and leaving it to be dealt with only under the second part of Sched. II, head (A), clauses (1), (2), (3) and (4). It is suggested that those four grounds constitute a self-contained code which governs the transfer or the renewal of an old on-beerhouse licence. But it is manifest that it is not self-contained, because

cl. (4), "on the ground that the applicant . . . is not duly qualified as by law is required," sends one at once to other portions of the statute. It is then said that the effect of any different construction would be to treat this Act, which is a consolidating Act, as an Act which is also an amending Act. That is often the effect of a consolidation Act, sometimes by inadvertence and sometimes by design. It does not appear to me practicable to deduce from a comparison of the ante-1910 position of ante-1869 old on-licences, any argument as to what the legislature intended the post-1910 position of ante-1869 old on-licences to be which would control or conflict with the plain language expressed in s. 23 (2) (b).

It appears to me, therefore, that it was within the jurisdiction of the licensing justices to exercise their discretion on the question whether or not the applicant was a fit and proper person in their opinion to be the holder of the licence. That, however, is a discretion which, however wide, must be exercised on a consideration of the matters which are permitted to justices in this respect by the legislature. On the affidavit of the justices, there appears to have been no evidence adverse to the personal character of the applicant, and I do not understand them even to say that any evidence was elicited adverse to his trade fitness for the business; because, although it is said that he had never kept a licensed house before, he had been a cellarman in the employment of the brewery company. That the justices must have been satisfied of his personal good character, I think may be inferred from the fact that, under the powers of s. 88 they had granted him a protection order on July 6, 1911, and to whatever extent they may have thought it necessary to inquire into his character and antecedents, they must at any rate have been satisfied that he was a man against whose character nothing was adducible for that purpose. I think it is clear that what impressed their minds and motived their determination on the application was the relation established by the terms of the agreement of tenancy between the brewery company and the applicant. It is true that they found that the applicant was not duly qualified as by law is required; but I think it is clear from their affidavit that that is a reference only to the relations between the landlord and the tenant. They further found that the applicant was not a bonâ fide tenant, but, as there is no suggestion, either in their own findings or in the evidence which they recite, that this agreement of tenancy was not a real agreement of tenancy, I think that that finding refers only to the amount of independence which, in their view, was left to the tenant under the terms to which he had agreed. I think they meant, not that the piece of paper purporting to be an agreement was a sham—because it was an operative instrument—but that its terms were, in their view, so stringent towards the tenant that, when he came to keep the house under those terms, he would have found himself fettered to an extent which they thought incompatible with the matter which they refer to in their third finding of fact, namely, that he would be fettered to such an extent that his interest was such as to render him indifferent whether he conducted the premises properly or not, and such that he could not properly carry on the place as a licensed premises.

That being what I take to be their real meaning, it is clear that, in their view, having regard to the price at which the tenant was bound to buy his beer, the price at which he covenanted and was required to sell it, and the rent which he would have to pay for the tenancy, it would not leave him an amount of profit that would be adequate to the necessities of a publican. Although he stated that he would have a balance of £3 a week, and that he had read and understood the agreement—although as to many of the provisions he was not aware of them—nevertheless, they say that he was unable to show the justices how the amount of £3 a week was arrived at; and I think their conclusion from that was that they were doubtful if he would make £3 a week out of it. At any rate, he could not tell them, and they did not know how he was going to do it and, if so, they did not think that he was receiving as much remuneration as they would, on a fair bargain, expect a publican to receive. That falls very far short of their finding of fact that he could not properly carry on the business of the licensed premises under the terms of the agreement, and that his interest was such as to render him indifferent whether he conducted the premises properly or not. It appears to me, therefore, that what they have really done has been to take into consideration the adjustment, as they

conceived it to be fair, of the relation between the tenant and the landlord, and they have been actuated by a consideration of the question whether, in their view, the tenant was getting too little and the brewery company too much out of the prospective profits to be made by the sale of beer.

I do not say that there may not be circumstances in which the terms of an agreement of tenancy may not be very material on the question of the fitness and propriety of the person applying to be the holder of the licence, or that there may not be terms of such a character that they would, of themselves, be material on which justices could come to the conclusion, by an inference judicially drawn, that they left the tenant no reasonable likelihood of keeping his house within the requirements of the law. But it is manifest that it has not been permitted to the justices by the legislature to revise the terms on which a tied house as such is held, and it does not appear to me that there is any ground for saying that the legislature has permitted to the justices an inquiry into the trading relations between a tenant who makes his bargain for himself and a landlord who makes his bargain for himself also. With regard, therefore, to the motives, which I do not question and which may be very well supported by excellent arguments of a general character, it appears to me that the justices have been actuated, not by those matters on which the legislature requires them to exercise their discretion, but by matters which are beyond the purview of their jurisdiction, and which, therefore, they should not have taken into account. That being so, it appears to me that the licence was refused on grounds which, in this case, were not open to the justices to act on.

BANKES, J.—I agree. It seems to me that there are two questions raised here of very great importance from the point of view of the administration of the licensing laws. The first is as to the proper construction of s. 23 of the Licensing (Consolidation) Act, 1910, and the other is with reference to the matters which the justices may legitimately take into consideration when exercising their discretion whether or not any particular applicant for a licence is, or is not, a fit and proper person to hold such a licence.

With regard to the first point, I have very little to add to what has been said by the other members of the court. This particular licence is a licence which has been known, and always commonly spoken of, as an ante-1869 beerhouse licence. Under the Wine and Beerhouse Act, 1869, s. 8, there was a provision:

> "That no application for a certificate under this Act in respect of a licence . . . shall be refused except upon one or more of the following grounds—namely . . ."

and then it sets out what are commonly known as the four grounds. The language there is distinct, that no application for any such licence should be refused except on one or more of those four grounds. One of those four grounds was "that the applicant . . . is not duly qualified as by law is required." At the time that Act was passed and from that time onwards until the passing of the Finance Act, 1910, one of the qualifications which by law was required in an applicant in such a case was that he was the real resident holder and occupier of the premises; and so the law continued down to the year 1910. In that year, the Licensing (Consolidation) Act was passed, and it had to do two things; it had to consolidate the existing statutes and also to modify the language hitherto used in those statutes, in order to meet the change of the law which had previously been introduced by recent legislation with reference to compensation. Section 18 of the Licensing (Consolidation) Act, 1910, deals with the restriction on the power of the licensing justices as to the renewal of justices' licences, and is expressed in this way:

> "The power to refuse the renewal of any such justices' on-licence as is described in the first part of Sched. II to this Act [which includes the old ante-1869 beerhouse licences] on any ground other than any of the grounds specified in the second part of that Schedule [that is, in this case, on any ground other than any of the four grounds] shall be vested in the compensation authority and not in the licensing justices."

Therefore, although not using the same form of language as the Wine and Beerhouse Act, 1869, because it was necessary to adapt the language to the new state of circumstances connected with the granting of compensation, this section does in substance say that the power of the licensing justices with regard to the renewal of an old ante-1869 licence is confined to the four grounds.

Then we come to the consideration of the provisions with reference to the transfer of licences. These are contained in s. 23, which commences by enacting that "(1)For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence." In sub-s. (2) it sets out the grounds on which the licensing justices may exercise their discretion with regard to a transfer, and provides that

> "an application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows . . ."

The first condition, contained in para. (a), if we read into para. (a) the language of Sched. IV, contains the cases in which, and the persons to whom, the transfer may be granted. When we are considering who the persons are to whom a transfer may be granted, where the occupation of premises is given up by the holder of a licence or his representative, we find that those persons include the new tenant or occupier of the premises. Where it is the case of an application by a new tenant or occupier of the premises, it is, in my opinion, clearly competent for the justices to ascertain whether or not the applicant is a new tenant or whether he is or is not the occupier of the premises. Paragraph (b) provides:

> "The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision."

Then comes para. (c), on which the argument of counsel in support of the rule has proceeded, and which provides:

> "The special provisions of this Act affecting the renewal of an old on-licence shall apply to the transfer of an old on-licence as they apply to the renewal."

The contention, as I understand it, is that that paragraph ought to be read as though it meant the power of refusal of a transfer of an old ante-1869 beerhouse licence must be confined to a refusal on one or more of the four grounds. I am not sure that that can properly be said to be the meaning, but assume for the moment that it is. When we look at the four grounds, we find that the last one is "that the applicant . . . is not duly qualified as by law is required." What, under the provisions of the Licensing (Consolidation) Act, 1910, are the qualifications of an applicant for a transfer of a licence of this kind? It is impossible, in my opinion, to say that, because the Finance Act, 1910, in s. 2 abolished the qualifications which had hitherto existed under the Beerhouse Act, 1840, therefore you are not at liberty to see whether or not the new Licensing Act, 1910, has substituted something for what had been originally contained in the Beerhouse Act, 1840. In my opinion, the proper construction of s. 23 is that the Act of 1910 has substituted for what was originally contained in the Beerhouse Act, 1840, the provisions of Sched. IV which are incorporated into para. (a) of s. 23 (2), and has, in addition, in para. (b), enacted that a transferee must be a fit and proper person in the opinion of the justices to be the holder of a licence, otherwise he cannot be said to be "a person duly qualified as by law is required."

On the second point, it seems to me that the question of what matters the justices are entitled to take into consideration in arriving at a conclusion whether any particular person is a fit and proper person to be the holder of a licence, is a very important one. It would not be right that this court should interfere in any way where, on proper materials, the justices have exercised an honest discretion. On the other hand, the court should not hesitate to declare, in cases where it is satisfied that, under cover of any inquiry into the question whether a particular person is or is not a fit and proper person to hold a licence, the justices have inquired into and been influenced by questions

which are wholly foreign to any such inquiry. I do not agree with the contention that the inquiry into this question of whether a particular person is or is not a fit and proper person to hold a licence ought to be confined to that person's character. It would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend on its own circumstances. As illustrations merely of what, in my opinion, are matters admissible for consideration, I would mention the health of the applicant, or his temper or disposition. I cannot think that a paralysed person, in the one case, or a person of so combative a temperament that breaches of the peace would be a certain consequence of permitting him to hold a licence, in the other, would be in either case a fit and proper person to be entitled to hold a licence. At any rate, it is quite clear that the discretion that is given to the justices in the selection of fit and proper persons to hold licences does not include the power to dictate the terms on which the applicant is to conduct his business, if those terms do not in any proper sense affect the fitness of the applicant, and then to treat the applicant as an unfit person to enjoy the licence because he refuses, or is unable to accept those terms.

In my opinion, this is what the justices have done in the present case. They have assumed a jurisdiction which I do not think they possess, first of all, of dictating the terms which the brewers shall offer to their tenant, and, secondly, of endeavouring to control the legitimate exercise of the brewers' discretion as to the way in which they shall conduct their business in competition with other brewers in the district. I arrive at this conclusion from the justices' own statement of what occurred. In the letter which their clerk wrote, having seen the proposed agreement between the landlord and the tenant, he stated that "judging from the schedule and one or two clauses in the agreement, the justices think you are proposing to introduce a new system in Hyde." When we look at the agreement, coupled with the affidavit of the justices, it seems to me clear that the new system there referred to, and what the justices really objected to, was that these brewers and this tenant, the applicant, were intending to introduce into this district a system under which the more expensive beer, the 37s. beer, should be sold at 2d. a pint, in competition with other persons in the district, who were selling a much cheaper beer—27s. or so a barrel—at the same price. I also notice that the justices in their affidavit say that they objected to certain clauses in the draft agreement, one of which was cl. 2, para. 9, which provided that the tenant should not at any time during or upon or after the expiration of his tenancy,

> "demand or require directly or indirectly any moneys in consideration of goodwill for the trade of the said house and premises, it being expressly agreed that the tenant shall have no claim on the landlords in respect of any increase of business which may take place during the tenancy."

Another clause which they mention is a provision in para. (e) in cl. 4, which provides that:

> "If any notice or complaint shall be given or made by any justice of the peace, or by the superintendent or acting superintendent for the time being of the local police court as to the conduct or management of the premises that shall by agreement between the parties be a ground for determining the tenancy."

In expressing the above opinion, I desire to guard myself against saying that an inquiry into the terms on which an applicant intends to carry on his business, either as between himself and the landlord, or as between himself and the public, can never be material. It may be that the circumstances are such that the only legitimate inference from a consideration of those terms is that the applicant cannot carry on his trade without infringing the law. And if the only legitimate conclusion from the terms arranged between the landlord and the tenant is that, in any ordinary business, it would be impossible for the man to carry on his trade without permitting drunkenness or permitting gaming, or watering his beer, or committing some such infringement of the law, then I think the justices might legitimately come to the conclusion that such a man in such a position was not a fit and proper person to hold the licence. In this case, there

was no evidence of that kind; on the contrary, I think it is plain that the justices have taken into consideration matters which they were not entitled to take into consideration, and have assumed a jurisdiction which they did not possess, and for the purpose of exercising that jurisdiction they have sought to impose terms on persons which they had no right to impose. I agree that this rule should be made absolute.

Rule absolute.

Solicitors: *Indermaur & Brown*, for *William F. Chambers*, Denton.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

COINTAT *v.* MYHAM & SON

[King's Bench Division (Lord Coleridge, J.), March 7, 19, 1913]
[Reported [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; 29 T.L.R. 387; 11 L.G.R. 760]

Sale of Goods—Warranty—Breach—Diseased meat sold for resale—Buyer convicted and fined—Measure of damage—Amount of fine, costs, loss of trade.

The plaintiff purchased the carcase of a pig from the defendants, who were meat salesmen, for the purpose of sale in his butcher's shop. He was ignorant of the fact that the carcase was unfit for human food, and it was seized in the shop by a sanitary inspector and ordered to be destroyed. Subsequently, plaintiff was convicted under the Public Health (London) Act, 1891, s. 47 (2), of having bad meat on his premises, and was fined. In an action for damages for breach of an implied warranty, the jury found that the meat was not fit for human consumption, that the plaintiff had impliedly made known to the defendants the purpose for which the meat was required, that he had done so in such a way as to show that he relied on their skill and judgment, and they awarded him damages both in respect of the fine and costs and of loss of trade.

Held: the damage was not too remote, and the plaintiff was entitled to recover in respect of it.

Fitzgerald v. *Leonard* (1) (1893), 32 L.R. Ir. 675, not followed.

Richard Holden, Ltd. v. *Bostock & Co. Ltd.* (2) (1902), 50 W.R. 323, *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.* (3), [1904] 1 K.B. 725, and *Watson* v. *Gray* (4) (1900), 16 T.L.R. 308, distinguished.

Notes. This case was overruled in the Court of Appeal on a point under the Sale of Goods Act, 1893, s. 55; see (1914), 84 L.J.K.B. 2253.

Distinguished: *Turpin* v. *Victoria Palace*, [1918] 2 K.B. 539. Considered: *Simon* v. *Pawson and Leafs, Ltd.*, [1932] All E.R.Rep. 72. Distinguished: *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35. Referred to: *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.*, [1914–15] All E.R.Rep. 1068; *Proops* v. *Chaplin* (1920), 37 T.L.R. 112; *Weld-Blundell* v. *Stephens*, [1920] All E.R.Rep. 32; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1926), 135 L.T. 83; *Marles* v. *Philip Trant & Sons, Ltd.* (*Mackinnon Third Party*) (No. 2), [1953] 1 All E.R. 651.

As to remedies of a buyer for breach of warranty, see 34 Halsbury's Laws (3rd Edn.) 156 et seq.; and for cases, see 39 Digest 468 et seq.

Cases referred to:

(1) *Fitzgerald* v. *Leonard* (1893), 32 L.R. Ir. 675; 39 Digest 477, *c.*

(2) *Richard Holden, Ltd.* v. *Bostock & Co., Ltd.* (1902), 50 W.R. 323; 18 T.L.R. 317; 46 Sol. Jo. 265, C.A.; 39 Digest 479, *1012.*

(3) *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K.B. 725; 73 L.J.K.B. 824; 91 L.T. 626; 53 W.R. 155; 20 T.L.R. 342; 9 Com. Cas. 200; 39 Digest 478, *1001.*

(4) *Watson* v. *Gray* (1900), 16 T.L.R. 308; 17 Digest (Repl.) 132, *384.*

(5) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99.*

(6) *Crage* v. *Fry* (1903), 67 J.P. 240; 1 L.G.R. 253; 39 Digest 478, *1008.*

(7) *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp.M.L.C. 433, H.L.; 41 Digest 802, *6627.*

(8) *Marcus* v. *Myers and Davis* (1895), 11 T.L.R. 327; 17 Digest (Repl.) 129, *365.*

(9) *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 4 T.L.R. 95, C.A.; 39 Digest 476, *995.*

(10) *Jackson* v. *Watson & Sons*, [1909] 2 K.B. 193; 78 L.J.K.B. 587; 100 L.T. 799; 25 T.L.R. 454; 53 Sol Jo. 447, C.A.; 39 Digest 478, *1010.*

(11) *Swain* v. *Schieffelin* (1892), 134 N.Y. 471.

(12) *Blake* v. *Fenner* (1911), cited in, [1913] 2 K.B. at p. 224; 82 L.J.K.B. at p. 554; 108 L.T. at p. 558, C.A.; 39 Digest 478, *1007.*

Also referred to in argument:

Randall v. *Raper* (1858), E.B. & E. 84; 27 L.J.Q.B. 266; 31 L.T.O.S. 81; 4 Jur.N.S. 662; 6 W.R. 445; 120 E.R. 438; 39 Digest 476, *992.*

Walshaw v. *Brighouse Corpn.*, [1899] 2 Q.B. 286; 68 L.J.Q.B. 828; 81 L.T. 2; 47 W.R. 600; 15 T.L.R. 403; 43 Sol. Jo. 568, C.A.; 25 Digest 113, *367.*

Addis v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466, H.L.; 17 Digest (Repl.) 74, *1.*

Hobbs v. *Winchester Corpn.*, [1910] 2 K.B. 471; 79 L.J.K.B. 1123; 102 L.T. 841; 74 J.P. 413; 26 T.L.R. 557; 8 L.G.R. 1072, C.A.; 25 Digest 111, *351.*

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640; 65 L.J.Q.B. 50; 73 L.T. 459; 59 J.P. 804; 44 W.R. 49; 12 T.L.R. 14; 40 Sol. Jo. 9; 14 R. 767, C.A.; 17 Digest (Repl.) 130, *376.*

Robinson v. *Harman* (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 17 Digest (Repl.) 81, *33.*

Further Consideration of an action tried before Lord Coleridge, J., and a jury.

This was an action brought by the plaintiff against the defendants for damages for breach of an implied warranty that the carcase of a pig purchased by the plaintiff from the defendants was merchantable and reasonably fit for human food. In ignorance of the fact that the carcase was tuberculous and unfit for human food, the plaintiff exposed it for sale, and it was seized by a sanitary inspector, adjudged unfit for human food, and destroyed. On a summons being issued against the plaintiff under s. 47 (2) of the Public Health (London) Act, 1891, he was found guilty and fined £20.

The plaintiff claimed as damages the amount of the fine which he had had to pay, the costs which had been incurred by him in defending the case, and also compensation for the loss of custom in his business caused by the breach of the warranty. The jury found that the meat was unfit for human food, that the plaintiff had impliedly made known to the defendants the purpose for which the meat was required, and that he had done so in such a manner as to show that he placed full reliance on the defendants' skill and judgment. The jury assessed the damages as to the fine and costs at £36 16s. 2d., and as to loss of trade £200. The plaintiff asked for judgment on these findings for the two amounts named, and the case was reserved for further consideration.

Lewis Thomas, K.C., and *Ellis Hill* for the plaintiff.
Shearman, K.C., and *Kerly* for the defendants.

LORD COLERIDGE, J., read the following judgment.—In this case the jury found that the defendants sold to the plaintiff a diseased pig with an implied warranty that it was fit for human food; that the plaintiff relied on the skill and judgment of the defendants; and that the plaintiff was entitled to damages—first £36 16s. 2d. in respect of

the payment of a penalty and costs of defence in and about a conviction for exposing bad meat; and, secondly, £200 for loss of business due to the injury to his trade and custom. The plaintiff is, primâ facie, entitled to be placed in the same position as if the contract had not been broken by the defendants. Damages must not be too remote. They are not too remote if they arise naturally out of the breach of contract, and if the damages sustained may fairly and reasonably be considered to have been in the contemplation of both parties as the probable result of the breach thereof at the time of making it.

First, then, are the damages consequent on the conviction of the plaintiff too remote? I do not think that they are. The jury have in substance found that the defendants must have known that the plaintiff, relying on the implied warranty, would naturally expose the meat for sale, and that a conviction for so doing might reasonably follow without any negligence at all on his part. Although, no doubt, in one sense the plaintiff was in default in rendering himself liable to the law, yet absence of knowledge or absence of negligence is no defence to the charge, and his conviction does not imply that he was negligent. If there was any ground for showing that the fine imposed was heavy on the ground of the absence of care on the part of the plaintiff, that might be a ground for deducting some portion of the fine from the damages. But the jury were entitled to find the whole £36 16s. 2d. on the facts if they thought it reasonably followed from the breach of warranty and was reasonably in the contemplation of the parties, within the principle of *Hadley* v. *Baxendale* (5), and was not brought about, wholly or in part, by the negligence of the plaintiff: see *Crage* v. *Fry* (6).

The next point for consideration is whether damage for loss of trade is too remote. If there was any case in which it had been held that, under no circumstances, can loss of trade come within the rule of *Hadley* v. *Baxendale* (5), of course I should follow it. But I can find none. There is *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (7), in which the loss of profits sustained by a ship being unable to go on a voyage owing to a collision was held to be recoverable. It is said that the rule is different in cases of tort and breach of contract. But in *Marcus* v. *Myers and Davis* (8), loss of business through breach of contract to insert an advertisement was held to be recoverable. *Hammond & Co.* v. *Bussey* (9) is not decisive of the present case, because there was express notice to the defendant that the plaintiffs were re-selling the coal and repeating the warranty given by the defendant to them, and the defendant repeated and insisted on the warranty. In *Jackson* v. *Watson & Sons* (10), damages were held to be recoverable by a husband where the defendant had supplied the husband with tinned salmon for the purpose of human consumption. The wife died, and the husband recovered damages for the loss of the services of the wife. That was decided on the ground of the breach of warranty that the salmon was fit for human consumption, and, therefore, it comes near, though it is not identical in principle with, this case. There is one case in the American courts which is exactly in point, *Swain* v. *Schieffelin* (11). This, of course, is not binding on me, but it shows that the point has been discussed and decided, where, on a similar contract, damages for loss of custom were held not to be too remote.

There are cases which at first sight indicate an opposite view, but I think that they are clearly distinguishable. In *Richard Holden, Ltd.* v. *Bostock & Co., Ltd.* (2), no claim for loss of business was ultimately made, although a claim was made, and succeeded, for costs incurred in minimising the loss to the plaintiff. It may be that the reason was that no evidence was forthcoming to prove that the sugar, which was in fact used for brewing beer, was purchased under a warranty that it was fit for that purpose. It may be that, for business purposes, the plaintiff did not wish to expose his losses. In *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.* (3), there was no warranty that the article purchased was fit for the purpose for which it was used. In *Watson* v. *Gray* (4), damages for loss of business were held not recoverable because, on the facts of that particular case, the defendant could not reasonably be supposed to have had in contemplation that the plaintiff would suffer such loss of custom from the breach of the particular contract. That case is not inconsistent with *Marcus* v. *Myers and Davis* (8), for KENNEDY, J., was a party to both decisions. The strongest case against the con-

A tention of the plaintiff is that of *Fitzgerald* v. *Leonard* (1). That case does not, in my opinion, decide more than that, in that particular case, the damages for loss of custom in fact arose from the conviction and not from the breach of the warranty, and that the conviction of the plaintiff was not what the parties could reasonably have had in contemplation on the facts of that case. If it decides more than this, it is in conflict with the unreported case of *Blake* v. *Fenner* (12), and I decline to follow it. *Blake* v. *Fenner* B (12) was decided by the Court of Appeal on Oct. 27, 1911, upholding a decision of mine that, on a similar implied warranty, damages for loss of custom could be recovered.

To sum up the whole matter, it appears to me that the sound view to take is this: The loss to a man's business may not be, and perhaps is not, usually in contemplation between the parties as the possible consequence of a breach of contract, but where the party guilty of the breach of contract or warranty knows that the other party is relying C on his fulfilment of the contract and knows the possible and probable consequences of such reliance, the damages caused to the other party by the consequent breach of his contract are recoverable by him. Where, as in this case, an article is supplied to a buyer to be used as food for his customers, and that is known to the seller and the article is supplied for that purpose, in the absence of negligence on the part of the buyer I think he may recover for the loss of custom due to the breach of the contract D by the defendant, under the principle laid down in *Hadley* v. *Baxendale* (5), on the ground that the special loss was in fact actually in the contemplation, or may be taken to have been in the contemplation, of the seller at the time of the making of the contract, as the reasonable consequence of such breach. Therefore, I give judgment for the plaintiff for the damages found by the jury under both heads.

Judgment for plaintiff.

E Solicitors: *C. Groebel & Co.*; *Cotton & Bower.*

Reported by J. A. Slater, Esq., *Barrister-at-Law.*]

F

BAKER AND OTHERS *v.* INGALL

G

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), November 29, 30, December 1, 1911]

[Reported [1912] 3 K.B. 106; 81 L.J.K.B. 553; 105 L.T. 934; 28 T.L.R. 104; 56 Sol. Jo. 122; 75 J.P. Jo. 580]

H *Trade Union—Action by union against member—Repayment by member of benefit paid to him when incapacitated—Ability to resume work—Agreement for repayment on cessation of incapacity—Trade Union Act*, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 4 (3) (*a*).

The Trade Union Act, 1871, s. 4, provides: "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing . . . 3. Any agreement for the application of the funds of a trade union— I (a) to provide benefits to members."

The defendant was a member of a friendly society, registered under the Trade Union Acts. By one of the rules of the society, a member becoming totally incapacitated by accident from following his employment for life was entitled to receive £100, and was bound, on receiving that sum, to sign an agreement to repay in the event of his returning to his trade. If he failed to refund the money, certain officers of the society were empowered to institute legal proceedings against him. The defendant, through an accident, was apparently totally incapacitated for life from following his employment, and he claimed, and was paid, £100 under the rules.

On receiving the £100, he signed an agreement that, in the event of his resuming work, he would repay it. The agreement recited the rules and that the £100 was paid under the rules, and provided that certain officers of the society should be entitled to sue for repayment. The defendant subsequently resumed work within the meaning of the agreement. In an action by the appropriate officers of the society against the defendant to recover the £100 under the agreement,

Held (KENNEDY, L.J., dissenting): the action was brought directly to enforce an agreement for the application of the funds of a trade union to provide a benefit to a member within the meaning of s. 4 (3) (a), of the Act of 1871, and, therefore, it could not be maintained.

Decision of the DIVISIONAL COURT, [1911] 2 K.B. 132, reversed.

Notes. Referred to: *Miller* v. *Amalgamated Engineering Union*, [1938] 2 All E.R. 517.

As to trade union agreements, see 32 HALSBURY'S LAWS (2nd Edn.) 473 et seq.; and for cases, see 43 DIGEST 96, 97. For the Trade Union Act, 1871, s. 4, see 25 HALSBURY'S STATUTES (2nd Edn.) 1245.

Cases referred to:

(1) *Russel* v. *Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506; 79 L.J.K.B. 507; 102 L.T. 119; 26 T.L.R. 228; 54 Sol. Jo. 213, C.A.; affirmed, ante p. 550; [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 32, *254*.

(2) *Ford* v. *Beech* (1848), 11 Q.B. 852; 17 L.J.Q.B. 114; 11 L.T.O.S. 45; 12 Jur. 310; 116 E.R. 693, Ex.Ch.; 17 Digest (Repl.) 263, *676*.

(3) *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256; 74 L.J.K.B. 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 107, *1127*.

(4) *Wilkie* v. *King*, 1911 S.C. 1310; 43 Digest 97, *g*.

(5) *Tatum* v. *Reeve*, [1893] 1 Q.B. 44; 67 L.T. 683; 57 J.P. 118; 41 W.R. 174; 9 T.L.R. 39; 5 R. 83; sub nom. *Tatham* v. *Reeve*, 62 L.J.Q.B. 30, D.C.

Appeal by the defendant from a judgment of the Divisional Court (PHILLIMORE and BANKES, JJ.) reversing a judgment of the county court judge at Sheffield.

The plaintiffs were Baker, Lawson and Toseland, the president, secretary, and ex-president of the Friendly Society of Ironfounders of England, Ireland, and Wales, which was a trade union registered under the Trade Union Acts, 1871 and 1876. The action was brought by the plaintiffs on behalf of themselves and all other the members of the society to recover £100 payable by the defendant under the terms of an agreement dated Aug. 29, 1907. The defendant, in 1906, was a moulder in an iron foundry, and was a member of the society. On June 18, 1906, the defendant, being a twelve-months' member and not owing twelve weeks' contributions within r. 25 (1) of the rules of the society, met with a severe accident while at his work and appeared to be totally incapacitated from following his employment for the rest of his life. He made a claim on the society under r. 25 (1) to be paid the sum of £100 in accordance with that rule, and on Aug. 29, 1907, he was paid £100, and signed the agreement on which this action was brought. An unexpected improvement having taken place in the condition of the defendant, in March, 1910, he resumed work in a foundry as a coremaker, in which capacity he received smaller wages than he had received as a moulder before his accident. This action was commenced to recover the £100. The defendant set up the defences (i) that he had not resumed work as an ironfounder within the meaning of the agreement; and (ii) that the agreement could not be enforced in a court of law, the society being an illegal society at common law, by reason of the provisions of s. 4 of the Trade Union Act, 1871. The learned county court judge found as a fact that the defendant had resumed work as an ironfounder, within the meaning of the agreement. On a consideration of the rules of the society, he came to the conclusion that the society was an unlawful one at common law, and that, therefore, if the action was within s. 4 of the Trade Union Act, 1871, it was not maintainable. He held that the agreement was an agreement for the application of the funds of the society to provide a benefit for a member within s. 4 (3) (a), and, accordingly, gave judgment in favour of the defendant.

The plaintiffs appealed, and the Divisional Court allowed the appeal and directed judgment to be entered for the plaintiffs for £100.

Spencer Bower, K.C., and *Arthur Page* for the defendant.
Danckwerts, K.C., and *H. T. Waddy* for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—It is admitted that this case is covered by the decision of the Court of Appeal in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1) and, therefore, it cannot be contended in this court that the Friendly Society of Iron-founders is not an unlawful association at common law. This does not, of course, affect the right of the society to raise this point hereafter in the House of Lords, if necessary. Consequently, if the agreement which we have to consider falls within s. 4 of the Trade Union Act, 1871, this action is not maintainable. That section provides:

> "Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, 1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. 2. Any agreement for the payment by any person of any subscription or penalty to a trade union. 3. Any agreement for the application of the funds of a trade union—(a) To provide benefits to members, or (b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or (c) To discharge any fine imposed upon any person by sentence of a court of justice; or 4. Any agreement made between one trade union and another; or 5. Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

In the view that I take of this case, I have only to refer to the provisions of sub-s. 3 of s. 4, that is, the clause dealing with benefits of members. I have come to the conclusion that the agreement in this case is an agreement for the application of the funds of a trade union to provide a benefit to a member. It is contended that the agreement contained in r. 25 of the society is quite separate and distinct from the agreement of Aug. 29, 1907. PHILLIMORE and BANKES, JJ, have held in the Divisional Court in this way, and this is an appeal from that decision. PHILLIMORE, J., says ([1911] 2 K.B. at p. 140):

> "It may be that there is in these rules an agreement for the application of the funds of the trade union to provide benefits to members, and the defendant could not have enforced the payment of this £100 because such an agreement would be struck at by s. 4, sub-s. 3 (a). But, if so, the benefit which the defendant has agreed to get, and the trade union has agreed to give him, and which cannot be enforced by action, is a conditional gift of £100, and the agreement for the application of the funds of the trade union has been performed when that conditional gift has been made and the necessary instrument for establishing that conditional gift has been executed. After that any rights which arise under that instrument are not rights which are to be enforced as part of the agreement for the application of the funds of the trade union."

BANKES, J., says (ibid. at p. 142):

> "It is clear that s. 4, sub-s. 3, of the Act of 1871 applies to all agreements between the society and its members with regard to benefits to which the members are entitled under the rules, because these agreements are clearly agreements for the application of the funds of the trade union to provide benefits to its members. The present case raises a question as to the construction of r. 25 (1) and (6). The agreement constituted by the rules is a promise that the society on its part will in certain events grant a conditional benefit to a member who brings himself within r. 25 (1), and

a promise by the member on his part that he will, as a condition of receiving the benefit, enter into an agreement to repay the benefit in certain events. Now, in so far as these two sub-rules constitute an agreement between the society and the member, I think that the agreement, being one for the application of the funds of a trade union to provide a benefit to its member, could not be sued upon. But that is not the question here. The question we have to decide is whether the agreement which the member has, in pursuance of his promise contained in sub-r. (6), entered into, is a separate and independent agreement, or whether it is merely a part or a term of the original agreement contained in r. 25, in which case it could not be enforced in a court of law. In my opinion it is a separate and distinct agreement, the result and not a part of the original agreement. That being so, I am at liberty to construe the agreement of August, 1907, as a separate agreement, and doing so I come to the conclusion that this is not an agreement for the application of the funds of a trade union to provide a benefit to a member, and consequently that there is nothing to prevent it from being enforceable in a court of law."

I cannot agree that the agreement of Aug. 29, 1907, which the member signed in pursuance of his promise contained in r. 25 (6), is a separate and independent agreement. I think it is merely a part or a term of the original agreement contained in r. 25; in which case, both the learned judges held that it could not be enforced in a court of law. Indeed, it is an agreement that in such a case could not be enforced.

I will now read the material portions of r. 25. Sub-rule (1) says:

"Accident benefit. Any twelve-months' member owing not more than twelve weeks' contributions meeting with an accident and thereby losing or disabling a limb, or suffering from bodily ailment, imperfect vision or blindness, not caused by old age, but the result of an accident to a previously healthy organ, and who, in consequence, is totally incapacitated from following his employment as a metal founder or general core maker for the remainder of his life, shall, if not disentitled according to rule, receive the sum of one hundred pounds."

I do not think I need read sub-r. (2). Then sub-r. (3) provides:

"Any member desiring to claim the accident benefit shall inform his branch secretary, who must bring the application before the next quarterly meeting, and if, after making the fullest inquiries, the branch is satisfied of the justice of the claim, they shall forward their report to the council for their consideration and decision."

Then I think the next I need read is sub-r. (6):

"All members receiving the accident benefit must sign an agreement that, in the event of their returning to the trade, they shall refund to the society the amount of accident benefit received. Failing to do so, the council shall be empowered to institute legal proceedings for recovery."

In my opinion, this r. 25, apart from any illegality in the society, and from the provisions of the Trade Union Act, to which I have already referred, would give a member, and the society he is connected with, rights which could be enforced by the one against the other. I think that the agreement is entirely one agreement, that every recital must be taken into consideration, and that, if an action is brought to enforce a part of it, it is an action brought to enforce an agreement for the application of the funds of the trade union, and, in particular, that it is an agreement made for the application of the funds of the trade union to provide benefits to members in pursuance of r. 25. Rule 25 is headed "Accident benefit." I think it is impossible to divide the agreement into two parts, and to treat the action as being brought on the mere agreement to refund. I do not say that the agreement is unlawful, but I do say that it is an agreement which falls within the words of sub-s. 3 of s. 4 of the Trade Union Act, 1871—an agreement for the application of the funds of a trade union to provide benefits for its members, and, therefore, that it is within the words,

"Nothing in this Act shall enable any court to entertain any proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements,"

A —that is, in the present case, the agreement mentioned in sub-s. 3 (a). I cannot accept the argument based on the use of the word "for" in the passage in s. 4 which I have just quoted, nor do I think that, in giving the construction that I have done to the agreement sued on, I am in any way departing from the canon on construction laid down by PARKE, B., in *Ford* v. *Beech* (2).

I propose now to read such parts of the agreement as I think ought to be read in B order to decide this case. It begins with this recital:

> "Whereas by the 25th rule of the said society it is provided that subject to certain conditions any free or twelve-months' member meeting with an accident and thereby losing," &c.

Then it recites sub-r. (6):

C > "And whereas it is provided by cl. 6 of the said rule that members receiving the allowance under either scale of the accident benefit shall sign an agreement whereby if they resume their occupation as ironfounders they shall in that case refund to the said society the whole amount received and if necessary legal proceedings shall be taken to recover the same."

D I think that those words are important. Then it proceeds:

> "And whereas the said Henry Ingall, being a member of the said society, has represented to the said society that he has been rendered permanently unable to follow his trade as an ironfounder through accident and has produced to the executive committee of the said society satisfactory testimony of such permanent disablement; and whereas the sum of one hundred pounds sterling has been on the E signing of this agreement paid to the said Henry Ingall out of the funds of the said society in pursuance of the [twenty-fifth] rule of the said society and the said Henry Ingall hereby acknowledges and declares that he has received the said sum of one hundred pounds sterling in full for all benefits which he might claim under any of the rules of the said society. Now these presents witness that in further pursuance of the said rule and in consideration of the premises the said F Henry Ingall for himself, his heirs, executors, and administrators hereby agrees with the said Thomas Toseland and Joseph Maddison, and with each of them, and with the executors, administrators, successors and assigns of them, and each of them, that in case the said Henry Ingall shall at any time hereafter resume work as an ironfounder the said Henry Ingall, his executors or administrators, shall forthwith repay to the said society the sum of one hundred pounds sterling so paid to him G as aforesaid, without any deduction or abatement whatsoever, and that any earning of money by the said Henry Ingall in any department of the trade of an ironfounder shall be deemed a resumption of work for the purposes of this agreement. And that in case the said sum of one hundred pounds sterling shall not be repaid to the said society by the said Henry Ingall, his executors or administrators, within one month after his resuming work as aforesaid, it shall be lawful for the said Thomas H W. Toseland and Joseph Maddison, or for either of them, or for the executors, administrators, successors, or assigns of them, or either of them, or for the president and corresponding secretary of the said society for the time being, or for either of them, to sue and proceed against the said Henry Ingall, his executors or administrators, upon this agreement in any court of competent jurisdiction for the said sum of one hundred pounds sterling, or for so much thereof as may remain unpaid for I the time being."

Then I think all I need read beyond that is this:

> "And that it shall be no answer to any such proceedings that the said sum of one hundred pounds sterling was partnership money, or that the rules of the said society were in restraint of trade, and the said Henry Ingall shall not demur to deny or put in question the right of the plaintiffs or plaintiff to sue for and recover the said sum of one hundred pounds sterling. And that for the purpose of such proceedings it shall not be necessary to prove the said rules, or the appointment of the plaintiffs

or plaintiff, or either of them, or of the persons or person through whom they or either of them claim or claims title as president or corresponding secretary of the said society respectively, except by the production of the minute book of the said society."

There is the agreement. I have already really expressed my view of this matter, and I can only say once again that, in my judgment, this is one single agreement which cannot be divided; and, treating it as one agreement, to my mind, if there is any clause in that agreement on which the society desire to bring an action, they will be prevented from bringing that action, because this agreement as a whole falls within sub-s. 3 of s. 4 of the Trade Union Act, 1871. I think this appeal must be allowed.

BUCKLEY, L.J.—On the question whether this society is one which is illegal at common law as having purposes in restraint of trade, the plaintiffs, the society, admit that there are decisions which bind this court, against which they cannot contend, though, of course, a contrary contention is perfectly open to them in the House of Lords. This judgment, therefore, proceeds on the footing that this society is a trade union, illegal at common law, but having the benefit of ss. 2 and 3 of the Trade Union Act, 1871, but, subject to the qualifications and the restrictions imposed by s. 4 of that Act. Counsel for the defendant indicated, but did not develop, another point, which I understood was that the society may be illegal on grounds other than those addressed to the question of a trade union. What that case is I do not know. We have heard nothing about it, and it was unnecessary to develop it because the decision of this court is in his favour on the main point. But that point, whatever it is, will also, of course, be open to him in the House of Lords.

The question on which I have to give judgment is this: This being a society illegal at common law as having purposes in restraint of trade, is this an action to enforce an agreement within s. 4 of the Act? If it is, it cannot be maintainable. I think that it is, and the head under which it falls is s. 4, sub-s. 3 (a). Section 4 provides that: [His Lordship read s. 4, 3 (a), and continued:] If an agreement be entered into between two parties containing, let us say, four terms, the first two binding on the one party, and the other two binding on the other party, and if three of those terms are performed and the fourth is not, an action to enforce that fourth term is an action directly to enforce that agreement. The points to be considered here are two. The first is whether this is an action to enforce an agreement in that sense; and, secondly, whether, as has been contended, the agreement is not one but two and whether the agreement which it is now sought to enforce is a separate and independent agreement which has nothing to do with the other agreement, and nothing to do with s. 4. Suppose that an agreement is entered into between a society of this kind and a member to this effect: That, under circumstances, the member should be entitled to receive £100 to be expended within twelve months in building or buying a house, and, if not so expended within that time, then to be refunded. Suppose the money was advanced, but that the house was not built or bought; an action to enforce the return of that money would be an action to enforce that agreement, and that agreement would, in my opinion, be one for the application of the funds of a trade union to provide benefits to its members. It would be an agreement to provide a benefit on the terms that the member on his part assumed a certain obligation towards the society. It would be an agreement under which the funds were, under circumstances, to be paid to a certain person on the terms that they should be his in one event, but should become again the funds of the society in another event. The funds are parted with, and are, in the language of the agreement, to be refunded. In my opinion, the whole of that agreement is an agreement for the application of the funds to provide benefits.

The agreement with which we have here to deal is not exactly of that kind. Passing to the rules, their effect, in my judgment, is this: under r. 25, the defendant, in an event which happened, was entitled to receive £100 on certain terms, and those terms included sub-r. (6) of r. 25. Sub-rule (6) had this effect, that, if the man received the £100 he was bound to sign a certain agreement—in this case the agreement of Aug. 29, 1907—and

then sub-r. (6) went on to say: "Failing to do so, the council shall be empowered to institute legal proceedings for recovery." I understand that to mean that, on failing to sign the agreement, the council shall be empowered to take legal proceedings. It appears to me that, under this sub-rule, if the £100 is paid and the man will not sign the agreement the council may immediately sue him for the £100 although he is still incapacitated. They can get it back from him because he will not comply with the terms. If he has complied with the terms and signed the agreement, then, in the event of his ceasing to be incapacitated, they are again to be entitled to recover the £100. Within the rules themselves there are contained provisions under which in both events, the one of his remaining incapacitated but refusing to sign the agreement, and the other of his signing the agreement and ceasing to be incapacitated, the £100 is to be repayable. The rules, I think, contemplate a complete code under which by virtue of the rules, the £100 is to be repayable in the various events which are contemplated.

What took place here was this. The defendant became incapacitated. Two events took place simultaneously. The first, the handing over of the money, and, secondly, the signing of the agreement. I get that fact from the agreement itself. The agreement, after reciting the rules and the obligation to sign the agreement to refund, and then stating that the defendant had represented he was incapacitated, says that, whereas the £100 has been on the signing of this agreement paid to the defendant, and he acknowledges that he has received it in full for all benefits which he is claiming under the rules; and that is expressed to be done in pursuance of r. 25; so that simultaneously the money is paid and the agreement is signed. The consideration for the agreement is this: "Now, these presents witness that in further pursuance of the said rule, and in consideration of the premises"—that is to say, in order to give effect to the bargain contained in the rules which is to be effectuated by the signing of an agreement, and in consideration of his having had the money, circumstances having happened in which he was entitled to it, he bound himself to pay a sum in an event. To my mind, the whole of that agreement was an agreement for the application of the funds of the union to provide a benefit to a member on terms which included that, in an event, the member should be responsible to return the sum paid to him.

The other point which requires consideration, and which I have largely considered already, is whether the agreement is a separate agreement altogether. To my mind, it is not. The agreement is part of one entire transaction, in which it is true that this part of the bargain is to be evidenced by a separate bit of paper; but that separate bit of paper is not a separate agreement independent of the other agreement; it is but a working out of that agreement, and an evidencing of the exact terms which are to be complied with. There is a decision in Scotland of *Wilkie* v. *King* (4), in which the Scottish court, following the decision of the Divisional Court in this case, decided to the contrary effect of that which I am now holding. LORD JOHNSTON was the dissentient judge, and I confess that I prefer his judgment to that of the other members of the court. It is true that, in that case, the rules contained not merely such a rule as r. 25 (6), but they also contained another, which was that members resuming work should be required to refund. So that you have there in express words that which I find by implication in the rules before me. But, to my mind, it is much too narrow to say that a case such as this could be differentiated by the fact that sub-r. (6) of r. 25, which requires the signature of an agreement to do the thing, is not followed or preceded by another rule which says that the member shall do the thing as to which he is to sign an agreement providing that he will do it. I do not think the cases are to be distinguished on that ground.

I arrive at the conclusion that here there was an agreement for the application of the funds of the union to provide benefits, one term of which has not been performed, and that this is an action to enforce it; that it is, therefore, an action to enforce such an agreement as is in the statute mentioned, and, having regard to the provisions of the statute, that it is incompetent to the court to deal with this action, being as it is, in my opinion, an action directly to enforce that agreement. For these reasons, I think that this appeal succeeds, and that judgment ought to be entered in the action for the defendant.

KENNEDY, L.J.—I am unable to concur in the judgment which has just been pronounced, and as that judgment is a judgment of the majority of this court, I feel a certain diffidence in expressing an opinion which I none the less hold clearly. It appears to me that the plaintiffs are right. This is an action brought on a certain document which, as I understand it, is in the form of an agreement. It is under hand only, and not under seal. It is a document in which, when we come to the operative part after the close of the recitals, we find it is stated: [His Lordship read the agreement of Aug. 29, 1907, and continued:] If I am asked as a lawyer what is the effect of that deed, or what is its purpose, or what is its object, or what is its scope, I do not think I should be accurate if I said more than this. It is a document under which the defendant binds himself in certain events to pay the sum of £100 to the society through its officials or to other persons named, who might recover the sum. It appears to me, with great respect to those who hold a different opinion, that, to say that I must add to that anything of the matters that are contained in the recitals, is not sound as a matter of legal construction of documents. Many deeds, I need not say, contain any number of recitals; but to say that a deed, as the argument on the other side would compel one to say, forms part of a recited document so far as its legal effect, purpose, object, or scope is concerned, is to my mind not good law. Of course, a deed may provide in terms that the deed shall be read with, or in subordination to, any other document that it mentions, in which case that deed is incorporated in the document. But I know of no legal authority which justifies me in saying, as must be assumed in support of the appeal here, that this document is a document which is not a document to secure this repayment except in so far as such repayment may be justified by some document referred to in the recitals. Of course it recites the history. It would never have been entered into but for the fact of the defendant being a member of the society. It would not have come into existence but for the rules which, according to the constitution of the society, made such an agreement a proper one to enter into, and a proper one to enforce. But if I am asked what is, in my opinion as a lawyer, the effect, purpose, object or scope of this deed, I must answer that it is a deed which, after reciting I do not care how many documents, says that this document is the title of the present plaintiffs to sue in a certain event for the amount to be recovered. Therefore, with great respect to those who think differently, I do not think that it is correct to say that anything except what is contained in the operative part can be read as a part or term of this document.

We have this question before us: Are the courts of law excluded by the statute which is invoked by the defendant? I hope that I am in accord with the authorities generally, as well as in regard to this Act in particular, in saying that, where a statute is invoked for the purpose of taking away from the parties to a legal document a right to enforce it in a court of law, I am bound (not merely entitled) to construe that provision strictly, whether it is the one party or the other who is seeking to insist on its validity. For example, with regard to *Ford* v. *Beech* (2) and the judgment of Parke, B., no one doubts that, generally speaking, the common and universal principle is that a document ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole of the agreement. I pause first to say that that has no reference to the construction of a statute, but only to the construction of a voluntary agreement between the parties; and, further, that, if I am to look at that which will best effectuate the intention of the parties to be collected from the whole of the agreement, I find that it is not only inferentially but expressly stated that the person who is now seeking to set aside that agreement, having received £100, is a person who has bound himself under his hand to an agreement not merely as to his liability, but as to the right of the other party to sue him in a court of law. Therefore, if we look at the language and give to it that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, that intention is that a court of law shall be the proper method of enforcing the rights of the one party or the other.

With regard to this particular legislation, a passage from the judgment of Lord Halsbury, L.C., in *Yorkshire Miners Association* v. *Howden* (3), was cited to us, in which he says, in reference to s. 4 of the Trade Union Act, 1871 ([1905] A.C. at p. 261):

A "That argument seems to assume that the object of the enactment was to keep the trades unions out of the jurisdiction of the court altogether. I do not think it does anything of the kind. It recites with great care what the courts are not to interfere with, and that exemption from their jurisdiction is very precisely limited."

LORD DAVEY, who represented the minority of opinion, said (ibid. at p. 270):

B "Where the primary object of the action is to enforce the agreement, and the right of the plaintiff to maintain the action is founded on his right to have the rules observed, I think that the action must be deemed to be one for directly enforcing the agreement. But where the right of action is of a different character, and the construction and effect of the rules (if it comes in at all) only comes in as evidence in support of the particular relief claimed, I think that the action would not be C one for 'directly' enforcing the agreement."

Turning to the words of the statute, the words which are material here—for the other points of the statute as to penalty have been either abandoned or not argued, and, I think, quite rightly, because to say this is a penalty seems to me to be absurd—s. 4 of the Trade Union Act, 1871, provides:

D "Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements."

What we have to consider here, amongst these agreements, is "3. Any agreement for the application of the funds of a trade union—(a) to provide benefits to members." Would any lawyer, to whom this agreement was handed, say that this was an agreement, E the purpose, object, or scope of which was to provide a benefit to members, or, to take it more fully, an agreement for the application of the funds of the trade union to provide benefits to members? I cannot bring myself to such a conclusion. That seems to me on the face of it to be doing that which I have never known done—namely, so to alter the agreement as to make the recited documents or agreements part of the operative part of the agreement so as to make its purpose, object, or scope, or whatever words F you like, to provide benefits to members. This action is one to recover from a member a certain sum of money which was paid to him on the signing of the agreement. I cannot get over that difficulty. Then it is said that the agreement forms a part or term of the rules of the society which are recited. Of course, it forms part in this sense, that the document never would have come into existence but for the rules of the society. That is perfectly true, but that does not, in the case of parties, for example, G who are in a particular position, such as trustees with power to do this, that, and the other, make any mortgage or other contract into which they enter a part of the settlement or other document constituting the trust. I feel, I confess, that difficulty which I have been unable to get over, though perhaps I ought to have been able to do so owing to the difference of opinion of my colleagues.

I agree with the majority in the Scottish case, *Wilkie* v. *King* (4), and with the argu- H ments very neatly expressed, I need not say, by my brothers PHILLIMORE, J., BANKES, J., in the court below, to which I shall refer. PHILLIMORE, J., said ([1911] 2 K.B. at p. 140):

"But if two people agree that in certain events one shall execute an instrument which will establish certain contractual relations, the original agreement is exhausted I when the further instrument is executed, and the right to sue on the contractual relation established by the further instrument exists quite independently of the original agreement which related to the instrument being executed. It may be that there is in these rules an agreement for the application of the funds of the trade union to provide benefits to members, and the defendant could not have enforced the payment of this £100 because such an agreement would be struck at by s. 4 (3) (a). But if so, the benefit which the defendant has agreed to get and the trade union has agreed to give him, and which cannot be enforced by action, is a conditional gift of £100, and the agreement for the application of the funds of the

trade union has been performed when that conditional gift has been made and the necessary instrument for establishing that conditional gift has been executed. After that any rights which arise under that instrument are not rights which are to be enforced as part of the agreement, for the application of the funds of the trade union."

I may add something, I hope, without spoiling that very clear statement. Could an action, apart from the Act, have been brought on the rules, or anything antecedent to this agreement, by either of the parties? To my mind, it could not. In effect, there is nothing outside this agreement, and nothing, therefore, which can be treated as being within s. 4. Then, BANKES, J., said (ibid. at p. 142):

"The question we have to decide is whether the agreement, which the member has, in pursuance of his promise contained in sub-r. (6), entered into, is a separate and independent agreement, or whether it is merely a part or a term of the original agreement contained in r. 25, in which case it could not be enforced in a court of law. In my opinion it is a separate and distinct agreement, the result [and that seems to me to be a sound legal distinction] and not a part of the original agreement."

Therefore, as it was unnecessary in this action for either party to refer to anything except the agreement, it appears to me that, legally, it is impossible to say, merely because this document recites previous rules and agreements, or because it would not have come into existence but for the relations created between the parties by the rules, that it is so closely a part or term of the rule or of any other agreement under them that it can come within the words of the statute.

As I ventured to suggest during the argument, the governing words of the statute are the words as to an agreement "for" the application of the funds of the trade union to provide benefits. I have had an opportunity of referring to the Gaming Act, 1892, the words of which are: "Money paid under or in respect of." Had the Trade Union Act, 1871, said "Any agreement for or in respect of," I could imagine a great difficulty in saying that this agreement was not "in respect of"; but, as LORD HALSBURY has pointed out, the words are precise, and one must not read s. 4 as if it included anything but what naturally comes within it. Of course, in a sense, this agreement is "in respect of" an application of trade union funds. As LORD COLERIDGE, C.J., pointed out in *Tatam* v. *Reeve* (5), "in respect of" differs in the Gaming Act, 1892, from "under." He says ([1893] 1 Q.B. at p. 47):

"I agree that they [that is, the money] were not paid 'under' such a contract or agreement, because there was no contract of betting or gaming between the plaintiff and the defendant; but the money was paid in respect of gaming debts which the defendant owed to the persons to whom the plaintiff paid it."

I decline to enlarge the words of the section so as to give it a loose or even a liberal interpretation which shuts out either of the parties from our courts of law on a perfectly legal agreement; there is no question of illegality in this case, but simply of enforceability under the express provisions of a particular statute—that is to say, to read "for" as if it meant "in respect of" or "in relation to."

It appears to me that the only answer which I can give as a lawyer as to the purpose, object, or scope of this agreement is that it is not an agreement for the application of the funds for benefits, but is a contract, enforceable by the express terms of the agreement itself in a court of law, to repay, under certain circumstances, the money paid. The Act, in my view, would apply if the question had arisen on the rule itself, as clearly it might have done. Supposing that the society had refused to pay the £100 under the rules and the defendant had been minded to sue for his £100, and had invoked the rules and claimed payment under those rules, or that it had gone a step further, and the society had written to him saying that they would pay him the £100, and he had sued; they would have said that this was an agreement for the application of the funds of the society for benefits to him and that he could not sue. On the other hand, if he had got this money and they had been seeking to say that they would enforce his obliga-

tion under the rules if he received this money to sign an agreement for its repayment in certain events, again an action would be barred, because there would be on their part an attempt to assert the liability or the duty created by the rules for not signing the agreement. The Act, therefore, applies to such a case till it has got to what BANKES, J., correctly calls the "result"—namely, that the distribution is complete, the application is complete, but there is a separate agreement entered into by which nothing is done with regard to the application of the funds, but the sole effect of which is to make that money the subject of a just claim in certain events by the society for repayment.

For these reasons, which I am sorry to have had to state at such length, I think that the judgment below was right in principle and in application, and that the agreement is the result, and that it is incorrect to state in fact or in law that it is a part or term of anything which was an agreement for the application of the funds of the trade union for the purpose stated in the restricting clause of the Act which we have to consider. I think that there is no answer to the reasoning which is substantially set forth in the judgments of the Divisional Court, and that their decision was right. On the other point, I need not add that it is quite clear that it is open to both sides to deal with any matter which has been fairly mentioned here, but which the circumstances do not make it either necessary or right to argue here.

Appeal allowed.

Solicitors: *Maude & Tunnicliffe* for *Simpson & Meakin*, Derby; *H. G. Campion & Co.* for *Arthur Neal & Co.*, Sheffield.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

BROWNE *v.* BLACK

[COURT OF APPEAL (Vaughan Williams, Buckley and Kennedy, L.JJ.), December 4, 5, 1911]

[Reported [1912] 1 K.B. 316; 81 L.J.K.B. 458; 105 L.T. 928; 28 T.L.R. 119; 56 Sol. Jo. 144, C.A.]

Solicitor—Costs—Recovery—Action—Delivery of bill one month before action commenced—Need for delivery a clear calendar month before action—Solicitors Act, 1843, (6 *& 7 Vict., c.* 93), *s.* 37.

By the Solicitors Act, 1843, s. 37: "No . . . solicitor . . . shall commence any action . . . for the recovery of any fees, charges, or disbursements for any business done by such solicitor . . . until the expiration of one month after such . . . solicitor . . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode," a bill of such fees, charges and disbursements. By s. 48, "month" means calendar month.

A solicitor posted a bill of costs to a client on Feb. 15. The client received the bill in the ordinary course of post on Feb. 16. On Mar. 16 the solicitor commenced an action on the bill against the client.

Held (BUCKLEY, L.J., dissenting): a bill of costs was not "sent by the post" to the party to be charged therewith one month before the action was commenced unless it was put in the post at such a time that, in the ordinary course of the post, it would be delivered to the party to be charged one clear calendar month before the action was commenced, and, therefore, the action was premature and could not be maintained.

Decision of the Divisional Court, [1911] 1 K.B. 975, affirmed.

Notes. The Solicitors Act, 1843, has been repealed. For s. 37 of that Act, see now s. 68 of the Solicitors Act, 1957.

Considered: *Retail Dairy Co.* v. *Clarke*, [1912] 2 K.B. 388.

As to delivery of bill of costs, see 36 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 42 DIGEST 135 et seq. For the Solicitors Act, 1957, s. 68, see 37 HALSBURY'S STATUTES (2nd Edn.) 1100.

Cases referred to:

(1) *Macgregor* v. *Keily* (1849), 3 Exch. 794; 6 Dow & L. 635; 18 L.J.Ex. 391; 13 L.T.O.S. 120; 154 E.R. 1066; 42 Digest 143, *1400.*

(2) *Dunn* v. *Hales* (1858), 1 F. & F. 174, N.P.; 42 Digest 49, *399.*

(3) *Blunt* v. *Heslop* (1838), 8 Ad. & El. 577; 9 Dowl. 982; 3 Nev. & P.K.B. 533; 1 Will. Woll. & H. 461; 7 L.J.Q.B. 216; 2 Jur. 542; 112 E.R. 957; 42 Digest 145, *1435.*

(4) *R.* v. *Inhabitants of Slawstone* (1852), 18 Q.B. 388; 21 L.J.M.C. 145; 19 L.T.O.S. 105; 16 J.P. 279; 16 Jur. 1066; 118 E.R. 145; 37 Digest 346, *1504.*

(5) *R.* v. *Recorder of Richmond* (1858), E.B. & E. 253; 27 L.J.M.C. 197; 31 L.T.O.S. 115; 22 J.P. 674; 4 Jur.N.S. 456; 6 W.R. 521; 120 E.R. 502; 37 Digest 337, *1411.*

(6) *Brooks* v. *Mason* (1789), 1 Hy.Bl. 290; 126 E.R. 170; 42 Digest 135, *1297.*

Also referred to in argument:

Engleheart v. *Moore* (1846), 15 M. & W. 548; 4 Dow. & L. 60; 15 L.J.Ex. 312; 7 L.T.O.S. 211; 153 E.R. 967; 42 Digest 151, *1501.*

Appeal by the plaintiff from a decision of the Divisional Court (RIDLEY and CHANNELL, JJ.), affirming a decision of the Mayor's Court.

An action was brought by the plaintiff, a solicitor, to recover the amount of a bill of costs for professional services rendered to the defendant. The defendant pleaded, inter alia, that

> "the plaintiff did not one calendar month before action deliver to the defendant, being the party to be charged therewith, or send by post to or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements subscribed with the proper hand of the plaintiff or inclosed in or accompanied by a letter subscribed in like manner referring to such bill as required by the [Solicitors Act, 1843] s. 37."

At the trial before the Common Sergeant, it was proved that the plaintiff posted a signed bill of costs to the defendant on the afternoon of Feb. 15, 1910, and that the bill was delivered to the defendant in the ordinary course of post on the morning of Feb. 16. The action was commenced on Mar. 16, 1910. The Divisional Court, affirming the decision of the Common Sergeant, held that the word "month" in s. 37 of the Solicitors Act, 1843, meant a clear month, and that a bill was not "sent by post" one month before action unless it was put in the post at such a time that it would in ordinary course be delivered one clear calendar month before the action was commenced, exclusively of the days on which the bill was delivered and the action commenced, and gave judgment for the defendant. The plaintiff appealed.

Foote, K.C., and *H. M. Sturges* for the plaintiff.

Lewis Thomas, K.C., (*Neilson* with him), for the defendant.

VAUGHAN WILLIAMS, L.J.—Section 23 of 2 Geo. 2, c. 23, so far as material, provided as follows:

> "No attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode a bill of such fees, charges, and disbursements . . . which bill shall be subscribed with the proper hand of such attorney or solicitor respectively."

From that, it will be seen that two alternatives were given to a solicitor—namely, of delivering the bill to the person to be charged personally, or leaving it for him at his dwelling-house or last place of abode. The words of s. 37 of the Solicitors Act, 1843, so far as material, run thus: [HIS LORDSHIP read s. 37, and continued:] The difference between the later Act and the earlier Act of George 2 mainly consists in this, that the later Act enables delivery to be made by post, and, as regards leaving it for the party to be charged, it adds "counting-house, office of business," to dwelling-house or last known place of abode. I only mention these words as being not unimportant when I have to deal with the construction of s. 37 and see how far the various modes of delivery are contrasted with one another. Undoubtedly the statute of George 2 interfered with the common law rights of attorneys by forbidding the bringing of an action for a bill of costs until the expiration of one month after delivery of the bill, and I cannot doubt that the addition of the words "sent by the post to" in s. 37 of the Act of 1843 were introduced in the interests of attorneys and solicitors in order to enable them to avail themselves of the increased postal facilities. I cannot agree with counsel for the defendant as to the spirit in which those words ought to be construed. It is said that those words should be construed against the solicitor and in favour of the parties to be charged, because the section was manifestly introduced in their favour. But it is also, in my judgment, true to say that the section is one which infringes the common law rights of a certain class and should, therefore, be construed strictly so as not to infringe those rights any further than on the face of the section was manifestly intended. I am of opinion that the words "sent by the post to" refer to the bill being sent to the client and not to its being received by him, which I understand was also the view of the Divisional Court. There is nothing to show in the judgments of RIDLEY and CHANNELL, JJ., that they thought that the words "sent to" imported receipt of the bill by the client; they appear to have decided that a bill was not sent by the post within the meaning of the section unless it was posted in such time that it would be delivered to the party to be charged one clear month before the commencement of the action. I think the construction put on the section by the Divisional Court is the right one, although I do not adopt the suggestion that "sent by the post to" means "received one clear month before action," or that the party to be charged should always have one clear month in which to examine and consider the charges set forth in the bill. Several cases were put to us for the purpose of testing the meaning of the section, but not very much weight ought to be attached to them. Thus, it was asked what should be done in a case where the party to be charged happened to be away from home—was he entitled to have a calendar month within which to consider the bill? I have already said that I do not think the section means that; the section provides only that there should be the three alternative modes of sending which are to be followed. Then it was said that, in the case of persons abroad, if the words in the section were not to be taken as referring to the receipt as part of the delivery of the bill, it might happen that the party to be charged would practically get no opportunity for consideration of the bill at all; but I am not disposed, on account of that, to put what I think is a forced construction on the section.

I will say a few words as to the authorities. In *Macgregor* v. *Keily* (1), PARKE, B., said as follows (3 Exch. at p. 797):

> "It is open to the plaintiff to select any mode of delivery which the statute authorises. He may deliver the bill to the defendant personally, or, according to the construction put on the other Act, he may deliver it to an agent authorised to receive such bill, or he may rely on its being sent by post, or left otherwise at the dwelling-house or last place of abode of the defendant. But having selected his mode, he must prove, to the satisfaction of the jury, a delivery by himself or his agent, or someone authorised by him."

I agree that, although the decision in that case was that there was evidence of a delivery, those observations of PARKE, B., do rather support the contention raised on behalf of the plaintiff. In *Dunn* v. *Hales* (2), which was a case at Nisi Prius, WATSON, B., said this (1 F. & F. at p. 176):

"Upon the special plea the simple question is, whether the bill signed was put into the post properly addressed to the defendant." A

That certainly is an expression of opinion in favour of the plaintiff's contention. As to *Blunt* v. *Heslop* (3), which RIDLEY, J., treated as an authority for the defendant, I do not myself see that it has any application to the question whether the words "sent by the post to" import that the bill must have been posted within such a time that a month shall have elapsed between the time when in the ordinary course of post it would have been delivered and the time of the commencement of the action. But in *R.* v. *Inhabitants of Slawstone* (4), LORD CAMPBELL, C.J., made some observations which, I think, strongly support the view of the Divisional Court in this case. He said (18 Q.B. at p. 392): B

"It seems to me that there is no difficulty in construing the statute 11 & 12 Vict., c. 31, s. 9. The effect of that section is that a notice of appeal must be held to be given at the time when, according to the ordinary course of post (if it be sent by post under 14 & 15 Vict., c. 105, s. 10), it would reach the party to whom it is sent. The notice in the present case, therefore, was given within the proper time. The same interpretation must apply to the word 'sending' with respect to the copy of the depositions." C D

Although that case is not precisely in point as regards either the facts or the particular statute, still the Court of Queen's Bench did there, in dealing with statutory words, adopt a like construction to that which the Divisional Court have now put on similar words. Counsel for the defendant also relied on *R.* v. *Recorder of Richmond* (5), in which *R.* v. *Inhabitants of Slawstone* (4) was followed.

Having regard to these authorities, and bearing in mind the rule that enactments of this sort must be construed strictly, I do not think it is straining or doing violence to the language of the section to construe the words "sent by the post to" as meaning that the posting must take place at such time that, in the ordinary course of post, the bill should have reached its destination one calendar month before the commencement of the action. I think, therefore, that the judgment of the Divisional Court was right and that this appeal must be dismissed. E F

BUCKLEY, L.J.—On Feb. 15, 1910, the solicitor put into the post a letter containing the bill of costs, and, if that act constituted a sending by post to the client, the month had elapsed before the action was brought, and the plaintiff is entitled to succeed. The question to be determined is whether the putting of that letter into the post was a sending of the bill by post to the client. Section 37 of the Solicitors Act, 1843, is a section which suspends an existing right of action. It debars the solicitor during a certain time from doing that which otherwise he would be entitled to do—namely, sue for the amount of his bill. The month may be shortened under a proviso at the end of the section, under circumstances which are there mentioned. The whole point, therefore, for investigation I think is this: whether, within the meaning of these words, as expressed in very intelligible English, the plaintiff has done the act which the section requires to be done a month before the action was brought. G H

The particular words which are to be satisfied, reading them apart from their context, are these: No solicitor shall commence an action for the recovery of his fees until the expiration of one month after he shall have sent by post, to one or other of various places, the bill of such fees. In ordinary English, when you speak of sending a thing you mean dispatching. If I say that I have sent someone two brace of pheasants, I mean that I have sent them to him on the day that I dispatched them, although he may not receive them until a time when they may be of no use to him. That is the ordinary meaning of the words, and I have to read s. 37 and see whether the words here are used in any other sense. I accept this in the first place, that these words "send by post to" are introduced by way of amendment to a previous statute, that of 2 Geo. 2, c. 23, and there they are contrasted with the words "left at." I think that their principal object was that, if you were going to take the latter of the three alternative modes I

of delivery of the bill and prove that you delivered it, you had to prove that the bill had in point of fact reached its destination. The words "send by post to" were intended to relieve the solicitor of that, and to render it sufficient for him to say, "whether the bill of costs reached its destination or not, whether the Post Office did its duty or not, at any rate I put it into the post." If he proved that, in that sense, he sent it by post to the client, that was to be a satisfaction of the statute, although he did not go on to prove that it reached its destination. I think that is right so far. But, on the other hand, it seems quite plain that there is not to be found in the statute that which the learned judges in the Divisional Court thought that they found there—namely, that the client was to have a month to consider the item in the bill. Both judges used that expression. RIDLEY, J., said ([1911] 1 K.B. at p. 979):

> "The object of the enactment is to give the client a month in which to consider the items in the bill and, if necessary, to take advice on them."

CHANNELL, J., said (ibid. at p. 981):

> "The object of the enactment is to give the client a clear month in which to consider the items in the bill and to decide what course he will take thereon. . . . I cannot think that the solicitor can by resorting to the medium of the post office deprive the client of one day in the month which is allowed to him by the section to consider the bill."

I do not agree with those propositions. I agree that the month was given in order that a certain time should elapse between the date at which the solicitor dispatches the bill in some sense or other and the date at which he may sue on it. But there is nothing in the section which shows that that dispatch of the bill is to be so effected as that it shall result in the receipt of the bill by the client at such time as will give him a month to consider it. There are no words to say that he is to have one calendar month during which he can look at the bill and see whether it is such as he wishes to quarrel with or not. Take this as an illustration. Suppose that the month is August or September, and that the client has gone to Norway for his holiday. You may add if you like, although it adds nothing to it in my opinion, that the solicitor knows he has gone to Norway for his holiday. In that state of things, the solicitor takes the bill and delivers it at the client's counting-house. Of course the client will not receive it in Norway, even if his clerk is diligent and sends it at once, in such time as to give him a month to consider it. However, it is quite plain that the section would have been complied with and that the month would have begun to run. Therefore, to say that "the object of the enactment is to give the client a month in which to consider the items" is, in my opinion, erroneous. The client is not to have a month to consider it, but a month is to elapse between the delivery or sending by post of the bill and the commencement of the action. Whether he can consider it during the whole of that time or not depends on where he is and whether the bill reaches him or not.

That being so, I have to apply my mind to these expressions "send by post to" and "left for him at" various places. I will make the assumption for a moment—erroneously, of course—that the words "by the post" are not in the section, and that the words are "sent to or left for him at." To my mind, there are two things plainly intended to be contrasted there. The former is the dispatch of the bill to the proper place; the other is the actual delivery of the bill at the proper place, the leaving it there, and those two are contrasted. So that, if there were no such words as "by the post" in the section at all, I think it would be possible to say that, if the solicitor sent a messenger off with the bill, although he did not reach the house, that would be a sending; and if he sent a messenger who did reach the place and leave it there, that would be a leaving, and that either way would satisfy the statute. But the legislature was not going to leave that mischief open. It would not enact that a solicitor might dispatch any messenger he liked whether he reached his destination or not; he was only to employ a particular agent if he was going to avail himself of that means of satisfying the section, and that agent was to be the post office. It seems to me that the section affirms that, if the solicitor employs a particular agency—namely, that of the Post Office—and

dispatches his bill by that agency, that dispatch is to be sufficient whether it reaches its destination or not. That is contrasted with the actual delivery at the proper place. Those two alternatives operate with relation to different points of time. If the solicitor adopts the authorised agent, the Post Office, and sends his bill by post, the proper moment from which the month begins to run is the moment at which he so sends it. If he does not choose to do that, but, on the contrary, takes the alternative of leaving it at one of the places set out in the section, then the material date is the date of actual leaving and delivering the bill at that place, and not the date of sending.

If the considerations which the learned judges pointed out in the court below were accurate and if I could find in the section that the client must have a month to look at the bill and think over it, I should be of a different opinion. It is because I cannot find in the section any indication whatever that that is the intention that I think their fair meaning ought to be given to the words. I think, therefore, that here, when the solicitor on Feb. 15 intrusted his letter containing the bill to the authorised messenger, namely, the Post Office, he then "sent" it "by the post to," within the meaning of the section. It is immaterial that it might not have reached the client—there is evidence that it did reach him—till Feb. 16. I think that the relevant moment was the moment at which the solicitor did the act required by the section, namely, sent by the hand of the Post Office, the authorised agent, the document in question. The month had run from that moment before the action was commenced. For these reasons, I think the plaintiff is right.

KENNEDY, L.J.—In my opinion, this appeal fails, and I agree with the judgment of the Divisional Court affirming that of the Common Serjeant. We have to construe s. 37 of the Solicitors Act, 1843, without varying or departing from the fair meaning of its language when read with reference to its subject-matter. But I think we are entitled to consider its provisions not only with regard to the decisions on statutes in pari materiâ which preceded this statute, but also with regard to the reasonableness and justice of the view of those provisions presented to us. Before the passing of this statute, there was a statute in pari materiâ—2 Geo. 2, c. 23, s. 23. It is sufficient to say that the provisions of that section are in substance to the same effect as those of s. 37 of the Act of 1843, in so far as they provided that, before the expiration of a month or more from the delivery of a bill in one or other of the modes of delivery there mentioned, an attorney or solicitor should have no right to bring an action for his fees. It has been pointed out more than once that the object of that enactment was that the client should have an opportunity of considering for a reasonable time the fees sought to be charged against him. As far back as 1789, in *Brooks* v. *Mason* (6), where an attorney sued for the amount of a bill of costs, and where, on its appearing at the trial that he had delivered a bill but had taken it back again, he was non-suited, the court said (1 Hy. Bl. at p. 291):

> "that the bill ought have been left with the defendant, as it was the intention of the statute that the client should have due time to examine the charges made by the attorney, and take advice upon them if necessary."

That decision was referred to and the intention of the statute was again declared in *Blunt* v. *Heslop* (3). That case is not exactly in point with regard to the present one, but the intention of the statute was again declared. LITTLEDALE, J., put the matter shortly thus (8 Ad. & El. at p. 581):

> "The words being 'one month or more,' we must suppose that the client was intended to have a full month after the delivery of the bill."

Then came the Solicitors Act, 1843, which, by s. 37, imposes a restriction in point of time on a solicitor's right to sue for the recovery of fees or charges for business done by him—namely, "until the expiration of one month after" the events mentioned in the section. I do not see any substantial difference between the expression "one month" in that section and the expression "one month or more" in the earlier statute. This section adds to the two alternative modes of delivering the bill mentioned in the earlier statute another mode, namely, sending it "by the post to" the party to be charged therewith

"at his counting-house, office of business, dwelling-house, or last known place of abode." The solicitor, therefore, now has an option to use one or other of three alternative modes of delivering a bill of costs. He may deliver it to the client in person; or he may leave it for him at one of the places mentioned; or he may send it by the post to one of those places. Speaking for myself, I must say, as to such alternatives dealing with the same subject-matter, namely, the period of time which is to elapse before an action can be brought, that it appears to me to be impossible, according to the usual canon of construction, unless the language absolutely compels it, to take the view that the alternatives so given are intended to have varying results with regard to the length of that period of time as the contention for the plaintiff requires. According to that contention, if the solicitor adopted the alternative of sending the bill by post, instead of the client having the same period of time before he could be sued as he would have if the solicitor adopted the alternative of leaving the bill for him at one of the places mentioned, he would have a shorter period. For the solicitor might post the letter containing the bill just before midnight, and, although it could not be delivered till the next day, the time would begin to run from the day on which it was posted. I confess that I regard that as an impossible construction of the section. It appears to me that, without varying or departing from the fair meaning of the words of the section, we may construe them as meaning that, if the solicitor adopts the alternative of sending the bill by the post, he must post it in such time as will give a clear month from the time when it would be delivered in the ordinary course of post before he commences his action. I agree with VAUGHAN WILLIAMS, L.J., that this is the proper construction of the section.

The section must be looked at from a business point of view. If the plaintiff's contention is right, a solicitor who posted a bill of costs to a client in some far distant place in the British dominions would have thereby satisfied the section and have made the month begin to run on the expiration of which he might issue his writ, although it might be physically impossible that the bill should reach the client so as to give him a single day of the month which the section intends that he shall have before he can be sued. But if the section is construed as the Divisional Court has construed it, no difficulty or incongruity would arise. It is said that there is nothing in the section to show that it was intended to bear that construction. I can only say that the same words strike different minds differently. It seems to me that the plain object of this section was to give the solicitor as an additional facility another mode of delivering his bill to his client, but not to trespass on the opportunity which the law gives the client of having a month in which to consider the bill. I agree that if we had merely to construe the words "send by the post to" apart from their context, it might be right to construe them as meaning merely put into the post. But I think we ought to construe the words in the light of their context. CHANNELL, J., correctly points out that the Post Office cannot be treated as the authorised agent of the client to receive the bill, as the argument for the plaintiff invites us to treat it. On this point we have the authority of *R.* v. *Inhabitants of Slawstone* (4). There, apart from the argument that the expressions "sending" and "giving" in 11 & 12 Vict., c. 31, s. 9, as applied to the copy of the depositions and the notice of appeal, should be construed reciprocally, it was held that the effect of the section was that the notice of appeal must be held to be given at the time when in the ordinary course of post, it would reach the party to whom it was sent. It seems to me that the words "sent by the post to" in s. 37 ought to be construed as they have been construed by the Divisional Court, namely, as meaning that, if the solicitor adopts the alternative of sending the bill by the post, he must post it at such time that, assuming it to be delivered in the ordinary course of post, the client may have the same opportunity for the consideration of the bill before an action can be commenced against him as he would have had if the solicitor had adopted either of the other alternative modes of delivering the bill. This construction appears to me to be reasonable, and not to depart from the fair meaning of the section, and to be supported by authority.

Appeal dismissed.

Solicitors: *Woodthorpe, Browne & Co.*; *Robert Greening & Siggs.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re ODDY

[CHANCERY DIVISION (Parker, J.), March 3, 7, 1911]

[Reported [1911] 1 Ch. 532; 80 L.J.Ch. 404; 104 L.T. 338; 27 T.L.R. 312; 55 Sol. Jo. 348]

B

Public Trustee—Audit of trust accounts—Costs—Order for payment otherwise than out of estate—Right of parties to be heard—Appeal to court—Need to serve Public Trustee—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 10, *s.* 13.

The Public Trustee Act, 1906, s. 10, applies to decisions of the Public Trustee when exercising judicial functions under the Act. Accordingly, where the Public Trustee directs under s. 13 (5) of the Act that the costs of an audit of trust accounts under s. 13 (1) shall be paid otherwise than out of the trust estate, the person so directed to pay the costs has a right of appeal to the court under s. 10, but, on such an appeal, it is not necessary to serve the Public Trustee. Before making a direction under s. 13 of the Act as to the payment of costs otherwise than out of the trust estate, the Public Trustee should hear the parties if they desire to be heard.

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Notes. Considered: *Re Utley, Russell* v. *Cubitt* (1912), 106 L.T. 858.

As to investigation of trust accounts, see 33 HALSBURY'S LAWS (2nd Edn.) 340, 341, and for cases see 43 DIGEST 1036. For the Public Trustee Act, 1906, ss. 10 and 13, see 26 HALSBURY'S STATUTES (2nd Edn.) 41, 43.

Case referred to in argument:

Sandback Charity Trustees v. *North Staffordshire Rail. Co.* (1877), 3 Q.B.D. 1; 47 L.J.Q.B. 10; 37 L.T. 391; 26 W.R. 229, C.A.; 11 Digest (Repl.) 219, *848*.

E

Adjourned Summons.

Sam Oddy by his will, dated Feb. 13, 1875, having given certain specific and pecuniary legacies, gave his real and the residue of his personal estate on trust, except as to certain bank shares, for sale and conversion, and he directed the trustees to stand possessed of the net proceeds on trust for investment as directed. He directed that annuities were to be paid to his wife and daughters out of the income and that of the bank shares, and the residue accumulated. On the death of his wife, the bank shares were to be held in trust for his son William Oddy, and the capital of the rest of the estate and the accumulations of income for his four daughters in equal shares. Each of these shares was settled on her for life and at death on her children. The trustees were given power to retain any part of the estate as then invested, and to delay or suspend the sale and conversion as they, in the exercise of their discretion, should think right. The testator died in 1876 and his widow in 1892. In 1908, three of the children of one of the testator's daughters, Mrs. Connell, who was alive, and another daughter asked for an account of the estate and for particulars as to the dealings therewith by the trustees of the will, and, further, that the accounts should be audited by accountants. A dispute having arisen as to the payment of the costs of the trustees' accountants on the audit, the trustees declined to allow the investigation unless the applicants undertook to pay the costs of the audit. This they refused to do, and applied under s. 13 (1) of the Public Trustee Act, 1906, to have the accounts audited for the whole period of the trust. The audit was conducted by an auditor appointed by the Public Trustee under s. 13, and, on Mar. 8, 1909, he delivered his report and certificate. On May 27, 1909, the Public Trustee directed that the expenses of the audit should be borne by the applicants under s. 13 (5) of the Act.

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This summons was taken out by the applicants asking for an order that the expense of the audit should be borne by the surviving trustee personally, or, alternatively, that it should be paid out of the trust estate, and, in that event, for directions as to raising and paying the amount.

By the Public Trustee Act, 1906:

"10 (1). A person aggrieved by any . . . decision of the Public Trustee in relation to any trust may apply to the court . . ."

"13 (1). Subject to rules under this Act and unless the court otherwise orders, the condition and accounts of any trust shall on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees, or, in default of agreement, by the Public Trustee or some person appointed by him. Provided that (except with the leave of the court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit . . ."

"(5). The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be prescribed by rules under this Act, and shall, unless the Public Trustee otherwise directs, be borne by the estate; and, in the event of the Public Trustee so directing, he may order that such expenses be borne by the applicant or by the trustees personally or partly by them and partly by the applicant."

T. J. C. Tomlin, for the surviving trustee.
Whitmore Richards for the applicants.
H. Boraston for other parties.

PARKER, J.—This summons is one by way of appeal from the decision of the Public Trustee. It is taken out under s. 10 (1) of the Public Trustee Act, 1906, and the decision appealed against is the decision of the Public Trustee under s. 13 (5) of that Act, directing that the costs of an audit under that section should be borne by the persons who applied for the audit, and should not come out of the estate. A preliminary objection has been taken to the effect that s. 10 applies only to the acts, omissions, or decisions of the Public Trustee under the preceding sections of the Act, and has no application at all to decisions under s. 13 (5). In my opinion, that contention cannot be upheld. In looking through the Act, it appears that, in many respects, the Public Trustee exercises not only an administrative but a judicial function, and, in my opinion, s. 10 is intended to give a right of appeal against his decision, at any rate in all cases where he exercises a judicial function as opposed to an administrative function; though I do not for a moment suggest that it may not apply to everything that he does—using the words of the Act—by way of act or omission.

Section 13, when you look at it, is an exceedingly drastic section. It enables any trustee or beneficiary to apply for an audit of the whole accounts of a trust at any time whatever. The only limit is that it cannot be applied for within one year after there has been a prior audit. There is no limit back beyond which the account or audit is not to be extended, so that, in a trust which has lasted for thirty or forty years, it is open to any cestui que trust to go back to the very beginning, unless, of course, the court otherwise orders; which means that an application must be made to stay what is the primâ facie right conferred on the beneficiary. The only penalty for insisting improperly on an investigation of the accounts is the jurisdiction which the Public Trustee has to order the applicant to pay the costs of the audit. It is quite clear, therefore, that, in making an order of that sort, the Public Trustee is exercising a judicial function, and it is clear to my mind that, when he exercises a judicial function, an appeal will lie under s. 10.

Another objection taken is that, if an appeal does lie under s. 10, it is necessary to serve the Public Trustee. In my opinion, again, that objection is untenable. I consider that applications under s. 10 are strictly in their nature appeals from a person who exercises a judicial function; and, that being so, it is not in accordance with ordinary custom, nor do I think it convenient, that the Public Trustee should be served. At the same time, no doubt, the court which hears the appeal from the decision will in matters of doubt ask the Public Trustee to state his reasons in writing, or possibly to appear and state his reasons if there is any doubt about the question.

One other question has been raised with regard to the functions of the Public Trustee. It is said that, in this case, he did not hear the parties. Whether that may be so or not,

or whether there was any particular reason for not hearing the parties, it appears to me clear—I express this view merely for his guidance—that, in a case where he is exercising a function of this sort, he ought to hear the parties if they desire to be heard.

With regard to the actual nature of the application, I may say that the trustee appears to me to have had ample grounds on which it was possible to make the order that he has made. I have not been into the whole of the evidence myself, and, therefore, I do not propose to say what conclusion I should have come to on the evidence; but it appears to me that, in this case, which is the case of an old trust created in 1875, where two shares of an estate have been distributed very many years ago, where two shares remain, subject to tenancies for life, and where remaindermen interested in one of those shares come forward and demand an investigation into the trust extending right back to 1876, and, though their attention was called by the Public Trustee to the fact that the matter would be a costly one and would be going back a very long way, they insist on their statutory right, it is a very serious consideration whether, exercising a right of that sort, they should not do it at their own risk as to costs, and, primâ facie, be responsible for the costs of others too. If it were not so, it would appear that s. 13 really reintroduces into the administration of trusts one of those abuses which in the course of the whole of last century judges were trying to get rid of—namely, the right of anyone, whatever his interest, large or small, in an estate, to put the estate to the expense of accounts from the foundation onward, extending in this case over thirty years. It appears to me that that jurisdiction to award costs against the applicant for an audit is a jurisdiction which ought to be exercised so as to control that primâ facie right within reasonable bounds; otherwise, as I say, having succeeded by reforms of Chancery procedure in abolishing an abuse which existed many years ago, we should be reintroducing it in a statutory form. In this particular case, the parties have accepted a suggestion of mine based on this fact, that the accountant, after examining the whole of the accounts, did discover certain errors or irregularities which gave rise to a claim not against the existing trustee, but against past trustees; and that claim has been asserted in an action and a sum of about £155 has been recovered. There is a principle on which this court very often acts, namely, that, when an action is brought and money is recovered for an estate, the parties who bring the action, primâ facie at their own risk, are entitled, as a rule, to be indemnified against their costs out of what they recover; not necessarily out of the estate generally, but out of what they add to the estate by their exertions. I suggested, and the parties acquiesced in the suggestion, that that would be a proper way, in the events that have happened, of dealing with this case. The parties having accepted that suggestion, I think it is within my power on this summons to give effect to it, and, by way of compromise of this summons, I sanction the compromise on behalf of absent parties under the order and of parties before me consenting. I direct that the costs of the trustee of the action to which reference has been made and in which that sum was recovered should be taxed as between solicitor and client, deducting what he has already got in respect of his party and party costs; and that the amount so ascertained be paid to him out of the £155. The costs of this summons are to be taxed as between party and party, and are to be paid, so far as the fund will extend, out of the residue after paying the first amount in respect of the solicitor and client costs of the trustee. If there is anything left after that, the applicants are to have it towards the £140 which they have been ordered to pay, but the order of the Public Trustee will stand, and they will, therefore, pay out of their own moneys, or what they have got in the way I have mentioned, the costs which they have been ordered to pay to the several persons to whom those costs are given.

Solicitors: *A. E. Bale*; *Blundell, Gordon & Co.*, for *Gordon, Hunter & Duncan*, Bradford.

[*Reported by* T. DE LA P. BERESFORD, ESQ., *Barrister-at-Law.*]

A

NEWBERRY *v.* BRISTOL TRAMWAYS AND CARRIAGE CO.

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), December 17, 18, 20, 1912]

B [Reported 107 L.T. 801; 29 T.L.R. 177; 57 Sol. Jo. 172; 11 L.G.R. 69]

Carriage of Passengers—Safety of passengers—Duty of care—"Use of best known apparatus, kept in perfect order, and worked without negligence by carrier's servants" —Liability for rare and obscure accident.

Carriers of passengers are not insurers of the safety of the persons whom they C carry. It is sufficient, to discharge the duty of care which lies on a carrier that he should adopt the best known apparatus, kept in perfect order, and worked without negligence by the servants he employs. If he does that he ought not to be made responsible for the consequences of an extremely rare and obscure accident which cannot in a business sense be prevented by any known means.

D **Notes.** Followed: *Hood* v. *Walthamstow U.D.C.* (1915), 79 J.P. Jo. 161. Referred to: *Manchester Corpn.* v. *Farnworth*, [1929] All E.R.Rep. 90.

As to a carrier's duty of care to passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 174–185, and as to the liabilities of tramways promoters, see 32 HALSBURY'S LAWS (2nd Edn.) 728–730. For cases see 8 DIGEST (Repl.) 75 et seq., and 43 DIGEST 351–353

Cases referred to:

E (1) *Readhead* v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead* v. *Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex. Ch.; 8 Digest (Repl.) 75, *496*.

(2) *Hyman* v. *Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest (Repl.) 96, *239*.

(3) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest F (Repl.) 16, *64*.

Also referred to in argument:

Vaughan v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 400, *608*.

G *Burns* v. *Cork and Bandon Rail. Co.* (1863), 13 I.C.L.R. 543; 8 Digest (Repl.) 81, **346*.

Hammersmith and City Rail. Co. v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, *59*.

West v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243; 24 T.L.R. 478; 52 Sol. Jo. 393; 6 L.G.R. 609, C.A.; 38 Digest (Repl.) H 17, *74*.

Appeal by the defendants from an order made by CHANNELL, J., in an action tried by him with a special jury at Bristol Assizes.

The defendants were a company incorporated under the Companies Acts and empowered by special Acts of Parliament to construct and use tramways in and about Bristol and to employ electrical power for the purpose of propelling the tramcars. I The company employed the system of electric traction in which the current passed along an overhead wire. Connection between each tramway car and the electric wire was effected by means of a trolly arm which extended from the top of a standard attached to the roof of the car and rested a wheel at its head against the wire. On Sept. 9, 1911, the plaintiff was travelling as a passenger on the top of an uncovered tramway car belonging to the defendants, and while the car was proceeding along its customary route, the wheel at the head of the trolly arm was detached from the electric wire with the result that the trolly arm became entangled in the overhead gear, was plucked away from the standard at its socket, and fell on the head of the plaintiff, causing him

injuries. The plaintiff, accordingly, brought this action against the defendants, claiming damages for negligence. A

Clavell Salter, K.C., and *T. W. H. Inskip* for the defendants.

Foote, K.C., and *Vachell* for the plaintiff.

Cur. adv. vult.

Dec. 20, 1912.—The following judgments were read.

B

COZENS-HARDY, M.R.—The plaintiff in this case undoubtedly met with a serious blow while riding on the outside of a tramway car at Bristol. The wheel at the head of the trolly arm came away from the electric wire and the trolly arm was detached from the standard and fell upon the plaintiff's head. This was due to the fact that the head of the trolly arm did not come off, but caught in the transverse tie and the momentum of the car pulled the standard out of the socket. It was proved beyond doubt that such C an occurrence is extremely rare. Nobody knows precisely why it happens, and no contrivance has yet been discovered to prevent it. The plaintiff, therefore, proved that the blow on his head was caused by the fall of a part of the apparatus on the car, and contended that there was primâ facie evidence of negligence—res ipsa loquitur. The defendants called a number of witnesses, including distinguished experts. Their evidence to the following effect was not substantially shaken: (i) The system adopted is D the best and most widely used overhead system of electric traction. (ii) The apparatus on this particular car was in perfect order and there was no patent defect in workmanship. (iii) There was no negligence on the part of the driver or the conductor. No rebutting evidence was called. The plaintiff in his statement of claim gave certain particulars of alleged negligence and the cross-examination of the defendant's witnesses was addressed to establishing these particulars. It was also attempted to show that the E defendants had not made any experiments with a view to protecting passengers in the event of the trolly arm falling and this was relied on as negligence.

CHANNELL, J.'s, summing up was not open to any adverse criticism. He said:

> "The plaintiff can only be entitled to recover if there is negligence on the part of the defendants in carrying him as a passenger. The tramway people are not insurers. They are bound to take every reasonable precaution to insure the safety of the F passengers, not as insurers, but every reasonable care that can be taken."

He asked the jury, if they thought there was negligence, to tell him what the negligence was that caused the accident. The jury found for the plaintiff with £150 damages, and the following conversation took place:

> "CHANNELL, J.: I asked you if you found there was negligence to tell us on what G ground?
>
> "The Foreman: Well, the tramways company, having used a detachable trolly arm, knowing the risk to passengers, did not take sufficient precautions to ensure their safety.
>
> "CHANNELL, J.: What precaution do you think they could have taken?
>
> "The Foreman: We are not engineers, but they undoubtedly knew the trolly arm, H under certain circumstances, would come out, and, knowing that, they were running the risk.
>
> "CHANNELL, J.: Do you suggest what they could have done by way of precaution?
>
> "The Foreman: We cannot."

I

If the jury had simply given a general verdict, I think we could not have interfered. But they have told us what they meant by their verdict. They have negatived all the alleged acts of negligence—or at least they have held that no one of these alleged acts of negligence was established to their satisfaction. I think they, in substance, treated the tramways company as insurers—as being bound to "insure" the safety of their passengers. In other words, they thought the company ought not to carry passengers on the car unless they could carry them safely, and this without any question of negligence on the part of the company.

In my opinion, this verdict, as explained by the written memorandum of the jury, shows that the defendants discharged the burthen which rested upon them. The only negligence alleged was disproved notwithstanding the plaintiff's primâ facie case. The standard of care required in the case of a carrier of passengers is not so high as the plaintiff contends. It is sufficient that the carrier should adopt the best known apparatus, kept in perfect order, and worked without negligence by the men employed. If he does that, he ought not to be responsible for the consequences of an extremely rare and obscure accident which cannot, in a business sense, be prevented by any known means. Counsel for the plaintiff mainly relied upon the absence of any efforts or experiments on the part of the company to guard against the risk, however remote it might be. But I have a difficulty in seeing that such negligence (if any) is sufficient to support the verdict. "Negligence" is not material unless, as CHANNELL, J., pointed out, the accident was due to the negligence, and of this there is not a trace. It follows that, in my opinion, the appeal should be allowed and judgment entered for the defendants.

FARWELL, L.J.—The plaintiff, a passenger on the outside of one of the defendants' tramway cars, was injured by the trolly pole of the car falling on his head. It is admitted that it is a case of res ipsa loquitur, and that the burden is cast on the defendants of proving that they are not liable in damages for breach of their contract to carry safely. The obligation cast on them is to take due care. In *Readhead* v. *Midland Rail. Co.* (1) it was said by MONTAGUE SMITH, J., delivering the judgment of the court, that (L.R. 4 Q.B. at p. 393):

> "'Due care' undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order."

Or, to use LINDLEY, J.'s, phrase in *Hyman* v. *Nye* (2) (6 Q.B.D. at p. 687):

> "Although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against."

The defendants called a number of expert witnesses with a view to showing that it is exceedingly rare for the trolly pole to fall and that there was no appliance in use on any tramway known to them by which the pole can be prevented from falling on the heads of the passengers on the top of the tram. The plaintiff called no evidence, but various suggestions were made to the defendants' witnesses in cross-examination. It is clear that if the wheel on becoming de-wired is not pulled off, the consequences may be very direful. The overhead wire carrying 500 volts might be pulled down with consequences one hardly likes to contemplate, or the pole might be pulled down with the result seen in the present case. It is a matter that requires great caution and consideration. It was suggested to the experts that some means of protecting the passengers either by fastening the pole or by some overhead wires might be tried. And the defendants' chief engineer said that "He had never considered any means of catching the pole," and no one on the company's behalf appears to have tried or thought of trying to do anything to protect the outside passengers from a falling trolly pole. The truth appears to be that the accident is so rare that the defendants have not troubled to try and guard against it; they have taken the chance.

On this the jury found a general verdict for the plaintiff, but, having been asked by the judge to state what the negligence was, handed in a paper thus stated in the judge's notes: "The tramways company, having used a detachable trolly arm, knowing the risk to passengers, did not take sufficient precautions to ensure their safety." On being asked by the judge: "Do you suggest what they could have done by way of precaution?" answered, "We cannot." In my opinion, this is a verdict which the jury were entitled to give on the evidence. The defendants had to show that they had "exercised all vigilance" and had left "no defects which care and skill can guard against." It is surely open to them to say: "The defendants have admitted that they never tried to find any kind of cover for the outside passengers; we do not believe that

it is beyond the resources of science to find any. The want of such protection is an obvious defect and is the direct cause of the accident here. We are, therefore, not satisfied that the defendants have exercised all vigilance." The real issue is not whether the plaintiff has proved negligence. Res ipsa is primâ facie proof of it. The real issue is whether the defendants have proved affirmatively that they have done everything that skill and care can provide; not whether the plaintiff has himself proved some specific case of omission, if the evidence given by the defendants permit of the finding that everything possible has not been done.

Counsel for the defendants took another point. He said that the defendants used the overhead system under statutory authority, and that their cars and lines had been sanctioned by the Board of Trade. Such sanction, however, is for the protection of the public—not of the company. The public gets the benefit of the requirement of the Board. But compliance with such requirements does not afford any protection to the company. Nor does the existence of statutory authority. In *Geddis* v. *Bann Reservoir Proprietors* (3), LORD BLACKBURN said (3 App. Cas. at pp. 455, 456):

> "It is now thoroughly well established that no action will lie for that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

Counsel suggests that the defendants are safe if they take every precaution consistent with the commercial use of the trams. But this does not mean that they may adopt a course dangerous to the public because it is more profitable to themselves than the course of safety. Even if they are bound by statute to use cars with these overhead wires and poles, they are not bound to carry outside passengers or to carry them to the full extent of sitting room on the top. I can find nothing in the Act which justifies them in carrying a full load on the top if by means of a re-arrangement of seats, by sliding or otherwise, safety can be secured by allowing no passenger to sit beneath the pole. I regret to find myself in disagreement with the other members of the court. In my opinion, there is no ground for interfering with the verdict, and this appeal should be dismissed.

HAMILTON, L.J.—There is no new question of law in this appeal. All turns on the meaning of the jury's verdict. We are not concerned to ask what the effect of a mere general verdict for the plaintiff would have been, or whether the jury were compellable to answer the question as put by the learned judge: "I asked you if you found there was negligence to tell us on what ground," a question which, in my opinion, he was fully entitled to put to them if he thought fit. No doubt this question was wisely put to assist the jury by bringing it home to them when considering their verdict that they must really be satisfied of any negligence they found upon evidence and not upon prepossessions or vague assumptions. We have the jury's answers. They have explained what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. We must take it as we find it. The jury may simply have meant: "Since the defendants cannot by any known means avoid exposing their passengers to this risk, they ought to take the risk themselves and insure the passengers." If that is all they meant, there must be a new trial, for they have passed upon a question that was not open to them and upon no other. Or they may have meant: "We find there was negligence but we cannot tell what. We negative the various suggestions of negligence, to which evidence has been directed, but we divine the existence of some other negligence, too obscure to be named in words or to be proved by testimony." In this case the defendants are entitled to judgment. Their evidence has successfully discharged the burthen of proof cast on them by the occurrence of such an accident in itself, and has shifted it to the plaintiff, and the plaintiff, who gave no rebutting or contradictory evidence, has failed to prove or to approach proof of anything beyond.

A It is quite possible that the jury may have meant both. It would be not unnatural for a lay tribunal to do so, not being either lawyers or tramway engineers. If so, again judgment goes for the defendants, because in that case the jury has passed upon the real issue and has done so in the defendants' favour. The jury in this view has said (it is true, inter alia): "The defendants have successfully met the burden cast on them of proving an explanation of the accident consistent with performance on their part of B their contractual duty to safeguard their passengers by all practicable care and skill." I cannot accept the suggestion that it was competent for the jury to say: "We negative the various suggestions of want of due care by omission or commission, which arise on the evidence given"—and it is admitted that their verdict at least means this—"but still we think that the defendants did not take care enough, though we cannot tell, and nobody can tell us, what it is that they have left undone, so as to cause the plaintiff's C injury." This simply means that a jury can fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness, and on their own notions of the fitness of things.

The jury dwell on the use of a detachable trolly arm without sufficient precaution to ensure safety, and excuse themselves from saying more on the ground that they are not engineers themselves. I think this clearly means that they are not condemning the D detachable arm in itself, or insisting on reversion to the fixed arm, but are desiderating some precautions or devices along with its use, which will give the passengers its advantage as a second defence, while safeguarding them from its peculiar risks by some device, which only an engineer can control or describe. I am clear that they are not finding negligence consisting in the want of an overhead structure of some sort to prevent the falling arm from injuring passengers, or in the fact that passengers were carried on the E top of the car at all, or in the adoption of the system of overhead wires by the defendants, which they were by statute empowered to adopt if they chose. Had they meant any of these things nothing would have been easier than to say so, and the sensible excuse that they were not engineers would have been wholly out of place. Nobody asked them to prepare a specification or claim for some device that would ensure the safety of passengers. Their meaning is this: "Engineers have done well in going so far, but they F have not gone far enough; they have made the detachable arm almost safe; they ought to make it quite safe. We do not know how to do it. The defendants ought to know, and they are falling short of their duty as carriers if they do not." There is absolutely no evidence to support such a finding. All the evidence is the other way. Nothing better is known, and the suggestions of counsel that one device or another might be tried are suggestions only, unsupported by any evidence, and, in my opinion, negatived G by the jury. It is not as though, when all the evidence was out, there remained some substantial area of mystery, unexplained by the defendants, into which the jury's knowledge of common law enabled them to penetrate. The evidence showed how the accident happened. It only failed to show why, in very rare cases, the wheel leaves the overhead cable and the trolly head refuses to detach itself from the arm. It proved a small residuum of risk which nobody at present knows how to guard against, and there H was no contradiction of this evidence. The jury were not tramway experts; they had no experience on which they were justified in acting when sworn evidence failed. They might conceive an ideal tramcar, but their hopes and aspirations, however natural and creditable in themselves, cannot take the place of evidence, or support a verdict which rests on no foundation of actuality. I think that the appeal must be allowed, and that the defendants are entitled to judgment.

I *Appeal allowed.*

Solicitors: *Stanley, Wasbrough, Doggett & Baker*, for *Stanley, Wasbrough & Doggett*, Bristol; *Ford & Ford*, for *Metcalfe & Lefroy*, Bristol.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

SINNOTT *v.* BOWDEN

[CHANCERY DIVISION (Parker, J.), July 10, 31, 1912]

[Reported [1912] 2 Ch. 414; 81 L.J.Ch. 832; 107 L.T. 609; 28 T.L.R. 594; 6 B.W.C.C. 157]

B

Insurance—Fire—Rebuilding damaged premises—Mortgaged premises—Right of mortgagee to have policy money applied in rebuilding—Fires Prevention (Metropolis Act, 1774 (14 *Geo.* 3, *c.* 8), *s.* 83—*Conveyancing Act*, 1881 (44 *and* 45 *Vict.*, *c.* 41), *s.* 23 (3).

By an indenture dated Nov. 3, 1911, B. charged his house with payment to C. of a sum of £30, and covenanted to keep the premises insured against fire. B. had insured the premises before the date of the charge, and when the policy expired at Christmas, 1911, he renewed it for the next year. In February, 1912, the house was burned down, and in the following May S., a judgment creditor of B., obtained a garnishee order nisi attaching the money due to B. from the insurance company under his policy. C. then served the insurance company with a notice that he required the moneys payable under the policy to be applied in the rebuilding of the house on which he had a charge.

C

D

Held: (i) the policy had been "effected under the mortgage deed" within the meaning of 23 (3) of the Conveyancing Act, 1881; (ii) s. 83 of the Fires Prevention (Metropolis) Act, 1774, applied in a case between mortgagor and mortgagee, and C. was a person interested in the premises demolished by fire within that section; therefore, under both those sections C. was entitled to have the insurance money applied in rebuilding the house, and the money could not be attached by S.

E

Notes. The Fires Prevention (Metropolis) Act, 1774, has been held to be of general, and not merely local, application: see judgment of PARKER, J., infra.

Considered: *Halifax Building Society* v. *Keighley*, [1931] 2 K.B. 248. Referred to: *Mathey* v. *Curling*, [1922] 2 A.C. 180.

As to the reinstatement of property damaged by fire, see 22 HALSBURY'S LAWS (3rd Edn.) 320–322. For cases see 29 DIGEST 340–343. For Fires Prevention (Metropolis) Act, 1774, and the Law of Property Act, 1925, see 13 HALSBURY'S STATUTES (2nd Edn.) 9, and ibid., vol. 20, p. 427, respectively.

F

Cases referred to:

(1) *Lees* v. *Whiteley* (1866), L.R. 2 Eq. 143; 35 L.J.Ch. 412; 14 L.T. 472; 14 W.R. 534; 35 Digest 392, *1357*.

G

(2) *Poole* v. *Adams* (1864), 4 New Rep. 9; 33 L.J.Ch. 639; 10 L.T. 287; 28 J.P. 295; 12 W.R. 683; 29 Digest 308, *2544*.

(3) *Rayner* v. *Preston* (1880), 14 Ch.D. 297; 43. L.T. 18; 44 J.P. 634; 28 W.R. 808; affirmed (1881), 18 Ch.D. 1; 50 L.J.Ch. 472; 44 L.T. 787; 45 J.P. 829; 29 W.R. 547, C.A; 29 Digest 308, *2546*.

(4) *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699; 59 L.T. 641; 4 T.L.R. 779, H.L; 29 Digest 337, *2752*.

H

(5) *Re Barker, Ex parte Gorely* (1864), 4 De G.J. & Sm. 477; 5 New Rep. 22; 34 L.J. Bcy. 1; 11 L.T. 319; 10 Jur.N.S. 1085; 13 W.R. 60; 46 E.R. 1003, L.C.; 29 Digest 342, *2753*.

(6) *Evans* v. *Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979; 79 L.J.K.B. 970; 26 T.L.R. 509; 54 Sol. Jo. 580; 18 Mans. 64, C.A.; 29 Digest 461, *88*.

I

(7) *Cairney* v. *Back*, [1906] 2 K.B. 746; 75 L.J.K.B. 1014; 96 L.T. 111; 22 T.L.R. 776; 50 Sol. Jo. 697; 14 Mans. 58; 21 Digest 638, *2184*.

(8) *Norton* v. *Yates*, [1906] 1 K.B. 112; 75 L.J.K.B. 252; 54 W.R. 183; 50 Sol. Jo. 95; 21 Digest 639, *2192*.

Also referred to in argument:

Simpson v. *Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618; 1 New Rep. 537; 32 L.J.Ch. 329; 8 L.T. 112; 9 Jur.N.S. 711; 11 W.R. 459; 71 E.R. 270; 29 Digest 342, *2752*.

Galbraith v. *Grimshaw*, [1910] 1 K.B. 343; 102 L.T. 113; affirmed [1910] A.C. 508; 79 L.J.K.B. 1011; 103 L.T. 294; 54 Sol. Jo. 634; 17 Mans. 183, H.L.; 21 Digest 618, *2058*.

Sevene v. *Maton* (1907), 51 Sol. Jo. 532.

Re Quicke's Trusts, Poltimore v. *Quicke*, [1908] 1 Ch. 887; 77 L.J.Ch. 523; 98 L.T. 610; 24 T.L.R. 23; 29 Digest 342, *2760*.

Wimbledon Park Golf Club, Ltd. v. *Imperial Insurance Co., Ltd.* (1902), 18 T.L.R. 815; 29 Digest 342, *2759*.

Badeley v. *Consolidated Bank* (1886), 34 Ch.D. 536; 57 L.T.Ch. 468; 55 L.T. 635; 35 W.R. 106; 3 T.L.R. 60; on appeal (1888), 38 Ch.D. 238; 59 L.T. 419, C.A.; 21 Digest 219, *541*.

Davis v. *Freethy* (1890), 24 Q.B.D. 519; 59 L.J.Q.B. 318, C.A.; 8 Digest (Repl.) 609, *510*.

Re General Horticultural Co., Ex parte Whitehouse (1886), 32 Ch.D. 512; 55 L.T.Ch. 608; 54 L.T. 898; 34 W.R. 681; 21 Digest 629, *2132*.

Castellain v. *Preston* (1882), 8 Q.B.D. 613; 46 L.T. 596; 30 W.R. 597; affirmed (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 310, *2562*.

Re Combined Weighing and Advertising Machine Co. (1889), 61 L.T. 474; 5 T.L.R. 524; affirmed (1889), 43 Ch.D. 99; 59 L.J.Ch. 26; 61 L.T. 582; 38 W.R. 67; 6 T.L.R. 7; 1 Meg. 393, C.A.; 21 Digest 639, *2185*.

Re Watt, Ex parte Joselyne (1878), 8 Ch.D. 327; 47 L.J. Bcy. 91; 38 L.T. 661; 26 W.R. 645, C.A.; 21 Digest 639, *2186*.

Application to make absolute a garnishee order nisi.

By s. 83 of the Fires Prevention (Metropolis) Act, 1774:

"In order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; Be it further enacted, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorised and required upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings, which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

By s. 23 (3) of the Conveyancing Act, 1881 [see now s. 108 (3) of the Law of Property Act, 1925]:

"All money received on an insurance [against loss or damage by fire] effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage."

James Whitehead, for Clarke, the first mortgagee. A
Aston Cross for the second mortgagee, Skipper.
Morton Smith for the garnishor, Sinnott.
F. B. Dutton for the London Assurance Corporation.

Cur. adv. vult.

July 31, 1912. **Parker, J,** read the following judgment.—By an indenture dated B Nov. 3, 1911, the defendant, William James Bowden, charged Nos. 41, 43, and 45, Worcester Road, Walthamstow, with payment to one J. J. Clarke of a sum of £30, by instalments as therein mentioned, and covenanted to insure the premises and keep the same insured in not less than three quarters of their value. The charge was expressed to be subject to a prior mortgage in favour of one Sinnott, but it appears that before Nov. 3, 1911, Bowden had contracted to convey to Sinnott the equity of redemption in C Nos. 41 and 43 in consideration of Sinnott releasing No. 45 from the mortgage. This contract was subsequently enforced by the court, so that the charge in Clarke's favour became a first charge, but on No. 45 only. The premises known as No. 45, Worcester Road, consisted of a cottage with a shed in the rear thereof, and had, prior to Nov. 3, 1911, been insured with the London Assurance Corporation to the extent of £190, the contents of the shed being by the same policy insured to the extent of £10. The policy D was an annual policy expiring at Christmas, and was, after the date of Clarke's charge, renewed by Bowden for the ensuing year. On Feb. 22, 1912, the premises were destroyed by fire, and the amount payable by the insurance company was subsequently agreed at £108 15s., the greater portion of which must have been for damage to the cottage and shed. On May 8, 1912, Sinnott, as judgment creditor of Bowden obtained a garnishee order nisi attaching the moneys due from the insurance company to Bowden E under the policy. He is now applying to have the order nisi made absolute, but the application is opposed by Clarke, and also by Skipper, a subsequent mortgagee under an indenture dated Feb. 16, 1912, which also contained a covenant on the part of Bowden, the mortgagor, to insure the premises against fire.

The question I have to decide is whether either of these gentlemen has any interest in the policy moneys which overrides the interest of the garnishor. It is, I think, clear that, F apart from special contract or the provisions of some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises: see *Lees* v. *Whiteley* (1); *Poole* v. *Adams* (2); *Rayner* v. *Preston* (3). In the present case there is no special contract, but each of the mortgagees relies on the provisions of s. 38 of the Fires Prevention (Metropolis) Act, 1774, and also on the provisions of s. 23 (3) of the Conveyancing Act, 1881. With regard to s. 83 of the Act of 1774 G I think that, notwithstanding the doubt expressed in *Westminister Fire Office* v. *Glasgow Provident Investment Society* (4) I am clearly bound by *Re Barker, ex parte Gorely* (5) to hold that the section is of general as opposed to local application. It has, however, never been actually decided whether the section has any application as between mortgagor and mortgagee, though prior to *Westminster Fire Office* v. *Glasgow Provident Investment Society* (4), it was, I think, generally assumed that it had. But in that case H Lord Selborne suggested there might be some difficulty in so holding, because of the concluding words of the section. I am not quite sure that I follow this suggestion. The words in question exempt the insurance company from having to lay out or take security for the laying out of the policy moneys in rebuilding the insured premises if within sixty days those moneys shall have been settled and disposed of to and among all "the contending parties" to the satisfaction and approval of the insurance company. If "the I contending parties" means the parties claiming to be interested in the policy moneys the clause may appear possibly to suggest that no one except the persons so interested has any right to require the policy moneys to be laid out in rebuilding, but, as a matter of fact, this right is expressly given, not to the persons interested in the policy moneys, but to the persons interested in the premises destroyed by fire, and I can see no reason why "the contending parties" should not include the persons who, though not interested in the policy moneys, are interested in the subject-matter of the insurance, and are insisting on the insurance money being laid out in rebuilding. This construction seems to me in

full accordance with the general object of the enactment, which is to deter fraudulent people from arson, and not to provide a solution of difficulties arising out of rival claims to the policy moneys.

I have come to the conclusion, therefore—though, having regard to LORD SELBORNE'S suggestion, with great hesitation—that both Clarke and Skipper are, unless their rights have been displaced by the order nisi, entitled under the statute in question to require the insurance moneys attributable to the cottage and shed to be laid out in rebuilding those premises. Each of them by his counsel has insisted that it should be done, and Clarke served the insurance company with notice to that effect on May 30, 1912.

I am further of opinion that Clarke, at any rate, has a similar right under s. 23 (3) of the Conveyancing Act, 1881. That sub-section provides that all moneys received on an insurance effected under the mortgage deed or under the Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the damage or loss in respect of which the money is received. I am of opinion that the policy in question was within the meaning of the sub-section effected under the mortgage deed. It is true it existed at the date of the mortgage deed, but it was subsequently renewed, and could have been relied on by the mortgagor as a compliance, or partial compliance, with his covenant to insure. Further, I do not think that a mortgagor can get rid of the right of the mortgagee under this section by himself parting with the right to receive the money.

The only remaining question is whether the rights of the mortgagees have been displaced by the garnishee order nisi. In my opinion, they have not. It appears from *Evans* v. *Rival Granite Quarries Ltd.* (6), *Cairney* v. *Back* (7), and *Norton* v. *Yates* (8) that the equitable rights of the holder of a floating charge will not be displaced by a garnishee order, even when made absolute, if before actual payment the charge crystallises and the holder applies for relief. It appears to me that the principle of those cases must, a fortiori, apply to a right conferred by statute. I hold, therefore, that the policy moneys, so far as attributable to the mortgaged cottage and shed, cannot be attached in the face of opposition from the mortgagee. So far as they are attributable to the contents of the shed the order must, however, be made absolute. Unless the parties can agree as to the amounts attributable to the cottage and shed on the one hand and the contents of the shed on the other, I must direct an inquiry or adjourn for further evidence.

Solicitors: *Shaen, Roscoe, Massey & Co.*; *Skipper & Co.*; *Taylor & Taylor*, for *J. Sinnott & Son*, Bristol; *Dawes & Sons*.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

R. *v.* MONMOUTH JUSTICES. Ex Parte NEVILLE and ANOTHER

[Court of Appeal (Vaughan Williams, Buckley and Kennedy, L.JJ.), October 21, 1913]

[Reported 109 L.T. 788; 78 J.P. 9; 30 T.L.R. 26]

B

Licensing—Compensation authority—Division of compensation—Compensation on refusal to renew old on-licence—Finality of decision.

Where a compensation authority in dividing among the persons interested the compensation money agreed upon or awarded to be paid in respect of the refusal to renew an old on-licence have not taken into consideration any extraneous matters which by law ought not to have been taken into consideration or matters which are altogether outside the ambit of their jurisdiction, their decision is final, and, however erroneous it may be either in law or in fact, the court will not grant a mandamus for the purpose of reviewing it.

C

Notes. As to compensation for non-renewal of old on-licence, see 22 Halsbury's Laws (3rd Edn.) 574 et seq. and for cases see 30 Digest (Repl.) 63. For Licensing Act, 1953, ss. 14 and 18, see 33 Halsbury's Statutes (2nd Edn.) 161 and 168; for Licensing Act. 1961, s. 38, see 41 Halsbury's Statutes (2nd Edn.) 619.

D

Cases referred to:

(1) *Liverpool Corpn.* v. *Peter Walker & Son, Ltd.*, [1908] 2 K.B. 33; 77 L.J.K.B. 700; 99 L.T. 231; 72 J.P. 233; 24 T.L.R. 443, C.A.; 30 Digest (Repl.) 63, *469*.

(2) *R.* v. *Cotham*, [1898] 1 Q.B. 802; 67 L.J.Q.B. 632; sub nom. *R.* v. *Pilkington, etc., Justices and Wallace, Ex parte Williams, R.* v. *Cotham, etc., Justices and Webb, Ex parte Williams*, 78 L.T. 468; 62 J.P. 435; sub nom. *R.* v. *Cotham, etc., and Webb, Ex parte Cotham, etc., and Webb*, 46 W.R. 512; 14 T.L.R. 367; 42 Sol. Jo. 470, D.C.; 30 Digest (Repl.) 41, *320*.

E

Also referred to in argument:

I.R. Comrs. v. *Earl Fitzwilliam*, [1913] 2 K.B. 593; 82 L.J.K.B. 777; 108 L.T. 741; 29 T.L.R. 538, C.A.; affirmed sub nom. *Earl Fitzwilliam* v. *I.R. Comrs*, [1914] A.C. 753; 83 L.J.K.B. 1076; 111 L.T. 385; 30 T.L.R. 459; 58 Sol. Jo. 493, H.L.

F

Appeal from an order of the Divisional Court (Ridley, Lord Coleridge, and Bankes, JJ.), (108 L.T. 797) on a rule nisi calling on the justices for the county of Monmouth, acting as the compensation authority for such county, to show cause why a writ of mandamus should not issue commanding them to hold a further meeting of such compensation authority to hear and determine the matter of the division of the amount of compensation between the lessees and freeholders of the Rising Sun beerhouse situate at Cwmitillery in the county of Monmouth.

G

The Rising Sun beerhouse, the licence of which was an "old on-beerhouse licence" within the meaning of s. 18 of the second schedule of the Licensing (Consolidation) Act, 1910, [see now s. 14 of the Licensing Act, 1953] was held under a lease dated Jan. 1, 1862, and expiring on Nov. 25, 1916, at a yearly rent of 10s. On June 7, 1912, the compensation authority refused the renewal of the licence of the Rising Sun on the ground that it was not required, there being an excess of licensed premises in the district. On July 20, 1912, notice was given by the compensation authority that a supplemental meeting would be held for the purpose of approving the amount of the compensation money and of settling the shares in which the compensation money was to be divided in accordance with s. 20 of the Licensing (Consolidation) Act, 1910, [see now s. 18 of the Licensing Act, 1953, as amended by s. 38 of the Licensing Act, 1961]. The amount of the compensation money was assessed at £1,264, and it was agreed that £162 7s. 6d. of that sum should be paid to the tenant of the premises, leaving £1,101 12s. 6d. to be divided between the freeholders and the leaseholders. After hearing argument and evidence on behalf of the freeholders and of the leaseholders, the compensation authority decided that the freeholders were entitled to £200, the chairman remarking that the freeholders would retain

H

I

A the property at the expiration of the lease, and they fixed the share of the leaseholders at £901 12s. 6d. The chairman of the compensation authority made an affidavit in which he stated that:

> "Arguments were put forward by both sides, and evidence placed before us directed to show the proper amount payable to each party. I and my fellow justices were fully
B aware of the principles laid down by the Court of Appeal in *Liverpool Corpn.* v. *Peter Walker & Son, Ltd.* (1), and we endeavoured to apply those principles to the best of our ability to the facts which were admitted or proved before us. It was not at any time suggested to us that any question of law was involved, nor were we asked to take a note of any point of law or to state a case for the opinion of the High Court, but the whole matter was treated as a mere question of fact. In arriving at
C our decision we gave effect to the arguments that were placed before us on both sides in so far only as they assisted us to ascertain the values of the respective interests in accordance with the principles laid down in the case above referred to, but we based our judgment upon proved or admitted facts. It is true that in arriving at our conclusion in this case we took into consideration the fact that there was no obligation upon the lessees to keep the licence on foot, as we were of opinion that
D it was a matter having a material bearing upon the determination of the values of the respective interests. I did not understand that it was contended otherwise, and the owners' valuer himself conceded the principle. Under the above circumstances I would respectfully submit to the court that I and my brother justices duly heard and determined the matter submitted to us for our decision according to law."

E The Divisional Court held that where a compensation authority in dividing amongst the persons interested the compensation money agreed upon or awarded to be paid in respect of the refusal to renew an old on-licence had not taken into consideration any extraneous matters which by law ought not to have been taken into consideration or matters which were altogether outside the ambit of their jurisdiction, their decision was final, and, however erroneous it might be either in law or in fact, the court would not
F grant a mandamus for the purpose of reviewing it, and they discharged the rule. The freeholders appealed.

G. Cecil Whiteley (*Elliott, K.C.*, with him) for the freeholders.
Macmorran, K.C., and *R. M. Montgomery*, for the leaseholders.

G **VAUGHAN WILLIAMS, L.J.**—It is really a question of the construction of the affidavit of the chairman of the compensation authority, and on that affidavit the only passage which is really material is that beginning with the words:

> "It is true that in arriving at our conclusion in this case we took into consideration the fact that there was no obligation upon the lessees to keep the licence on foot, as we were of opinion that that was a matter having a material bearing upon the deter-
H mination of the values of the respective interests."

So far as the facts are concerned the compensation authority are the final judges. The Court of Appeal has jurisdiction in cases where it is manifest upon affidavit that the compensation authority went outside their jurisdiction, but if they only went wrong on their finding of facts their jurisdiction would appear in their finding, and the Court
I of Appeal has no jurisdiction to review the matter. I cannot agree, if I rightly understand the observations of BANKES, J., that the same proposition is true as to going wrong in law. We have jurisdiction where it is manifest, upon affidavit, that the compensation authority have gone outside their jurisdiction. To my mind, the passage I have read from the affidavit by the chairman of the compensation authority, though a perfectly true conclusion, is a conclusion merely on an immaterial fact, unless one supposes that the freeholders had no right to obtain a licence in the event of the lessees choosing not to obtain a renewal; but the fact that the lessees were under no obligation to keep the licence on foot does not seem to me to have a material bearing upon the

determination of the values of the respective interests, unless the freeholders themselves had no right to apply for a renewal. Although that paragraph of the affidavit is so worded, there is no statement to be found therein that the compensation authority decided the case exclusively upon the ground that there was no obligation upon the lessees to keep the licence on foot; there is no such statement. It is a mere inference which I should perhaps primâ facie put upon the words of the affidavit, but it is a mere matter of construction of the affidavit, and I might have arrived at the conclusion that they really did decide the case exclusively upon the ground that there was no obligation upon the lessees to keep the licence on foot. Whoever looks at the figures will see that it is absolutely impossible to reconcile those figures with any other proposition than that the compensation authority did really arrive at those figures simply upon the ground that there was no obligation upon the lessees to keep the licence on foot. My brethren, however, take another view as to the construction of the affidavit, and I do not think it would be in the interests of the parties that I should differ from the conclusion they have arrived at. I, therefore, reluctantly accept their view. The result, therefore, will be that the appeal fails and must be dismissed.

BUCKLEY. L.J. —In my opinion this appeal fails. There was a sum of £1,264 for compensation—as to that amount there is no dispute; it had to be divided between the tenant, the lessees, and the freeholders. There was allotted to the tenant £612 7s. 6d.; there then remained £1,101 12s. 6d. to be divided, somehow or other, between the lessees and freeholders. The lessees' term was three and a half years; but, notwithstanding the shortness of that term and the fact that the reversion would fall in at the end of the term the compensation authority awarded £901 12s. 6d. to the lessees, and £200 to the freeholders. Now, the point of this case is that those figures strike one as being extraordinary. The way in which the compensation money was to be divided was solely for the compensation authority so long as they acted within the ambit of their jurisdiction, and it is not for us to review them upon the question of division. On that question they are supreme, within the limits of their jurisdiction. In order to entitle the freeholders to a mandamus, they must show that the compensation authority went outside their jurisdiction. I fail to find that they did so. The particular ground relied upon is para. 6 of the affidavit of the chairman, which says

> "In arriving at our decision we gave effect to the arguments that were placed before us on both sides in so far only as they assisted us to ascertain the value of the respective interests in accordance with the principles laid down in the case referred to; but we based our judgment upon proved and admitted facts. It is true that in arriving at our conclusion in this case we took into consideration the fact that there was no obligation upon the lessees to keep the licence on foot as we were of opinion that it was a matter having a material bearing upon the determination of the values of the respective interests."

The matters stated by FARWELL, L.J., in *Liverpool Corpn.* v. *Peter Walker & Son, Ltd.* (1), such as the chance of making profits to a brewer who was to be regarded as a possible bidder for the house, are exactly the matters they could take into consideration. The lord justice says ([1908] 2 K.B. 49).

> "Where the values of the respective interests have to be considered, the matters specified in the judgment of the county court judge, to which the Lord Chief Justice has called attention, such as the nature of the interest in licensed premises, the vicissitudes to which it is subject, the age and character of the house, the fact that in the particular case the lessees were under no obligation to maintain the licence, or to surrender the premises with a licence, and such like, are all matters which must be taken into consideration."

It is impossible to contend successfully that any fault can be found with that sentence,

> "as we were of opinion that it was a matter having a material bearing upon the determination of the values of the respective interests."

A It may well be that the compensation authority not only took that fact into consideration, but that they excluded from consideration the fact that if the lessees did not apply for a renewal of the licence the freeholders of reversioners could do so. In my opinion, there are no materials for saying that the compensation authority proceeded wrongly, and upon the affidavit by the chairman nothing is shown enabling us to say that the compensation authority went outside the ambit of their jurisdiction. If that is so, the B question was one wholly for them; and, they having settled the way in which the compensation sum was to be divided, it is not for the Court of Appeal to review it; and the appeal must be dismissed.

KENNEDY, L.J.—I am of the same opinion, and after the judgments that have been delivered I have very few words to add. As regards the principle on which the court C acts in granting a mandamus, I entirely agree with the judgment of WILLS, J., in *R.* v. *Cotham* (2), which was cited by BANKES, J., in the court below, where he said ([1898] 1 Q.B. 806).

> "It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject D show that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they E have taken into consideration matters which are absolutely outside the ambit of their jurisdiction and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law."

I think it is very important that the limits of the remedy mentioned by WILLS, J., should be observed and that there should be no appeal, and the courts must be careful F to observe the limits placed upon the grant of a mandamus. In the present case I can see nothing which justifies us in saying that the compensation authority took into consideration matters absolutely outside their jurisdiction or apart from those which they ought to consider. They are the tribunal appointed by the law to deal with the question of compensation; they may make mistakes in law and in fact, but so long as they keep within the limits stated by WILLS, J., in *R.* v. *Cotham* (2) they are the sole judges. G I see nothing in the affidavit before me which would justify me in saying that they have gone outside their jurisdiction in considering matters which they are allowed to take into consideration. On the fact of it, it seems to me that these figures are figures which one would have expected to be different from those which were in fact awarded, but, whether the figures awarded are correct or incorrect, it is not for this court to deal with them upon this application. I think the appeal fails.

H *Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, for *W. C. Cripps, Son, & Daish*, Tunbridge Wells; *Le Brasseur & Oakley*, for *Le Brasseur & Co.*, Newport, Mon.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

GRIFFITH *v.* RICHARD CLAY & SONS, LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), May 9, 1912]

[Reported [1912] 2 Ch. 291; 81 L.J.Ch. 809; 106 L.T. 963]

B

Easement—Light—Obstruction—Measure of damages—Ancient lights in two buildings on part of plot of land—Probable demolition and building of new premises—Consideration of damage to site as a whole.

The plaintiff was the owner of two dwelling-houses facing a street, and also of some land, on which was a small warehouse, in their rear. The windows in the two houses were ancient lights, and in an action by the plaintiff against the defendants for obstructing the same by the erection of a building on the opposite side of the street, the obstruction was admitted and the question of damages left to be tried by the court. Evidence was given that the two houses were dilapidated and must shortly be demolished, and that the whole site would probably be used solely for the purpose of building on it a substantial factory.

C

Held: in assessing the damages regard must be had, not only to the deprivation of the light to which the two houses were entitled, but to the fact that the premises as a whole were a building site the value of which would be affected by the reduction in the light.

D

Decision of NEVILLE, J., [1912] 1 Ch. 291, affirmed.

Notes. Applied: *Wills* v. *May*, [1923] All E.R.Rep. 502. Followed: *Horton's Estate* v. *Beattie* (1926), 42 T.L.R. 701. Considered: *Sheffield Masonic Hall Co.* v. *Sheffield Corpn.* (1932), 48 T.L.R. 336. Applied: *Hapgood* v. *J. H. Martin & Son, Ltd.*, [1934] All E.R. Rep. 370.

E

As to the easement of light, see 12 HALSBURY'S LAWS (3rd Edn.) 582–594, and for cases see 19 DIGEST 123 et seq.

Cases referred to:

F

(1) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 123, *830*.

(2) *Re London, Tilbury and Southend Rail Co., and Gower's Walk Schools Trustees* (1889), 24 Q.B.D. 326; 62 L.T. 306; 38 W.R. 343; sub nom. *Re Gower's Walk Schools Trustees and London, Tilbury and Southend Rail Co.*, 59 L.J.Q.B. 162; 6 T.L.R. 120, C.A.; 19 Digest 194, *1470*.

G

(3) *Horton* v. *Colwyn Bay and Colwyn U.D.C.*, [1908] 1 K.B. 327; 77 L.J.K.B. 215; 98 L.T. 547; 72 J.P. 57; 24 T.L.R. 220; 52 Sol. Jo. 158; 6 L.G.R. 211, C.A.; 11 Digest (Repl.) 144, *238*,

Also referred to in argument:

Martin v. *Goble* (1808), 1 Camp. 320, N.P.; 19 Digest 145, *994*.

Moore v. *Hall* (1878), 3 Q.B.D. 178; 47 L.J.Q.B. 334; 38 L.T. 419; 42 J.P. 343; 26 W.R. 401, D.C.; 19 Digest 137, *927*.

H

Hadley v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Gracie (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433, H.L.; 41 Digest 802, *6627*.

Ecclesiastical Comrs. for England v. *Kino* (1880), 14 Ch.D. 213; 49 L.J.Ch. 529; 42 L.T. 201; 28 W.R. 544, C.A.; 19 Digest 138, *940*.

I

The Notting Hill (1884) 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp. M.L.C. 241, C.A.; 14 Digest 809, *6699*.

Appeal by the defendants from an order of NEVILLE, J., awarding the plaintiff £200 damages for the obstruction by the defendants to ancient lights in houses the property of the plaintiff.

Jenkins, K.C., & Vernon for the defendants.

Peterson, K.C., and Gover, for the plaintiff, were not called on to argue.

A **COZENS-HARDY, M.R.**—This is an appeal from a decision of NEVILLE, J., who has awarded a certain sum by way of damages in respect of an admitted legal nuisance. I say "admitted" because it was admitted in the most formal manner on the pleadings that by a new building belonging to the defendants there had been such an interference with the comfortable use and enjoyment of ancient lights in a house belonging to the plaintiff as amounted to a legal actionable nuisance within the meaning of *Colls* v. B *Home and Colonial Stores, Ltd.* (1) in the House of Lords.

We have heard a long and elaborate argument as to the principle upon which it is contended that damages should be awarded in a case like this. First of all, what is it we are dealing with? The plaintiff is the owner of a block of land nearly but not quite square, 43 ft. facing Brunswick Street and 48 ft. 6 in. at right angles to Brunswick Street. Upon this site there are two houses facing Brunswick Street which admittedly have C ancient lights which are interered with. No. 63 is an extremely small tenement judging by the scale on the map which is before me. Its frontage to the street is about 20 ft. The depth going back may be 25 ft., but not more than that. It is a one-story building so far as I can gather from the model. No. 62 is even narrower towards the front. It is not even 15 ft. towards the street. It goes back a little further, and it may be it amounts to about 30 ft. in depth. These houses are obviously very small. They are D old. The learned judge says that, if they were not demolished by the owner of the property himself, they would probably be compulsorily demolished by virtue of some order made by the local authorities in London. At the rear of this small block there is a piece of land which is approached from Brunswick Street by a passage alongside No. 63, and on that there is a warehouse, which again must be a very small warehouse indeed. The dimensions do not appear, but inasmuch as the whole length can only be E 43 ft. and about 15 ft. deep, that would leave no margin, I think, anywhere for building. From the nature of the structures upon this property they must inevitably be taken down, and the land in some way utilised as a building site by a prudent owner. It is also apparent that the neighbourhood is now being covered more or less with large buildings, not perhaps quite so large as the defendants', but at any rate buildings which are in the nature of factories or warehouses, and the point we have to consider is this— F there being admittedly ancient lights in Nos. 62 and 63 facing Brunswick Street, and the defendants having admittedly committed an actionable wrong by interfering with those ancient lights, what is the measure of damages, or what are we entitled to take into consideration in assessing damages for this wrong?

I wish to approach this question in at least two ways. In the first place, if the plaintiff had not failed to obtain an injunction by reason of delay in commencing proceedings, G he certainly could have obtained one, and, if he had done so, it is clear that that injunction would have prevented the defendants from erecting any part of their building which is opposite Brunswick Street beyond the line shown on the model. That would have enured for the benefit of the whole site, and it would have been competent without doubt for the plaintiff to have utilised this site in the only way in which a man of business or a sane man would use it—namely, by treating it as a whole. To suggest that anybody H would re-build these two buildings on their old foundations and their old site is to assert that which seems to me is quite absurd and impossible.

It is said that that may be so as to an injunction—it may be that in that indirect way the plaintiff could have got protection for the whole of this building site, but that has nothing whatever to do with the case in which an injunction was asked for in the writ and statement of claim, but no injunction was obtained at the hearing, merely damages. I I ask myself why not? A wrongful act has been committed by the defendants. What damage has the plaintiff suffered? It has been argued that if there be a house with, say, a small garden on one side or the other, the only thing one can do is to see what damage has accrued or arisen to the plaintiff with reference only to the brick and mortar of the actual building round which that garden lies. It has been said that one must disregard altogether the fact that it is a house with a garden alongside it or an open space in the back; that one has nothing whatever to do but to consider what is the value of the particular rays of light which are prevented from coming into the ancient lights, and that that is all you have to do. I am very slow indeed to accept that view.

It seems to me there is absolutely nothing in *Colls* v. *Home and Colonial Stores* (1) which has any bearing upon this. That case only dealt with the question of nuisance or no nuisance. There may be many cases in which there is an interference with an ancient light, but, in considering whether the interference is of such a nature as to amount to a legal nuisance, certain very important and very valuable rules are laid down in that case. But, given the existence of the nuisance as we have here, I fail to see that *Colls* v. *Home and Colonial Stores, Ltd.* (1) has any bearing whatever upon the measure of damages. It cannot be that in assessing damages the only thing to be considered is the right in respect of the precise building which is before the court. Under the Prescription Act, 1832, one has to consider the quantity of obstruction in order to consider whether there is a nuisance. The nuisance has been established here, and I fail to see why in a case like this the plaintiff cannot say: "I am the owner of this small block of land, which obviously must be used as one building site, and, in considering the amount of damages to which I am entitled, regard must be had to the fact that it is a building site and that the value of Nos. 62 and 63 is not to be considered solely as though my property ended with the wall at the opposite end of those houses from Brunswick Street, but must fairly be considered on the footing that they are part of a small block of land the residue of which belongs to me, and which any reasonable and prudent man would deal with on that footing."

It seems to me that the judgment of LORD ESHER in *Re London, Tilbury, and Southend Rail Co. and Gower's Walk Schools Trustees* (2) is directly and expressly in point. That was a case where a railway company had erected buildings which interfered with ancient lights of some building on the opposite side of the road. This building had, as most of these buildings have, some lights which were not ancient, and the question was whether the railway company was bound to pay compensation in respect to the whole of the windows so obstructed, including the windows and portions of the windows which did not coincide with any of the ancient lights. The case was put on two grounds. One was under s. 16 of the Railways Clauses Act, 1845, which of course, does not apply here. But LORD ESHER says 24 Q.B.D. at pp. 329, 330:

> "Supposing the company had been in the ordinary position of owners of land and not affected by any statute and had then done what they have done, the trustees would have been entitled to sue them in a common law action for interference with ancient lights, could the plaintiffs in such action have recovered damages in respect of injury to all the lights affected, the new as well as the old? On this point the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act, and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights."

If that is good law, it seems to me to carry the case the whole way.

The matter came before this court in a subsequent case of *Horton* v. *Colwyn Bay and Colwyn U.D.C.* (3) in which BUCKLEY AND KENNEDY, L.JJ., were both parties to the decision, but in which BUCKLEY, L.J., especially referred to the decision of the *Tilbury Case* (2) and gave an explanation of it, as it seems to me, approving and adopting what LORD ESHER had said, and it is impossible to regard that as a mere dictum. It was one of the two grounds for his decision. It is no doubt true that the decision might have been supported on the ground of s. 16 of the Railways Clauses Act, as LORD ESHER said: but that does not in any way detract from the value of that opinion of a very learned judge, particularly on this branch of law.

A I therefore, think that this is a case in which we must not consider merely what damages have been done in respect to these ancient lights in these ancient buildings, but that we must consider what is the damage which the plaintiff has suffered by reason of the wrongful act of the defendants in creating a nuisance by interfering with the ancient lights. From that point of view I think the learned judge was quite right in the view he took. He does not say that the plaintiff had any ancient lights in the ware-
B houses, No. 63A, which he was entitled to claim, but that is not the way to look at it. He in effect says, "The interference with the plaintiff's admitted ancient lights involves the consideration that he, as owner of this block, would be entitled to use, and would naturally and reasonably use, those two houses in conjunction with the other part of his property, and I must have regard to that fact in assessing damages." That being so, it seems to me that the learned judge's decision was quite right, and that this appeal
C must be dismissed with costs.

BUCKLEY, L.J.—This is a nice question, and in the exact form in which it here presents itself it is, I think, new, but at the same time I do not think there is any difficulty in its solution in principle, although it may not be covered by authority.

I start with the proposition upon which the defendants insist, and which has my
D entire concurrence. Section 3 of the Prescription Act, 1832, uses the word "therewith." It speaks of the access to, and use of, light to and for a building actually enjoyed therewith for twenty years, and says that the right thereto shall be deemed absolute. There is no question, I think, that that is a right enjoyed with a building and attributable to, founded upon, attached to—I do not know exactly what the right verb is—a building. You cannot have it except in connection with a building. It must be enjoyed with the
E building, and it is a thing which is preserved with the building so long as the substantial identity of the building and the substantial identity of the aperture through which the light is enjoyed remains undisturbed. But having started with that proposition, the next step is this. The plaintiff here was entitled to two little houses, Nos. 62 and 63, Brunswick Street, with windows looking upon the street, and I agree that the right of light which he enjoyed was a right to Nos. 62 and 63. He also owned a warehouse at
F the back of those houses, No. 63A, which was a building which enjoyed no right of light over the defendants' premises.

The question to be answered is, inasmuch as there has been a legal nuisance by the defendants raising their building so as to obscure the plaintiff's lights to Nos. 62 and 63, what is the proper measure of the damages to which the plaintiff is entitled? Is it limited to his ownership of Nos. 62 and 63, or does it extend to his ownership of Nos.
G 62, 63, and 63A? Let me first give an illustration for the purpose of explaining what I conceive the right to light to be. Suppose a man has for more than the statutory period of prescription enjoyed the right of light to a house which has a dining-room and that for more than the statutory period that dining-room was 20 ft. deep, but that some two or three years ago he increased the depth of his dining-room by the wall being put back so that the dining-room from front to back was increased from 20 ft. to 25 ft. Of course, so
H far as this additional 5 ft. is concerned, there is no prescription of light at all. He has not enjoyed the light to that building with the additional 5 ft. for the prescriptive time. But the enjoyment of the light to the 20 ft. enured to his benefit in that when he threw the additional 5 ft. in he enjoyed a greater advantage. If that person sued, to what damages would he be entitled on it being found there was a nuisance? Would he be entitled to damages on the footing that a house with a dining-room 20 ft. deep had been injured, or
I that a house with a dining-room 25 ft. had been injured? Certainly I think the latter. He is entitled to such damages as result from the injurious act which the defendant has done to him, and the damage he has sustained is the damage to his house with a dining-room 25 ft. deep. One might put another illustration which was suggested in the course of the argument. Suppose a man had a warehouse bounded with a very high blank wall on the road and with only one little window in, say, a counting-house about the middle of it, and there were buildings opposite. Of course the owner of that building might open any number of windows—modern windows—in his counting-house, but in respect of those he would not be entitled to sue. But suppose the man on the opposite side of

the road raised his building and that the owner of the blank wall with the little window in it said, "You are interfering with the access of the light to my window that has been in more than twenty years," and it was found that there was a legal nuisance, he would be entitled, under proper circumstances, to an injunction, and if he obtained an injunction his injunction would operate to protect not only the one little window in the counting-house, but all other windows, which would be of very great importance. Suppose he did not get an injunction but damages, what damages would he be entitled to get? He would be entitled to get damages measured by the depreciation of the building being such as it is—namely, a building, not with one little window on the ground floor only, but with a good many windows above. That is the extent to which he has been injured, and it seems to me that that is the measure of damages as a matter of principle.

The argument on the other side is really this. What you sue in respect of is the pecuniary value of the light of a particular room through a particular window, a room of a particular size. If that is so, you would have to sue in respect of each room in the house. No room enjoys the same light exactly as another room; you do not sue in respect of that, but for the injury to the house as a whole, not to each room and each window; but what you have to ascertain is the injury to the house as a whole by reason of the infringement of the right to light. The question is, what is the house as a whole? The house as a whole does not mean necessarily merely those rooms which look to the front. It may include rooms which look to the back. They do not get any light from the front, but, the house being as it is by reason of the deprivation of the light to the front, damaged as being a house having both a front and a back, you must take the whole property into consideration in determining what is the amount of damage sustained. Here the material facts are these. These two houses are little, old, dilapidated buildings, and the plaintiff's property, is valuable not for the purpose of these two little houses only, but for the purpose of these two little houses and the land at the back. The ground eventually is to be the site of a building which, I agree, will want more light than the light to be enjoyed through the ancient apertures, but it will be light to a building which may cover more surface than the present buildings, and the damage sustained is damage by reason of being injured in respect of such a building, as being substantially identical with the present building, reproducing substantially the present aperture through which light is enjoyed—the difference between the value of that site if the injury is not done, and the value of that site if the injury is done.

So far as regards principle. But now, further, as it seems to me, the decision in the *Tilbury Case* (2) goes a very long way to decide this case. I agree with what has been said that the point relevant to this case is to be found only in the judgment of LORD ESHER. There were two points in that case—the one at common law whether the damages would extend to the modern windows as well as the old windows; and the other whether, having regard to s. 16 of the Railways Clauses Act, 1845, it would extend to both one and the other. I think the latter two judges who gave judgment founded those judgments only on the second, and not the first. LORD ESHER certainly founded his judgment on the first. It seems to me that the outcome of the *Tilbury Case* (2) is really this, that if the plaintiff, as here, has an actionable wrong in respect of Nos. 62 and 63, and he is injured, but not so that he has an action in respect of the injury as regards No. 63A, then if he is in a position to sue, as he is in a position to sue in respect of Nos. 62 and 63, he may at the same time say: "The injury done me is not confined to those two parcels; I am injured also as regards No. 63A." It seems to me clear that LORD ESHER'S decision in the *Tilbury Case* (2) governs this case, upon the proposition that here the plaintiff is injured not only in respect of the houses in front but in respect of the whole property. He could not have sued in respect of No. 63A alone, but being in a position to sue in respect of Nos. 62 and 63, he can recover the whole damage including that in respect of No. 63A. For those reasons I think the appeal should be dismissed.

KENNEDY, L.J.—I am of the same opinion The important passage in the judgment of NEVILLE, J., is this ([1912] 1 Ch. at pp. 295, 296):

> "It seems to me I am entitled to take into consideration the plaintiff's position and to have regard, in considering the diminution in value of the premises lighted by

these windows, to the fact that he is the owner of property which would enable a purchaser from him to acquire a site available for the purpose of erecting buildings of the character which are suitable for the neighbourhood."

I am not going, after the description that has been given in that judgment and in the two judgments of this court already pronounced, to describe the nature of the premises, but it is said that that judgment, assuming the premises to be taken as described, is wrong in the passage I have quoted, and I will endeavour to summarise the arguments which have been addressed to the court by the defendants' counsel, He says that the damage in respect of which damages have been given by the learned judge is too remote. But junior counsel for the defendants rather put it as a case in which the judge had gone wrong, because he has allowed into the calculation of damages to come the consideration of a loss which is described as damnum absque injuria—in which words, a loss that has not been due as between these litigants to an actionable wrong on the part of the defendants.

I confess I am unable to follow either of these two contentions. The case is one of considerable novelty, but at the same time I do not see any real difficulty in coming to the same conclusion as NEVILLE, J., has. He has said in terms what he has considered in giving £200 damages, and he has considered the diminution in value of the premises lighted by those windows. Unless the impossible proposition (which nobody has argued) is made, that you are to look only at the premises as they exist so as to assess the damages upon the rooms in which there are ancient lights, what you must consider is the damage to the owner in respect of the injury to the light to the premises in question. Its diminution, if it is an actionable wrong at all, is diminution by the loss of light to the whole premises. I cannot grasp the force of the argument that directly you have got to assess the diminution in value to the premises by reason of the wrong you ought to limit the assessment of those damages to the premises without considering the premises adjoining if the evidence is such as to show that the natural utilisation of the premises is in connection with the adjoining premises. It cannot be contended that in these circumstances the plaintiff, who is seeking for a remedy either by injunction or by damages, is limited to a claim in respect to the dilapidated or antiquated buildings which at present exist, and directly you have quitted what I may call the dress and circumstances of the buildings as they exist, why exclude then the user which any sensible man would make of these premises, and omit to consider how far that user of the premises has been diminished by reason of the wrongful act causing the diminution of light. I do not see how you can say that that is too distant and not sufficiently proximate. Picture the owner of a house in a state of dilapidation with ancient lights; how can it be too distant to consider whether he can avail himself of the advantage of those lights which his dominant tenement possesses, and that in re-building he might build upon his garden as well as upon the site of the house as it stands. I cannot see from any point of view how that could be said, nor can I see that it is damnum absque injuria, because the loss which has been inflicted on the owner of the premises (which now as a matter of law must be assumed to be proved) when rebuilding on a sensible scale and in a sensible way is a loss which he would not have suffered but for the wrongful act. It is true that that act is wrongful because it has affected only one part of the lights, regarding which it gives a cause of action, but the wrong which has been inflicted produces, as a natural and necessary sequence, the deprivation of the advantage which the extent of the protection of the particular lights gave to the owner of the premises as the owner of the property to which those lights belonged. For those reasons I am of opinion that the learned judge could not rightly refuse to take into consideration that which he has taken into consideration—namely, the diminution in value caused to these premises to which the lights belong by reason of the act of the plaintiff lessening their value if they are developed in a way that reason dictates.

Solicitors: *Munton, Morris & King*; *Church Adams & Prior*, for *Marshall & Liddle*, Croydon.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

R. *v.* LEACH. Ex Parte FRITCHLEY

[King's Bench Division (Darling, Banks and Lush, JJ.), June 2, 1913]

[Reported [1913] 3 K.B. 40; 82 L.J.K.B. 897; 109 L.T. 313; 77 J.P. 255; 29 T.L.R. 569; 23 Cox, C.C. 535]

Magistrates—Fine—Enforcement—Imprisonment in default of payment—Term longer than that provided as additional or alternative to fine—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 65—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict., c.* 49), *ss.* 5, 21(3).

A club steward on being convicted under s. 65 (1) of the Licensing (Consolidation) Act, 1910, of selling beer by retail without a licence, was fined £25 and costs, and in default of payment and sufficient distress being levied was sentenced to three months' imprisonment. The maximum penalty for his offence under s. 65 was a fine of £50 or one month's imprisonment. The steward failed to pay the fine and in default of distress was committed to prison.

Held: the conviction must be upheld since, there being nothing in s. 65 of the Licensing (Consolidation) Act, 1900, to say how the offender was to be punished if the fine inflicted was not paid, regard had to be had to s. 5 of the Summary Jurisdiction Act, 1879, which enacted that when a fine exceeding £20 was imposed and not paid the magistrates had power to impose up to three months' imprisonment.

Notes. As a result of s. 22 of the Licensing Act, 1961, the penalty for selling intoxicating liquor without a licence can be 6 months' imprisonment which exceeds the maximum imprisonment (still 3 months) that can be imposed for default in payment of a fine. This case, therefore is now of no effect in licensing law, but it is of general value with regard to the powers of magistrates to impose a term of imprisonment for non-payment of a fine greater than that which would have been imposed instead of in addition to the fine.

As to maximum terms of imprisonment in default of payment of penalty under a conviction of a magistrates' court, see 25 Halsbury's Laws (3rd Edn.) 240; and for cases see 33 Digest 460–1. For the Licensing Act, 1953, s. 120, see 33 Halsbury's Statutes (2nd Edn.) 250, for the Licensing Act, 1961, s. 22, see 41 Halsbury's Statutes (2nd Edn.) 596, for the Magistrates' Courts Act, 1952, s. 64, see 32 Halsbury's Statutes (2nd Edn.) 470.

Case referred to:

(1) *R.* v. *Hopkins*, [1938] 1 Q.B. 621; 62 L.J.M.C. 57; 68 L.T. 292; 57 J.P. 152; 41 W.R. 431; 9 T.L.R. 294; 37 Sol. Jo. 286; 5 R. 315, D.C., 33 Digest 461, *1730*.

Also referred to in argument:

Re Clew (1881), 8 Q.B.D. 511; 51 L.J.M.C. 140; 46 J.P. 534; 30 W.R. 704, D.C.; 18 Digest (Repl.) 430, *1746*.

Rule for Certiorari directed to justices of the peace for the county of Derby, to remove into the High Court three convictions by the justices whereby one William Fritchley, the applicant for the rule, was convicted on Mar. 7, 1913, for selling on three separate occasions beer by retail which he was not then licensed to sell by retail under s. 65 (1) of the Licensing (Consolidation) Act, 1910 (see now s. 120 of the Licensing Act, 1953, as amended by s. 22 of the Licensing Act, 1961).

The Summary Jurisdiction Act, 1879, provided:

"S. 5. The period of imprisonment imposed by a court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the non-payment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall, notwithstanding any enactment to the contrary in any past Act, be such period as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale; that is to say, where the amount of the sum or sums of money adjudged to be paid by a conviction, as ascertained by the conviction, . . . exceeds twenty pounds, the said period shall not exceed three months.

"S. 21... (3) Where a person is adjuged by the conviction of a court of summary jurisdiction, or in the case of a sum not a civil debt by an order of such court, to pay any sum of money, and on default of payment of such sum a warrant of distress is authorised to be issued, and it appears to the court of summary jurisdiction to whom application is made to issue such warrant that such person has no goods whereon to levy the distress, or that in the event of a warrant of distress being issued his goods will be insufficient to satisfy the money payable by him, or that the levy of the distress will be more injurious to him or his family than imprisonment, such court, instead of issuing such warrant of distress, may, if it think fit, order the said person on non-payment of the said sum to be imprisoned for any period not exceeding the period for which he is liable under such conviction or order to be imprisoned in default of sufficient distress."

(These provisions have been repealed and replaced by s. 64 of the Magistrates' Court Act, 1952.)

Grimwood Mears showed cause against the rule.

Sturge in support of the rule.

DARLING, J.—In this case I am of opinion that the rule must be discharged. If it were not for the very ingenious argument of counsel in support of the rule founded upon s. 21 (3) of the Summary Jurisdiction Act, 1879, there would have been no reason at all for coming to any other conclusion than that the case was covered by that of *R.* v. *Hopkins* (1). It seems to me that, our attention having been called to s. 21 (3) there is still no difficulty in saying that the present case is covered by that case. The argument used by the court in that case exactly applies in this case, as also does the observation of LORD COLERIDGE, C.J., who said that although it was a great anomaly to hold that a man could be sent to prison for a longer time if he was merely fined for an offence than he could if he had in the first instance received a sentence of imprisonment for the offence itself, yet it was an anomaly which Parliament, and not the courts, could solve. That was said by LORD COLERIDGE, C.J., in 1893, twenty years ago, and seventeen years after that—namely, in 1910—the legislature, when, if it had so pleased, it might have altered the law, deliberately re-enacted it in the same form in which it stood when *R.* v. *Hopkins* (1) was decided.

In my opinion it is clear that there being nothing in s. 65 of the Licensing (Consolidation) Act 1910, to say how the offender is to be punished if the fine inflicted upon him is not paid, regard must be had to s. 5 of the Summary Jurisdiction Act, 1879, which enacts that where a fine which exceeds £20 is imposed, and the fine is not paid, the justices shall have power to impose as much as three months' imprisonment. They are not bound to impose three months' imprisonment, but they may do so. I agree that they might have imposed a different punishment from that actually imposed in this case. The justices to whom application for the distress warrant was made might have taken advantage of the provision in s. 21 (3) of the Summary Jurisdiction Act, 1879, and they might have come to the conclusion that Fritchley had no goods whereon to levy a distress or not sufficient goods to satisfy the fine imposed on him, and they might under that sub-section, instead of issuing a distress warrant, have ordered him imprisonment for one month. That perhaps, would have been the best exercise of their discretion, but it may be that the reason they adopted this method of punishment was that they had come to the conclusion that Fritchley was a person who had no goods and was therefore willing to break the law and take the consequences of a term of imprisonment, and for that reason they imposed imprisonment for the term of three months.

There is no ground for saying that the orders made by the justices were wrong, and, therefore, this rule must be discharged, and the convictions upheld.

BANKES, J.—I agree.

LUSH, J.—I agree.

Rule discharged.

Solicitors: *Speechly, Mumford & Craig*, for *W. Mortimer Wilson*, Alfreton: *H. G. Campion & Co.*, for *Arthur Neal & Co.*, Sheffield.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

R. *v.* DALY. Ex parte NEWSON

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Ridley and Channell, JJ.), March 24, 1911]

[Reported 104 L.T. 892; 75 J.P. 333; 22 Cox, C.C. 641]

Distress—For rent—Expenses—Excessive charges—Order by magistrates for payment of treble amount—Penalty—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 2—*Summary Jurisdiction Act*, 1884 (11 *& 12 Vict., c.* 43), *s.* 19, *s.* 21.

An order made by justices under s. 2 of the Distress (Costs) Act, 1817, for the payment of treble the amount of money unlawfully taken on the levying of a distress is a penalty within s. 19 of the Summary Jurisdiction Act, 1848, and not a civil debt, and, accordingly, under s. 21 of the Act it was enforceable by imprisonment in default of sufficient distress.

Notes. Section 21 of the Summary Jurisdiction Act, 1848, has been replaced by s. 64 of the Magistrates' Court Act, 1952.

As to the penalty for taking improper charges out of the produce of distress, see 12 HALBURY'S LAWS (3rd Edn.) 148, and for cases see 18 DIGEST (Repl.), 345 et seq. For Distress (Costs) Act, 1817, s. 2, see 6 HALSBURY'S STATUTES (2nd Edn.) 162, and for Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.), 416 et seq.

Cases referred to :

(1) *Robson* v. *Biggar*, [1908] 1 K.B. 672; 77 L.J.K.B. 203; 97 L.T. 859; 24 T.L.R. 125; 52 Sol. Jo. 76, C.A.; 18 Digest (Repl.) 347, *946*.

(2) *R.* v. *Paget* (1881), 8 Q.B.D. 151; 51 L.J.M.C. 9; 45 L.T. 794; 46 J.P. 151; 30 W.R. 336, D.C., 18 Digest (Repl.) 423, *1689*.

Rule Nisi for mandamus directed to three justices and Spencer J. Cummins, a certificated bailiff, to hear and determine according to law the matter of an application by Henry Richard Newson for warrants of commitment against the said Spencer J. Cummins in default of distress issued under two orders of justices made May 12, 1910, adjudging that Spencer J. Cummins should pay under s. 2 of the Distress (Costs) Act, 1817, three times the amount overcharged in respect of two distresses for rent together with costs.

The justices refused to grant the warrants on the ground that the proceedings under the Act of 1817 constituted a civil debt under s. 6 of the Summary Jurisdiction Act, 1879 (see now s. 50 of the Magistrates' Courts Act, 1952), and were not criminal proceedings.

Bruce Williamson (*A. H. Bodkin* with him) showed cause.
E. Bennett Calvert in support of the rule.

LORD ALVERSTONE, C.J.—The justices refused to issue warrants of committal on the ground that the orders were orders for the payment of a civil debt. It has been contended that the sums in respect of which the orders were made were in the nature of penalties, and that the distress warrants having been returned "no effects," the justices were bound to entertain the application for warrants of committal.

Primâ facie the matter depends on the construction of s. 2 of the Distress (Costs) Act, 1817. That Act provides that where any person levies, takes, or receives excessive charges the person aggrieved may apply to a justice for redress, and the justice, if the complaint be found to be true, shall order the person offending to pay to the complainant treble the amount unlawfully taken, together with full costs. Section 2 as originally enacted provided for the issue of a distress warrant and for committal in the case of no sufficient distress. On that section as it originally stood I should have held, if there had been no authority, that that was a penalty. By s. 4 of the Summary Jurisdiction Act, 1884, and the schedule thereto, the words from "and in case of nonpayment" to the end of the section were repealed. In my opinion, that section and the other sections of

A the Summary Jurisdiction Act, 1884, show that the only object of the repeal and the enactment of s. 5 of the Summary Jurisdiction Act, 1884 was to make the procedure uniform.

I agree that for many purposes there is a distinction between a penalty and a sum of money held to be due, and ss. 6 and 35 of the Summary Jurisdiction Act, 1879, point out what are civil debts and provide the procedure for their recovery. If the sum to be B paid is a penalty, ss. 19 and 21 of the Summary Jurisdiction Act, 1884, apply. The argument that s. 5 of the Summary Jurisdiction Act, 1879, is limited to sums ordered to be paid on a conviction is not conclusive, because under s. 47 the scale of imprisonment fixed by s. 5 is to apply to orders for the payment of any sum of money where such sum is not a civil debt nor enforceable as a civil debt. Therefore, if this was a penalty, the justices ought to have entertained this application. In *Robson* v. *Biggar* (1) the Court C of Appeal described proceedings of this character as "proceedings for a penalty," and held them a "criminal cause or matter." I think, therefore, both on principle and on authority that this is a penalty, and *R.* v. *Paget* (2) confirms that view.

RIDLEY, J.—I am of the same opinion. I think this sum is in the nature of a penalty. Apart from authority, I should have hesitated before coming to the conclusion D that there ought to be a warrant of committal in this case, but *Robson* v. *Biggar* (1) makes it clear that we must come to that conclusion.

CHANNELL, J.—I agree. I think that the case is governed by the decision of the Court of Appeal in *Robson* v. *Biggar* (1). But for that case I should have had some doubt in the matter.

Rule absolute.

E Solicitors: *Jessopp & Gough*, Waltham Abbey; *H. F. Parker Roberts.*

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

F

CHESHIRE LINES COMMITTEE *v.* HEATON NORRIS URBAN DISTRICT COUNCIL

G

[King's Bench Division (Alverstone C.J., Darling and Phillimore, JJ.), July 26, 1912]

[Reported [1913] 1 K.B. 325; 81 L.J.K.B. 1119; 107 L.T. 348; 76 J.P. 462; 28 T.L.R. 576; 10 L.G.R. 973]

H

Street—Danger adjoining street—Footpath along river bank—Erosion of soil by river—Liability of owner of soil to repair river bank—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *s.* 30.

By s. 30 (1) of the Public Health Acts Amendment Act, 1907: "If in any situation fronting, adjoining, or abutting on any . . . public footpath . . . any . . . bank is, for I want of sufficient repair . . . dangerous to the persons lawfully using the . . . footpath," the local authority may serve notice upon the owner requiring him to repair the same, and, if the owner neglects to do so, the local authority may do the necessary repairs and recover the expenses from the owner.

"Bank" in this section could not be construed as including the ground on which the footpath ran. It meant some artificial erection constituting a danger to users of the footpath.

Where, therefore, a public footway ran along the top of the bank of a river, being bounded on one side by the bank of the river, so that by the action of the weather

and by erosion of the river, portions of the river bank on which the footway ran were washed away, portions of the footway fell into the river, and other portions of the bank were threatening to fall into the river, and by that the footway was rendered dangerous to persons lawfully using the same,

Held: the bank of the river or the bank on which the footway ran was not such a "bank" as was contemplated by s. 30 and did not come within the section, and, therefore, the owners were not liable under the section to repair the bank.

Notes. Section 30 of the Public Health Acts Amendment Act, 1907, has been replaced by s. 144 of the Highways Act, 1959: see 39 HALSBURY'S STATUTES (2nd Edn.) 566.

Distinguished: *Gaby* v. *Palmer* (1916), 85 L.J.K.B. 1240.

As to repair of dangerous premises near a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 306–306, and for cases relating to footpaths see 26 DIGEST (Repl.) 280–283.

Case referred to:

(1) *Carshalton U.D.C.* v. *Burrage*, [1911] 2 Ch. 133; 80 L.J.Ch. 500; 104 L.T. 306; 75 J.P. 256; 27 T.L.R. 280; 9 L.G.R. 1037; 7 Digest (Repl.) 300, *212*.

Also referred to in argument:

Rundle v. *Hearle*, [1898] 2 Q.B. 83; 67 L.J.Q.B. 741; 78 L.T. 561; 46 W.R. 619; 14 T.L.R. 440, D.C.; 26 Digest (Repl.) 282, *98*.

Wilson v. *Halifax Corpn.* (1868), L.R. 3 Exch. 114; 37 L.J. Ex. 44; 17 L.T. 660; 32 J.P. 230; 16 W.R. 707; 7 Digest (Repl.) 300, *208*.

Short v. *Hammersmith Corpn.* (1910), 104 L.T. 70; 75 J.P. 82; 9 L.G.R. 204, D.C.; 26 Digest (Repl.) 421, *1296*.

Sandgate U.D.C. v. *Kent County Council* (1898), 79 L.T. 425; 15 T.L.R. 59, H.L.; 26 Digest (Repl.) 277, *69*.

Case Stated by Strangeways, Manchester, justices.

A complaint was laid by Frederick William Brooke, the clerk to the respondents, the Heaton Norris Urban District Council, pursuant to the Public Health Acts Amendment Act, 1907, against the appellants, the Cheshire Lines Committee, for that they the appellants being the owners of portions of the bank of the river Mersey fronting, adjoining, or abutting on a public footpath situate in Heaton Mersey within the urban district of Heaton Norris, which were for want of sufficient repair and protection dangerous to persons lawfully using the said footpath, and the respondents having by notice in writing required the appellants to repair and protect the bank so as to prevent any danger therefrom within the time therein specified, which time had elapsed, did not comply with such notice, whereupon the respondents had caused such works as they thought proper to be done for effecting such repair and protection of the bank, and the expenses thereof amounted to the sum of £38 16s. 8d., which sum or any part thereof the appellants had not paid, but refused so to do, although the same had been lawfully demanded, contrary to s. 30 of the Public Health Acts Amendment Act, 1907. The appellants were summoned to appear before the justices to answer the claim of the respondents.

At the hearing of the summons the following facts were found by the justices:—(*a*) The respondents were the local authority through whose district the footpath hereinafter mentioned ran. The appellants were a railway company, part of whose railways were situate in the district. (*b*) An ancient public footway from Stockport to Heaton Mersey ran along the top of the bank of the river Mersey, the footway being some 20ft. above the water level at ordinary times and was bounded on one side by the bank of the river Mersey. There was no evidence given at the hearing of any obligation upon the appellants to repair the footway ratione tenuræ. (*c*) By the action of the weather and by erosion caused by the river Mersey eating away the bank, portions of the river bank on which the footway ran were washed away and portions of the footway fell into the river, and further portions of the bank were threatening to fall into the river, and the way was thereby rendered dangerous to persons lawfully using the same. (*d*) The appellants were the owners of parts of the bank which adjoined the footway

and of the site over which the footway ran. (*e*) The respondents obtained an order from the Local Government Board on Nov. 27, 1908, putting in force Part 2 of the Public Health Acts Amendment Act, 1907, in their district as from Jan. 1, 1909, and on Dec. 28, 1910, they gave to the appellants a notice under s. 30 of that Act. (*f*) The appellants did not comply with the notice, and the respondents thereupon repaired the bank and claimed from the appellants the sum of £38 16s. 8d. for the expenses incurred. The justices were of opinion that for the cost of repairing so much of the river bank as was not the property of the appellants, the respondents were not entitled to succeed, and, in so far as the work done on so much of the bank as belonged to the appellants was done to prevent the footway from being washed away, the appellants were equally not liable, as they were not bound either to repair or maintain the footway, but in so far as the work was necessary to protect the public using the footway from danger they were liable.

By the Public Health Acts Amendment Act, 1907, s. 30 [see now Highways Act, 1959, s. 144]:

> "With respect to the repairing or inclosing of dangerous places, the following provisions shall have effect—namely: (1) If in any situation fronting, adjoining, or abutting on any street or public footpath, any building, wall, fence, steps, structure or other thing, or any well, excavation, reservoir, pond, stream, dam, or bank, is, for want of sufficient repair, protection, or inclosure, dangerous to the persons lawfully using the street or footpath, the local authority may, by notice in writing served upon the owner, require him, within the period specified in the notice and hereinafter in this section referred to as the 'prescribed period,' to repair remove, protect, or inclose the same so as to prevent any danger therefrom. (2) If, after service of the notice on the owner, he shall neglect to comply with the requirements thereof within the prescribed period, the local authority may cause such works as they think proper to be done for effecting such repair, removal, protection, or inclosure, and the expenses thereof shall be payable by the owner, and may be recovered summarily as a civil debt."

E. Sutton for the appellants.
Macmorran, K.C., and Cyril Atkinson, for the respondents.

LORD ALVERSTONE, C.J.—The only point that I am going to decide is that, in my opinion, the locus upon which the repairs, the costs of which are sought to be cast upon the Cheshire Lines Committee, have been done does not come within s. 30 of the Public Health Acts Amendment Act, 1907. The section is a very difficult one to construe. One can conceive many cases in which it was clearly wanted. As to how far it goes, I do not pretend to decide, but I have a very clear opinion that it does not go far enough to include the locus in quo in question in this case.

I desire very briefly to summarise the facts. The Cheshire Lines Committee have got the legal estate in two pieces of land which run out to the middle of the river Mersey. When they bought that land there was an old footpath upon it. It is not suggested that either by statute or by liability ratione tenuræ, or by any other means, they are bound to maintain that footpath. On the outside of their land, by the footpath, is the river Mersey, and what happened was that the Mersey eroded its bank upon that land, with the result that at various places the subsoil which supports the footpath has come down. The local authority have (as they are entitled) restored the subsoil which supports the footpath, have raised it up to substantially the same level at a variety of places, and so have, therefore, restored the footpath. The question is: Is the expense of doing that work an expense which is, by the terms of this section, to be put upon the owners—namely, the Cheshire Lines Committee? In my opinion, it is not. I think if the matter were confined to the question of the stream alone, the difficulties in the way of supporting the order now appealed against would be almost insuperable. The appellants are not, in my opinion, the owners of the stream, within the meaning of the section, as I will point out when I come to the section itself. They have the legal estate and own the land ad medium filum, including the bank.

Counsel for the respondents said: "I do not put it that the appellants are the owners of the stream, and I cannot so put it; but I say they are the owners of the bank on which the path runs, and therefore it comes within the section as the bank, on which the path runs, has become dangerous, because in some places it is not there at all, and in other places it is so crumbling away that people walking along may go down, before the path has actually disappeared." In my opinion, that is not the kind of bank which is referred to in this section. Let us see for a moment what is enacted in the section. Section 30 of the Public Health Acts Amendment Act, 1907, begins by saying that it is enacted "with respect to the repairing or inclosing of dangerous places." It does not purport to deal with the responsibility of maintaining the highway. Counsel for the respondents has with perfect fairness stated that he cannot put his case upon any obligation on the railway company, the appellants, to maintain the footpath as such, but he says that this is a bank within the meaning of the section, and that, therefore, the appellants are liable to keep it up. Section 30 goes on to say: "If in any situation fronting, adjoining, or abutting on any street or public footpath". I think that the words there were intentionally chosen. They are not purporting to deal with the actual soil which supports the street or public footpath, but they are dealing with a situation fronting or adjoining the footpath—and the section goes on: "any building, wall, fence, steps, structure, or other thing"—those, counsel for the respondents suggests, and perhaps rightly so, are things apart—"or any well, excavation, reservoir, pond, stream." A well, excavation, or reservoir may be above or below the level; the well would very likely be below, and the excavation also, and the reservoir or pond might very well be above the level; they might be something which the owner had put up for his own purposes upon his land. "Stream, dam, or bank"—. A stream in all probability would not be above the level, but there might be cases of a stream which an owner had got on his private property, "fronting, adjoining, or abutting on a public footpath," which requires to be kept in its proper course, and would be dangerous to people using the footpath by going over the footpath and either washing it away or flooding it. The sections goes on: "dam or bank." It is difficult to say whether that was intended to be above or below the level. My own impression is that it is meant to refer to a dam or a bank which is a danger or would be a danger to the footpath which it fronts, adjoins, or abuts on. The section provides that if any of these structures is,

> "for want of sufficient repair, protection, or inclosure, dangerous to the persons lawfully using the street or footpath,"

then the local authority may serve a notice on the owner requiring him to do the necessary repairs, and so on.

The purview of that section is, in my opinion, perfectly plain. It is to enable the local authority to protect the persons lawfully using the footpath from dangers arising from any of those enumerated objects, and to give them a new power to do the work and to charge the owners of the dangerous objects with the expense of doing it; and it is to be observed that the powers given by the section only apply when any of those things is, "for want of sufficient repair, protection, or inclosure, dangerous to the persons lawfully using the street or footpath." In my opinion, there is nothing in the section which can be said to put upon the owner the responsibility of maintaining the land upon which the footpath runs, and I think it is not sufficient for counsel for the respondents to say that the bank on which the footpath runs is giving way, and that, therefore, there is an obligation upon the owner of that bank to maintain it. There would be such an obligation on the owner if the resulting condition of the bank were that part which was not the footpath had come over and was projecting over the footpath and was in danger of coming down upon the persons who were upon the footpath. A bank in that condition, fronting, adjoining, or abutting on the street or footpath, might be a dangerous bank in the ownership of the person who owned the land. *Carshalton Urban District Council* v. *Burrage* (1), before NEVILLE, J., is a very good illustration of that. As counsel for the appellants shortly put it, the chalk pit there in question had come by erosion into the strip of land, and, therefore, there was a hole in the owner's strip of land which might be a danger to persons going along the footpath, and the owner must

A fence it. In my judgment, the present case is an attempt under this section to impose upon the appellants the responsibility of maintaining the footpath and the soil upon which the footpath runs. It is not a case in which the footpath has been rendered dangerous and the danger to the persons lawfully using the footpath has been created by reason of any of the enumerated things. I cannot construe "bank" to include the ground upon which the footpath runs. I think it is, like the other things enumerated in the B section, something which may be a private structure or may be a natural result, but which is in the occupation or ownership of the person and is adjoining the footpath, and has become dangerous to the people using the footpath. I think that the decision in this case goes much too far and that we ought not to construe the provisions of s. 30 as imposing liability upon the owners of land over which the footpath runs. As to what may be the decision in another case I express no opinion; I decide this case entirely C with reference to the facts of this case. I think, therefore, that the appeal must be allowed.

DARLING, J.—I am of the same opinion. In one sense the piece of land between the footpath and the river was the bank of the Mersey, and unless it can be spoken of as a bank it is not within this section at all. But I do not think that it ought to be D called a bank in the sense in which the statute uses the word.

I am very much inclined to think that the bank that the statute contemplates is not what we usually call the bank of a river, as when we say that a person lives on the bank or has a house on the bank of the Thames, or that he kept his flocks on the bank of the Danube. I think that it means some sort of artificial elevation, and that this burden cannot be put upon the owners of the land on which the footpath goes merely because E between the footpath and the river there is that which prevents the river from flowing further inland. If we speak of the bank of the river in that sense, it is a much wider thing; it would go beyond the footpath, and it might go a mile inland. The bank cannot be limited to the little strip between the footpath and the river.

Therefore, on that ground, and on that ground alone, I do not think that the piece of land which is meant to prevent the footpath from slipping into the river should be F called a bank at all. The words used with respect to it are that the owner is to repair it, and I do not think that those would be the proper words to use about the natural edge of a river into which in the course of time the river will eat deeper and deeper. I do not think that this statute ever intended that the river should be preserved at the width at which it was when the statute was passed, and that that should be done at the expense of the person who happened to own the narrow piece of land along the edge of it. G If counsel for the respondents is right, his reasoning, as he most candidly admitted involves this—and this, I think, is a reason for deciding against him—that it might be necessary that a man owning a very narrow strip of land between the footpath and the river would be bound to embank that river, just as the Thames is embanked in London, to prevent the river from doing what all rivers will do in the course of time—namely, eating away the soil, and so in time allowing the footpath to slip into the river. It H would not be necessary for him to own the footpath, as he would be just as liable if he did not own the footpath, but owned the soil under the footpath, and it would be impossible to say how far the footpath might be from the river and might be half a mile away. His argument, as he himself admitted, might involve this, and in fact it does involve this, that if a footpath ran near an estuary of the sea it would be necessary for the owner to keep out the sea, or to prevent the sea from flowing up and the river from I flowing down beyond the points at which they were when a summons might happen to be issued. That, to my mind, shows how impossible it is for this court to construe the section as the justices construed it, because it might involve this, that if the footpath runs, as many footpaths do, along the top of precipitous cliffs, such as the cliffs of Dover, it would cast upon the owner of the piece of land between the footpath and the edge of the cliff the duty of preserving that cliff from falling into the sea, unless he were fortunate enough to own it at a time when by some great accident caused by the weather the whole thing, footpath and all, went into the sea. He would not be bound to maintain it if the footpath went with the piece of land between the footpath and the edge of the cliff,

but as long as the footpath did not go, no matter how high was the cliff and how great was the expense, he would be bound to shore up the whole of it to prevent the English Channel from eating under the cliff—it might be one of the cliffs of Dover. I cannot imagine that the legislature, when it used these words in this section, meant to impose upon landowners any such obligation. The common law never imposed upon them anything like such an obligation, and I cannot help thinking that, had they meant to impose upon them such a burden as this, much plainer words would have been used to show what the legislature really intended. For these reasons I think that the appeal should be allowed.

PHILLIMORE, J.—I am of the same opinion. I appreciate the argument for the respondents that one must not look too closely at the common law, because this statute was evidently intended to impose a burden upon owners of property which the common law does not impose. All I say as to that is, that we must not extend the statute further than it was intended to go. I also appreciate the argument that this is not an attempt to make the owner of the soil repair the footpath. The statute intended to make him either repair some recumbent structure, something hanging over the road, or inclose some hollow or slope or other danger, or in some way to protect the public from either of the two dangers, either from above or below. But it seems to me that the right construction of this section is that it only applies to artificially constructed dangers, and I think the decision of NEVILLE J., in *Carshalton Urban District Council* v. *Burrage* (1) must be taken to have proceeded upon that ground. In that case the chalk pit was artificially constructed. It is true that in process of time, nature acting upon the artificial structure widened the chalk pit, but the main thing was that the chalk pit was an artificial pit. In my opinion, the only way to look at this matter is to say that this bank is not such a bank, and that the Mersey is not such a stream, as this section contemplates. All the words of the section can be satisfied by treating it as referring to artificial structures, and even the word "stream" comes within that description, because, although a stream most likely is something which runs through the land of various proprietors as to which each proprietor has only certain rights, there are other streams which a proprietor may construct according to his own desires, and the section may also apply to natural streams which may have been diverted in such a way as to bring them within the artificial danger. At any rate, it seems to me that there is not enough to bring this case within the statute, and that we ought to allow the appeal.

Appeal allowed.

Solicitors: *Davenport, Cunliffe & Blake*, for *Lingards & Hamp*, Manchester; *Pritchard, Englefield & Co.*, for *Boote, Edgar, Grace & Rylands*, Manchester.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re ASH

[King's Bench Division (Horridge and Rowlatt, JJ.), December 15, 1913]

[Reported 110 L.T. 48; 21 Mans., 15]

Bankruptcy—County court—Official receiver—Official receiver acting as trustee in bankruptcy—Power of court to order documents relating to matters outside bankruptcy to be handed over to official receiver.

The official receiver is not the deputy of a county court judge, and the custody of the official receiver is not the custody of the court, and, consequently, neither a county court registrar nor the judge has jurisdiction to order documents relating to matters outside the bankruptcy to be handed over to the official receiver as trustee in bankruptcy.

Notes. As to the jurisdiction of county courts in bankruptcy proceedings, see 2 Halsbury's Laws (3rd Edn.) 253; and for cases see 4 Digest (Repl.) 41–43.

Cases referred to:

(1) *Re Geiger* (1913), 109 L.T. 224, D.C.; 5 Digest (Repl.) 665, *5841.*

(2) *Re Condon, Ex parte, James* (1874), 9 Ch. App. 609; 43 L.J. Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 15, *62.*

Appeal from an order of His Honour Judge Harrington at Reading County Court, in an application by the official receiver for an order that E. T. Hatt, who had acted as solicitor to a bankrupt, Elizabeth Mary Ash, should hand over to the official receiver draft accounts which he had prepared for his own use concerning matters outside the bankruptcy proceedings.

The official receiver acting as trustee summoned Hatt under s. 27 of the Bankruptcy Act, 1883, [s. 25 of the Bankruptcy Act, 1914: 2 Halsbury's Statutes (2nd Edn.) 321] to give evidence in regard to the bankrupt's dealings and property, and in the course of his examination Hatt admitted that he had in his possession the aforesaid documents. Hatt offered to provide the official receiver with such copies as he might require, if the usual charges were paid, or else to produce the documents for the official receiver's inspection. The official receiver would not agree to these proposals and on his application the registrar of the Reading County Court ordered Hatt to hand over to the official receiver the draft accounts, such documents to be retained by the official receiver at his offices in London for a period of ten days for the purpose of making copies, and this was upheld by the county court judge.

By s. 27 of the Bankruptcy Act, 1883 [now repealed]:

(1) The court may on the application of the official receiver or trustee at any time after a receiving order has been made against a debtor summon before it . . . any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property.

Frank Mellor for E. T. Hatt.

Hansell for the official receiver.

HORRIDGE, J.—This is an appeal from an order of His Honour Judge Harrington upholding the decision of the registrar, and ordering the bankrupt's solicitor, E. T. Hatt to hand over to the official receiver as trustee in the bankruptcy of Elizabeth Mary Ash certain draft accounts relating to matters outside the bankruptcy, such documents to be retained by the official receiver at his London office for a period of ten days. Hatt, who was summoned to give evidence under s. 27 [now repealed] inspecting the debtor's dealings and property, was examined by the official receiver and admitted that he had these documents in his possession. Hatt offered to produce them for the official receiver's inspection at his office and to allow him to take copies, or alternatively he undertook to supply the official receiver with such copies as he might require, if the latter

would pay for them in the usual way. The order in this case goes a long way beyond the decision of *Re Geiger* (1), and in my judgment neither the registrar nor the county court judge had jurisdiction to order these documents to be sent outside the jurisdiction of the court. It may be that the official receiver is for some purposes an officer of the court, but he is not the deputy of the judge as the registrar is, and the custody of the official receiver is not the custody of the court. I do not think, as I have said, that either the registrar or county court judge had jurisdiction to make this order, and if they had discretion to do so, I think that it was very wrongly exercised. I consider the official receiver has acted very unreasonably, and for that reason I shall not order the documents to be deposited in court.

ROWLATT, J.—I agree. Although the decision in *Re Condon, Ex parte James* (2) is authority for saying that the official receiver and trustee in bankruptcy are in a sense officers of the court, they are not officers of the court in the sense that their custody is the custody of the court.

Appeal allowed.

Solicitors: *Webster & Webster* for *E. T. Hatt*, Reading; *Solicitor to the Board of Trade.*

[*Reported by* Donald Corrie, Esq., *Barrister-at-Law.*]

Re BELTON

[King's Bench Division (Phillimore and Lush, JJ.), February 24, 1913]

[Reported 108 L.T. 344; 29 T.L.R. 313; 57 Sol Jo. 343]

Bankruptcy—Receiving order—Debtor insane—Reception order made and receiver appointed—Unpaid promissory note—Discharge of debtor from asylum, but receivership continued—Receiving order made against debtor not ineffective.

A debtor gave a promissory note to a creditor in respect of money lent, but before it matured the debtor became insane and a reception order was made against him under the Lunacy Act, 1890. By an order of the master in lunacy the debtor's wife became receiver of the debtor's estate. Eleven months later the debtor was discharged from a lunatic asylum as sane. From that time he behaved in a rational manner, but his wife still retained control over his income under the order. The creditor obtained judgment against the debtor for the amount of the unpaid promissory note and costs, a bankruptcy notice was served in respect of the judgment debt, and the registrar made a receiving order against the debtor.

Held: (i) as the debtor had been discharged as sane from the asylum it must be assumed that he was sane when judgment was obtained against him and the act of bankruptcy was committed; (ii) as it was open to the debtor to charge the property subject to the order in lunacy since that order merely vested the produce of the corpus of the property in the receiver, the making of a receiving order would effectively prevent the rights of his creditor being postponed in favour of mortgagees and incumbrancers.

Notes. The Lunacy Act, 1890, has been replaced by the Mental Health Act, 1959: 39 Halsbury's Laws (2nd Edn.) 961.

As to bankruptcy and persons of unsound mind, see 2 Halsbury's Laws (3rd Edn.) 256–257; and for cases, see 4 Digest (Repl.) 30–31.

A Cases referred to:

(1) *Re Betts, Ex parte Betts*, [1897] 1 Q.B. 50; 66 L.J.Q.B. 14; 75 L.T. 292; 45 W.R. 98; 13 T.L.R. 23; 41 Sol. Jo. 50; 3 Mans. 287, C.A.; 4 Digest (Repl.) 173, *1591*.

(2) *Re Browne*, [1894] 3 Ch. 412; 63 L.J.Ch. 729; 71 L.T. 365; 43 W.R. 175; 10 T.L.R. 656; 38 Sol. Jo. 679; 7 R. 580, C.A.; 33 Digest 220, *1290*.

Also referred to in argument:

B *Re Leonard, Ex parte Leonard*, [1896] 1 Q.B. 473; 65 L.J.Q.B. 393; 74 L.T. 183; 44 W.R. 438; 12 T.L.R. 257; 40 Sol. Jo. 338; 3 Mans. 43, C.A.; 4 Digest (Repl.) 172, *1593*.

Re De Murrieta, Ex parte, South American and Mexican Co. (1896), 12 T.L.R. 238; sub. nom. *Re Murrieta, Ex parte South American and Mexican Co.*, 3 Mans. 35; sub. nom. *Re Murrietta, Ex parte South American and Mexican Co.*, 40 Sol. Jo.
C 317, C.A.; 4 Digest (Repl.) 172, *1584*.

Appeal from a receiving order made by a registrar in respect of a debtor, Bernard Joseph Belton, on the petition of William Harvey, a registered money lender to whom the debtor owed £345 on a promissory note.

The order made by Master FISCHER appointing Grace Belton, the debtor's wife as receiver of the debtor's dividends, interest and income arising from his estate was in the
D following terms:

"*In Lunacy.*—Saturday, Oct. 8, 1910. In the matter of Bernard Joseph Belton, a person of unsound mind not so found by inquisition, and in the matter of the Lunacy Acts, 1890 to 1908.—Upon the application of Grace Belton, of Heath House, Weybridge, Surrey, the wife of the above-named Bernard Joseph Belton, and upon
E hearing the solicitors for the applicant, and upon reading the evidence specified in the schedule of evidence hereto, I do order as follows: (i) Upon the certificate of the Masters in Lunacy that she has completed her security the said Grace Belton is authorised in the name and on behalf of the said Bernard Joseph Belton to receive and give a discharge for (a) All dividends, interest, and income, and all arrears thereof respecting to which the said Bernard Joseph Belton is or may become entitled;
F (b) the gains and profits from the licensed public-house known as the Albany, Twickenham, Middlesex, with power to continue the management of the said business in the ordinary course and to pay all proper outgoings in respect thereof; (c) the gains and profits of the business formerly carried on by the said Bernard Joseph Belton at No. 12, Hatton Garden, London, and of the furniture and effects therein, with power to manage the said business in the ordinary course until the sale thereof,
G and with power to sell, subject to the approval of the said masters, the goodwill and assets of the said business and the said furniture and effects, and to receive and give a discharge for the proceeds thereof; (d) the sum of £124 11s. 7d. or other the amount payable to the said Bernard Joseph Belton by the Commissioners of Inland Revenue in respect of returned income tax; (e) all money payable to the said Bernard Joseph Belton by Claude William Hamilton; (f) the sum of £27 6s. 10d. or other the amount
H standing to the credit of the said Bernard Joseph Belton, carrying on business as Belton and Sons with the Union of London and Smiths Bank, Ltd., Hatton Garden branch; (g) the sum of £38 2s. 6d. or other the amount standing to the credit of the said Bernard Joseph Belton with the London and South-Western Bank, Ltd., Borough branch. (ii) The said Grace Belton is to pay such sums as may be expended for the maintenance of the said Bernard Joseph Belton as from July 19,
I 1910. (iii) The said Grace Belton is to keep up the policies of assurance on the life of the said Bernard Joseph Belton for £2,500 with profits with the National Provident Institution numbered 42,051 and 43,053. (iv) The said Grace Belton is hereby authorised to sell the 150 shares belonging to the said Bernard Joseph Belton in the Anglo Bolivian Rubber Estates, Ltd., and the 100 shares belonging to him in the Balang Malaka Rubber Estates, Ltd., and to receive and give a discharge for the proceeds thereof after payment of all money due in respect of calls on the said shares, and for the aforesaid purpose to execute all necessary transfers. (v) The said Grace Belton is hereby further authorised on behalf of the said Bernard Joseph Belton and

subject to the approval of the said masters: (a) To surrender or assign the estate and interest of the said Bernard Joseph Belton in Heath House, Weybridge, and for that purpose to execute and do such instruments acts and things as the said masters shall settle and approve. (*b*) To sell so much of the furniture and effects in the aforesaid premises as she may not desire to retain for the use of herself and her children, and to receive and give a discharge for the proceeds thereof. And the said Grace Belton is to pay the rent, rates, taxes, and all proper outgoings due in respect of the said premises."

By s. 116 of the Lunacy Act, 1890:

"(1) The powers and provisions of this part of this Act relating to management and administration apply (c) To every person lawfully detained as a lunatic though not so found by inquisition."

By Bankruptcy Rule 271A (1):

"Where it appears to the court that any debtor or creditor or other person who may be affected by any proceeding under the Act or rules, is a lunatic not so found by inquisition (hereinafter called the lunatic) the court may appoint such person as it may think fit to appear for, represent, or act for and in the name of the lunatic, either generally or in and for the purpose of any particular application or proceeding, or the exercise of any particular rights or powers which under the Acts and rules the lunatic might have exercised if he had been of sound mind. The appointment may be made by the court either on an application made as hereinafter mentioned, or if the court thinks fit to do so, without any previous application."

Tindale Davis for the appellant.

Clayton, K.C., and *Frank Mellor* for the creditor.

PHILLIMORE, J.—The appellant in this case is the wife of the debtor whose affairs she has been administering since Oct. 1910, under an order of the Masters in Lunacy made in accordance with s. 116 of the Lunacy Act, 1890, and whom she has been appointed to represent under the provisions of Bankruptcy Rule 271A. The appeal is against the making of a receiving order against the debtor by the registrar of the Hastings County Court on Jan. 15, last, and two grounds of objection to such an order are put forward by counsel for the appellant. In the first place it is contended that the debtor cannot be made bankrupt because he is a person of unsound mind; and secondly, that even if he can be made bankrupt, the court ought to refuse to make a receiving order against him, because by reason of the order in lunacy there can be no assets available for distribution among creditors.

Up to the present time the courts have been unwilling to decide the question whether a lunatic so found by inquisition can be made bankrupt against the will of his committee. But that question does not arise here, because the debtor is not a lunatic so found by inquisition, but merely a person within the meaning of s. 116 (1) (c) of the Lunacy Act, 1890, in respect of whose property an order in lunacy has been made. The order of Oct. 8, 1910, remains in force until it is discharged, but the debtor, against whom a reception order was made in July, 1910, and who was confined in the Essex County Asylum in Dec. 1910, was discharged as sane on June 15, 1911. We must, therefore, assume that he was sane when judgment was obtained against him and when the act of bankruptcy was committed, and consequently the first objection fails.

Then there is the objection that no good purpose can be served by making this debtor a bankrupt. The fact that there cannot be any assets available for distribution among creditors may be a good reason for not making a receiving order. In *Re Betts* (1) the fact of a prior bankruptcy was held to be sufficient ground for such refusal. But it has often been laid down that, where there is a possibility of available assets, the debtor may be made bankrupt. In this case there appears to be good ground for suggesting that the debtor may have available property. In view of the decision in *Re Browne* (2) it is clear that these orders in lunacy may or may not vest the corpus of the property in the receiver; but this particular order does not appear to do more than vest the produce of the corpus in the receiver, and the corpus cannot be sold by the receiver without a

special order of the Masters in Lunacy. Therefore it is open to the debtor, who is now sane, to charge this property subject to the order in lunacy, and postpone the rights of his creditors to those of the mortagees and incumbrancers; and this is an occurrence which the making of a receiving order will effectively prevent. For these reasons the appeal fails.

LUSH, J.—I agree. If the order of Oct. 8, 1910, had been framed to include every species of property of the debtor, both present and future, there would have been much force in the appellant's second objection. But it is a specific order, dealing only with specific property, and we cannot therefore treat it as an order which vests all available assets in the Receiver in Lunacy and which would render any order in bankruptcy wholly vain and of no effect. The difficult question whether a lunatic can be made bankrupt does not concern us.

Appeal dismissed.

Solicitors: *Withall & Withall*; *David Davis.*

[*Reported by* D. W. CORRIE, ESQ., *Barrister-at-Law.*]

HOWE *v.* BOTWOOD

[KING'S BENCH DIVISION (Channell and Lord Coleridge, JJ.), April 11, 1913]

[Reported [1913] 2 K.B. 387; 82 L.J.K.B. 569; 108 L.T. 767; 29 T.L.R. 437]

Landlord and Tenant—"Outgoings"—Covenant by tenant to pay outgoings—Covenant by landlord to keep exterior in repair—Exterior work involving reconstruction carried out under order of magistrates.

Under the terms of a lease of a dwelling house, the landlord covenanted to "keep the exterior of the said dwelling house and buildings in repair," and the tenant covenanted to "pay and discharge all rates, taxes and assessments, charges and outgoings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof (land tax and landlord's property tax only excepted)." During the tenancy the landlord was ordered by justices to carry out certain work in connection with the outside drainage of the house. The work involved, in addition to repairs, a certain amount of reconstruction and improvement of the existing system. The landlord admitted liability for that part of the work relating to repairs, but contended that the tenant should pay for that part relating to reconstruction and improvement on the ground that such expense was an "outgoing imposed or charged on the premises."

Held: *per* CHANNELL J., the tenant's covenant must be read as meaning he would discharge all outgoing, except such as were by the lease thrown upon the landlord, and this particular expense was left upon the shoulders of the landlord; *per* LORD COLERIDGE, J., the landlord having undertaken to do the particular work by law the burden of it was not by implication transferred to the tenant by virtue of his covenant, as the tenant's covenant was subject to the performance of the landlord's covenant and the landlord's covenant had not been performed; and, therefore, the landlord's claim failed.

Stockdale v. *Ascherberg* (1), [1904] 1 K.B. 447, distinguished.

Notes. Referred to: *Henman* v. *Berlines*, [1918] 2 K.B. 236.

As to covenants for payment of rates, taxes, and outgoings, see 23 HALSBURY'S LAWS (3rd Edn.) 610 et seq; and for cases see 31 DIGEST (Repl.) 331 et seq.

Cases referred to: A

(1) *Stockdale* v. *Ascherberg*, [1904] 1 K.B. 447; 73 L.J.K.B. 206; 90 L.T. 111; 68 J.P. 241; 52 W.R. 289; 20 T.L.R. 235; 48 Sol. Jo. 244; 2 L.G.R. 529, C.A.; 31 Digest (Repl.) 333, *4667*.

(2) *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B. 905; 80 L.J.K.B. 713; 104 L.T. 290; 55 Sol. Jo. 290, C.A.; 31 Digest (Repl.) 363, *4953*.

Appeal from the decision of His Honour JUDGE EARDLEY WILMOT, sitting at the Ipswich County Court in an action brought by the plaintiff who was the landlord of a dwelling house let to the defendant by a lease dated Mar. 3, 1911, to recover a sum of £23 7s. 5d. spent by the plaintiff in pursuance of an order of the Justices, dated Sept. 12, 1912, relating to the drains of the dwelling house, such amount relating to that part of the work carried out constituting renewal and reconstruction as distinct from repairs. The relevant covenants of the lease are set out in the headnote. B C

Henlé for the plaintiff.
C. E. Jones for the defendant.

CHANNELL, J.—This case raises a somewhat novel question. The lease entered into by the defendant contains a covenant which no sensible tenant for a short term would ever agree to, and this particular covenant has been interpreted by the court in *Stockdale* v. *Ascherberg* (1) in a way unfavourable to tenants. There is also in the lease a covenant by the landlord to do exterior repairs, which was not to be found in *Stockdale* v. *Ascherberg* (1). We have to construe these two covenants so that they hang together as one contract. D

With regard to the covenant entered into by the tenant, *Stockdale* v. *Ascherberg* (1) shows that a charge such as that imposed in the present case—viz., an obligation to lay a new drain, construct inspection chambers, and carry up the soil pipe—is an outgoing within the meaning of the covenant imposed upon the landlord by law in respect of the premises. If that covenant stood alone we should be compelled to hold that it imposed upon the tenant the burden of making the payments now claimed. The second covenant to be considered is that by which the landlord undertook to keep the exterior of the house in repair. No one would question that the drains are a part of the building and an outside part of it. The drains in fact were out of repair. The landlord set to work to repair them, and then found that the law would not allow him to put them into repair unless he executed certain work which was in the nature of improvements on the existing system. Suppose, for instance, that the old drain was laid in mortar and that the law required, when it came to be repaired, that concrete must be used. No one can doubt that the landlord would not be allowed to defend himself from failing to repair by saying that the law did not allow him to use mortar and he declined to use anything else. In the present case he was not allowed to repair unless he constructed inspection chambers and ventilating pipes. It is like the case of the wall in *Lurcott* v. *Wakeley* (2), which was so out of repair that it could not have been repaired without being re-built, and the tenant was held liable, under his covenant to repair, to pay the cost of taking down and re-building the wall. E F G H

The consequence seems to be that the landlord is not entitled to perform his covenant without doing something which is in the nature of improvement. That is the way in which the covenant would have to be construed if it stood alone, and the expense would fall upon the landlord. There are, however, two covenants to be considered, one throwing the burden upon the tenant and the other on the landlord, and the question is how they are to be construed in such a way as to make the whole agreement intelligible. In my opinion the tenant's covenant must be read as meaning that he shall discharge all outgoings, except such as are by the lease thrown upon the landlord. If we are justified in so reading it, then, notwithstanding the decision in *Stockdale* v. *Ascherberg* (1), where there was no such covenant as that entered into by the landlord in the present case, we are justified in saying that this particular expense was left upon the shoulders of the landlord. That being so, the decision of the learned county court judge was right, and the appeal must be dismissed. I

A **LORD COLERIDGE, J.**—I agree. In this case there were two apparently conflicting covenants in the lease, one by the landlord to keep the exterior of the premises in repair—that included the outside drain; and a covenant by the tenant to bear all outgoings imposed upon the landlord in respect of the premises. The question is which of those covenants is to be held to override the other.

It is quite clear that the landlord's covenants to repair included renewals and replace-
B ments, so far as renewals and replacements were necessary to repair. The bare fact, therefore, that there have been renewals and replacements in respect of the drain do not necessarily prevent them coming within the category of repairs. On the other hand, it was held in *Stockdale* v. *Ascherberg* (1) that an imposition made by a local authority charged upon the landlord in respect of the premises came under the heading of out-
goings in a lease which contained a similar provision to that with which they were now
C dealing. Therefore, apart from other considerations, this burden would have been thrown upon the tenant in the present case. If it was physically necessary to do the work in the manner in which it was done, although it involved renewal and replacements, it is clear that the landlord would have to do it in pursuance of his covenant. I can draw no distinction between what is physically necessary and what is legally necessary to enable the landlord to perform his covenant; and if it was legally necessary to
D do the repairs in the particular manner, it seems to me that the cost of doing the work must be borne by the landlord.

The case, therefore, stands thus. The landlord having undertaken to do the particular work by law, was the burden of it by implication transferred to the tenant by virtue of the tenant's covenant in regard to outgoings? I do not think it was. The tenant's covenant was subject to the performance of the landlord's covenant. The
E landlord's covenant has not been performed, and the extra work—the imposition—was primarily caused by the breach of his covenant by the landlord. If his covenant had been performed the expense would not have been imposed. I agree that the appeal fails.

Solicitors: *Field, Roscoe & Co.*, for *Birkett, Ridley & Francis*, Ipswich; *Elvy Robb & Welch*, for *Turner, Turner & Martin*, Ipswich.

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*]

A

FAUNTLEROY *v.* BEEBE

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.) April 28, 1911]

[Reported [1911] 2 Ch. 257; 80 L.J.Ch. 654; 104 L.T. 704; 55 Sol. Jo. 497]

B

Equity—Conversion—Court order for sale of real property—Conversion from date of order.

A testator by his will left an estate on trust and directed his trustees to pay an annuity out of the rents therefrom to his four children after making certain deductions. Subsequently an order was made by the court that the estate should be sold. Before the whole of the property had been sold, A., one of the children died intestate, and the question arose whether A.'s share of the annuity should be considered as realty and so be payable to A.'s heir-at-law, or as personalty and so be payable to A.'s personal representatives.

C

Held: the effect of the court order for sale was the same as if the testator had imposed a direct obligatory trust upon his trustees to sell, and from the making of the order A.'s beneficial interest was simply and solely an interest in money to which A.'s personal representatives were entitled.

D

Notes. Applied: *Herbert* v. *Herbert*, [1912] 2 Ch. 268.

As to conversion under order of the court, see 14 HALSBURY'S LAWS (3rd Edn.) 584–585; and for cases see 20 DIGEST 361 et seq.

Cases referred to:

E

(1) *Arnold* v. *Dixon* (1874), L.R. 19 Eq. 113; 23 W.R. 314; 20 Digest 362, *1002*.

(2) *Hyett* v. *Mekin* (1884), 25 Ch.D. 735; 53 L.J.Ch. 241; 50 L.T. 54; 32 W.R. 513; 20 Digest 340, *825*.

(3) *Re Dodson, Yates* v. *Morton*, [1908] 2 Ch. 638; 77 L.J.Ch. 830; 98 L.T. 395; 20 Digest 361, *997*.

(4) *Wallace* v. *Greenwood* (1880), 16 Ch.D. 362; 50 L.J.Ch. 289; 43 L.T. 720; 20 Digest 395, *1336*.

F

(5) *Re Stinson's Estate*, [1910] 1 I.R. 13; 20 Digest 391, *o*.

Also referred to in argument:

Oxenden v. *Lord Compton* (1793), 2 Ves. 69; 4 Bro. C.C. 231; 30 E.R. 527; 20 Digest 402, *1408*.

Dyer v. *Dyer* (1865), 34 Beav. 504; 6 New Rep. 79; 34 L.J.Ch. 513; 12 L.T. 442; 11 Jur. N.S. 721; 13 W.R. 732; 55 E.R. 730; 2 Digest (Repl.) 132, *985*.

G

Steed v. *Preece* (1874), L.R. 18 Eq. 192; 43 L.J.Ch. 687; 22 W.R. 432; 20 Digest 361, *994*.

Hartley v. *Pendarves*, [1901] 2 Ch. 498; 70 L.J.Ch. 745; 85 L.T. 64; 50 W.R. 56; 20 Digest 402, *1409*.

Burgess v. *Booth*, [1908] 2 Ch. 648; 78 L.J.Ch. 32; 99 L.T. 677, C.A.; 20 Digest 388, *1255*.

H

Foster v. *Foster* (1875), 1 Ch. D. 588; 45 L.J.Ch. 301; 24 W.R. 185; 20 Digest 364, *1015*.

Appeal from an order of WARRINGTON, J., on the hearing of a summons to vary a certificate made by the master after directing an inquiry as to who were the persons entitled to a one-fourth share of freehold hereditaments in Bermondsey, of which a testator Charles Fauntleroy was seized at his death, which share was originally the share of a daugher of the testator who had since died.

I

The testator, Charles Fauntleroy, by his will, dated Sept. 30, 1872, directed that any mortgage debt or debts which at the time of his decease might remain on his freehold hereditaments situate in Bermondsey should with the consent of the mortgagees be continued as a charge thereon until such time as the accumulated fund thereinafter provided for the payment thereof should be sufficient to satisfy and discharge the same or otherwise that the trustees of his will should be at liberty by sale or further charge of such freehold hereditaments or a competent part thereof to raise such sum or sums of

money as they might think necessary to provide for payment and satisfying the same mortgage debt or debts. He further directed that all his debts, funeral and testamentary expenses, and the legacies bequeathed by his will should be paid and discharged, and that his personal estate not specifically bequeathed should be the primary fund for the payment thereof; and after appointing executors and trustees of his will and making certain specific bequests, the testator devised and bequeathed unto the trustees all and singular his freehold hereditaments situate in Bermondsey, and also the residue of his real and personal estate, to hold the same unto the trustees upon trust to sell and convert certain real and personal estate therein specified but not including the Bermondsey estate, and with the moneys to arise therefrom to pay all his debts (other than the mortgage debt on the Bermondsey estate), funeral and testamentary expenses. He directed that the trustees should stand possessed of the Bermondsey estate upon trust that the trustees should by, with, and out of the rents and profits of his real estate discharge the interest which should become due on the mortgage or mortgages of his Bermondsey estate, and after payment thereof should pay unto each of his four children, Robert Thomas Fauntleroy, Charles Sidney Fauntleroy, Emily Beatrice, the wife of Augustus Greatrex, and Mary Fauntleroy, spinster (afterwards the wife of David Bernard Davies to whom she was married on Sept. 27, 1876)—an annuity of £200 each for the space of ten years after his decease, as is therein mentioned, and upon further trust subject to the payment of the mortgage debt and incumbrances on the Bermondsey estate. That the trustees should stand possessed of the estate and hereditaments and the accumulations therefrom after providing for the payment of the annuities in trust for his four children in equal shares as tenants in common but so, nevertheless, that the shares of his children respectively should not be conveyed, assured, assigned, or divided between them until the expiration of the term of ten years next after his decease. He further declared that if from any cause whatever the net rents and profits of the trust estates should become insufficient after payment of the mortgage debts and interests to pay the annuities of £200 each to his four children, the annuity given to his daughter, Mary Fauntleroy, should not abate or be diminished, but the annuity to his three other children should alone abate and be diminished pro rata and in equal proportions.

The testator died on Oct. 2, 1872 and a suit was instituted for the administration of the real and personal estate of the testator, and a decree was made therein in the usual form on Nov. 8, 1873, By an order dated Feb. 3, 1879 and made on the hearing of the further consideration of the cause, it appeared that all the debts of the testator other than the incumbrances on the Bermondsey estate had been paid and that the whole of the real and personal estate of the testator, including personal estate specifically bequeathed by his will (but not including the Bermondsey estate), was insufficient for the payment of his debts and that the deficiency had been made up partly out of the rents of his real and leasehold estate, and partly by a charge on the Bermondsey estate, and the court declared (amongst other things) that Mary Davies (formerly Mary Fauntleroy, spinster) was entitled as between herself and the other annuitants to have her annuity of £200 and all arrears thereof made good to her out of the rents and profits of the Bermondsey estate in priority to the other annuities. It was ordered that the receiver who had been appointed in the cause should out of the rents and profits of the Bermondsey estate keep down the interest on the several mortgages thereon and apply the balances in respect of the rents and profits in the first place in satisfaction of what should be certified to be due to Mary Davies in respect of the arrears of her annuity and subject thereto until further order out of any balances in his hands keep down that annuity in full so far as the balances would extend and apply the residue of such rents and profits in each year in payment rateably of the other annuities and arrears thereof. The period of ten years fixed by the testator in his will expired on Oct. 2, 1882.

By an order dated Feb., 12 ,1883, and made by CHITTY, J., in the cause on the petition of the persons interested in the testator's estate, it was ordered that the Bermondsey estate should be sold with the approbation of the judge, and that the proceeds of such sale should be paid into court to the credit of the cause. In pursuance of that order the Bermondsey estate was forthwith put up for sale by auction in twelve lots, and at such sale six of the said lots were sold. The only real estate of the testator remaining unsold

consisted of the residue of the Bermondsey estate. On Mar. 17, 1887, Mary Davies died without having had any issue. Her eldest brother, Robert Thomas Fauntleroy, became on her death her heir-at law. On Sept. 8, 1886 a receiving order in bankruptcy was made against R. T. Fauntleroy, and subsequently he was adjudicated a bankrupt. By an indenture dated Nov. 9, 1903, and made between the trustee in bankruptcy of R. T. Fauntleroy, of the one part, and Thomas Frederic Simmons of the other part, in consideration of the sum of £1,000, the trustee in bankruptcy conveyed all his estate and interest in the one-fourth share and interest of Mary Davies in the portion remaining unsold of the Bermondsey estate, and of, and in the moneys to arise by any sale of that property, and of, and in the rents and profits thereof, to hold the same unto and to the use of T. F. Simmons, his heirs and assigns for ever. On Nov. 4, 1910, the master certified that the result of the inquiry which had been made in pursuance of an order dated Jan. 21, 1910, was that T. F. Simmonds was entitled to receive the one-fourth share of Mary Davies in the rents and profits of the testator's real estate remaining unsold. Subsequently a summons was taken out by Charles Sidney Fauntleroy and Emily Beatrice Greatrex, asking that the certificate of the master might be discharged or varied, by declaring that the applicants were entitled in equal shares to receive the one-fourth share of Mary Davies, in the rents and profits of the testator's real estate remaining unsold thereby certified to be the property of T. F. Simmons. On Dec. 21, 1910, Warrington, J., held that the existing certificate should be discharged and that the estate stood converted into personalty at the death of Mary Davies and so passed to her personal representatives, and that the matter should be sent back to the master to ascertain who were the persons now entitled.

Henry Terrell, K.C., and *W. H. Gover* for T. F. Simmons.
Cave, K.C. (with him *H. E. Wright*) for Charles Fauntleroy and Emily Greatrex.

COZENS-HARDY, M.R.—This appeal raises a question which was presented to us not only as one of difficulty and importance, but one which was entirely open to review by us, and which ought to be decided in favour of Mr. Simmons unless we were prepared to go contrary to the decisions of the courts, going back at least to the days of Lord Loughborough, and probably earlier. The point may be stated very shortly: An order was made by the court within its jurisdiction ordering an absolute sale of a particular property, in which A., B., C., and D. were interested in equal shares. Before the sale of the whole of the property took place A. died intestate. Is the share of A. in the unsold portion of the property real estate or personal estate? That, I think, is the problem, when all the fringe is got rid of.

In my opinion, the share is personal estate. I think that is the result which follows a principle that is quite settled law namely, that if a testator devises real estate to trustees upon absolute trust for sale—not a discretionary trust, but an absolute trust for sale—and to divide the proceeds between A., B., C., and D. it makes no matter at the death of A. the property has not been sold. A's only right, in the view of the court of equity, is to his share of the money to be produced by that sale. It makes no difference whatever that there may be an express power to the trustees authorising them to postpone the sale. The beneficial interest is not in any way affected by that. Of course it can make no difference whatever that A. may die immediately after the testator, or may die some years after the testator, but before the sale takes place. In that case it would not and could not be disputed that A.'s beneficial interest is simply and solely an interest in the money to be derived from the sale: that the persons equitably interested in the death of A., B., C., and D. would not be their respective heirs-at-law, but their respective personal representatives. What is the position of this in point of principle, if you have, not a testator who has imposed a direct obligatory trust upon his trustees to sell, but you have an order made by a court of competent jurisdiction, in the presence of A., B., C., and D., absolutely ordering the property to be sold? In my opinion, precisely the same results must logically follow. From that moment of time, in the view of the court, the interests of A., B., C., and D. are interests in the proceeds to be derived from the sale absolutely ordered by the court; so that, if this matter had come before us for the first time to-day,

A I should have possibly desired a little more time to think about it. But I should, as at present advised, have come to the conclusion that the decision of WARRINGTON, J., in this case was perfectly right; and that the share of every one of the persons interested in this estate vested in his legal personal representative and not in his heir-at-law.

This is not, however, a case that we ought to decide merely on the strict grounds of principle. It is of the last importance, in dealing with questions of title to land, to have B regard to settled authorities and to long standing decisions, and we ought to be very careful not to imperil titles by what we may say in this court. It appears that in 1874 HALL, V.C.—of whom it would be almost impertinent for me to say that I speak with respect, for in matters of this kind he was undoubtedly a great lawyer—in terms, as I read his judgment in *Arnold* v. *Dixon* (1) decided this very point. That was, as I have said in 1874—thirty-six years ago. There the court directed a sale of the property, the C court having jurisdiction. But before it was effected one of the parties interested in the real estate died. The learned Vice-Chancellor held that the estate was sufficiently converted, and then when the estate was afterwards sold and the money had to be divided it was held that the share of the deceased beneficiary passed to his legal personal representative. The question came before KAY, J., ten years afterwards—that is to say, in 1884, in *Hyett* v. *Mekin* (2). In that case KAY, J., gave a long and carefully D reasoned judgment, which is I think stated with perfect accuracy in the headnote to the report of the LAW REPORTS in these terms (25 Ch.D. 735):

> "An absolute order for sale made within the jurisdiction of the court in an administration suit, operates as a conversion from the date of the order and before any sale has taken place."

E I need not say that that was not a mere dictum, for not only was the point before him, but also that that was the very point he decided in the case. He went through all the prior authorities and came unhesitatingly to that decision. That was twenty-six years ago. As recently as the year 1908 precisely the same point was decided by EVE, J., in *Re Dodson, Yates* v. *Morton* (3). Even, therefore, if I had any doubt, which I have not, as to the accuracy of those decisions, I should hesitate long before I felt justified in F coming to a contrary conclusion. I should not feel justified in giving a decision which would tend to impair the authority of a decision upon which I cannot for a moment doubt that very many people must have acted in the last thirty years. In my opinion the decision of WARRINGTON, J., was perfectly right; that the share of Mary Davies belongs to her legal personal representative, and not to her heir; and that this appeal must, therefore, be dismissed with costs.

G

BUCKLEY, L.J.—*Arnold* v. *Dixon* (1) was decided by HALL, V.C., in the year 1874. *Hyett* v. *Mekin* (2) was decided by KAY, J., in the year 1884. In the interval *Wallace* v. *Greenwood* (4) had been decided by SIR GEORGE JESSEL, M.R. The last-mentioned case, I agree, is distinguishable from the present in this respect, that there was there a conditional contract which was approved by the order. I, therefore, simply set that aside H for the moment, although there are expressions used in the judgment of SIR GEORGE JESSEL, M.R., in that case which go to the point that is here the subject of discussion. And I think it is addressed to the point, not on the footing that it was a case in which a conditional contract was approved but the court treated it as a general case. But in the other two cases the point was expressly decided which we have to decide in the present case. Of course, they do not bind us. If we thought it necessary we should I have to review them. But those decisions have undoubtedly existed for a great number of years, and I certainly should for long hesitate before disturbing them. Apart, however, from authority altogether, it seems to me that those decisions are quite right. The matter seems to me to stand thus: If there be a trust for sale, of course devolution of interests of beneficiaries under that trust takes place on the footing that the trust has been executed; for this reason: If there had been a trust for sale the beneficiary could do nothing but enforce the trust. He could say: "Sell, and give me my share." But he never could say: "Give me the land." If there be a power of sale, of course that is different. Until the donee of the power elects to exercise the power the land is land,

and devolves as land, and when he has determined to exercise the power but has not exercised, and is determined to sell but has not found a buyer, the beneficiaries cannot compel him to go on and sell. There is nothing the beneficiaries can enforce. But directly an order for sale has been made, binding the parties, in the jurisdiction that rests in the court it is competent for any beneficiary to come to the court and say: "I am a person taking the benefit of that order; carry it into effect." In the proper circumstances the court would carry it into effect. In other words, in the case of a trust for sale and the case of an order for sale the right of the beneficiary is to have the property sold, and he can only get the proceeds of the sale. Counsel for Mr. Simmons has pressed upon us very much many expressions in judgments of judges relevant to cases before them in which they have said that when it comes to a question of devolution you must take the property as it is. Those are cases really addressed to this state of circumstances: Suppose there had been real estate and it had been converted into money, the argument that has been advanced is that one ought to treat it as real estate, because it is the proceeds of real estate. The answer is "No"; and in dilating upon this question of taking the property as it is, it was in that state of facts that the judge in each case was proceeding in the language he used. He said, "You must take it as it is. It has been turned into money, and you must take it as such." The proposition then is: "If the property has been converted there is no equity as between volunteers to have it reconverted. You must take it as it stands." That is not at all the question in the present case. The question here is this: If the property has not been converted in fact, but has been converted notionally by an order made for its conversion, is it to be enjoyed in its notional state? The cases of *Arnold* v. *Dixon* (1), and *Hyett* v. *Mekin* (2), said, "Yes, it is to be enjoyed in its notional state." That, I think, is perfectly good law. In that state of facts no one beneficiary can any longer—unless all the beneficiaries concur of course to elect to take the property as land—say "I am entitled to take this property as land." He can only say "I am entitled to have this order carried into effect, and take the property as money." The result is that there is conversion. For those reasons, I think, both on principle and authority, that the real estate in the present case has been converted into personalty, and the legal personal representative of Mary Davies is entitled to her share of the proceeds, and this appeal ought to be dismissed.

KENNEDY, L.J.—I agree, for the reasons which have been given.

COZENS-HARDY, M.R.—I intended to say that our attention was called to a decision of the Irish Court of Appeal in *Re Stinson's Estate* (5). I should have placed great reliance upon it, except that I think it probable there that as the death of the person in question took place on June 30, 1908, and the sale was completed in July, Counsel for Mr. Simmons was right in suggesting that there must have been a contract before the death took place. No such distinction was spoken of by the learned judges. They took substantially the view that this court has taken of late years in questions of this kind, which tends to support our decision in the present case. But it is not so directly in point as *Arnold* v. *Dixon* (1), *Hyett* v. *Mekin* (2) and *Re Dodson, Yates* v. *Morton* (3).

Appeal dismissed.

Solicitors: *Henry Gover & Son*; *Edmund Ward Oliver & Son.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re JONES BROTHERS. Ex Parte ASSOCIATED NEWSPAPERS, LTD. AND OTHERS

[KING'S BENCH DIVISION (Phillimore and Lord Coleridge, JJ.), July 16, 1912]

[Reported [1912] 3 K.B. 234; 81 L.J.K.B. 1178; 19 Mans, 349]

Bankruptcy—Assignment for benefit of creditors—Right of creditors to revoke assent—Right to found petition on acts and statements leading up to proposed assignment.

Bankruptcy—Petition—Joint petitioners—Estoppel of one petitioner from relying on act of bankruptcy—Effect on other petitioner.

Until a deed is executed a creditor may at any time revoke an assent to a deed of assignment made by a debtor for the benefit of his creditors, and, having done so, he is not estopped from founding a petition upon acts of bankruptcy consisting of the acts and statements leading up to the proposed deed.

Where there are two joint petitioning creditors and one of them is estopped from relying on a particular act of bankruptcy, that estoppel does not affect the other creditor, and, provided his debt amounts to £50, a receiving order can be made on his petition.

Notes. Considered: *Re Debtor* (*No.* 23 *of 1939*), *Debtor* v. *Petitioning Creditor and Official Receiver*, [1939] 2 All E.R. 338.

As to assignments for the benefit of creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 260–263; and for cases see 4 DIGEST (Repl.) 139 et seq.

Cases referred to:

(1) *Re Woodroff, Ex parte, Woodroff* (1897), 76 L.T. 502; 4 Mans. 46, D.C.; 4 Digest (Repl.) 142, *1278.*

(2) *Re Hawkley, Ex parte Ridgway* (1897), 76 L.T. 501; 4 Mans. 41, D.C.; 4 Digest (Repl.) 140, *1263.*

(3) *Re Stray, Ex parte Stray* (1867), 2 Ch. App. 374; 36 L.J. Bcy. 7; 16 L.T. 250; 15 W.R. 600, L.JJ.; 4 Digest (Repl.) 141, *1271.*

Also referred to in argument:

Bamford v. *Baron* (1788), 2 Term Rep. 594, n.; 100 E.R. 319, n., 4 Digest (Repl.) 140, *1254.*

Re Tannenberg & Sons, Ex parte Parrier (1889), 60 L.T. 270; sub. nom. Re *Tannenberg & Sons, Ex parte Perrier*, 37 W.R. 480; 6 Morr. 49, D.C.; 4 Digest (Repl.) 143, *1281.*

Re Mills, Ex parte Mills, [1906] 1 K.B. 389; 94 L.T. 41; 54 W.R. 322, C.A.; 4 Digest (Repl.) 139, *1253.*

Back v. *Gooch* (1815), 4 Camp. 232; Holt, N.P. 13, N.P.; 4 Digest (Repl.) 140, *1256.*

Re Brindley, Ex parte Taylor, Sons & Co., [1906] 1 K.B. 377; 75 L.J.K.B. 46; 22 T.L.R. 115; 12 Mans. 387, C.A.; 4 Digest (Repl.) 142, *1279.*

Clough v. *Samuel*, [1905] A.C. 442; 74 L.J.K.B. 918; 93 L.T. 491; 54 W.R. 114; 21 T.L.R. 702; 12 Mans. 347, H.L.; 4 Digest (Repl.) 116, *1031.*

Re Onslow, Ex parte Kibble (1875), 10 Ch. App. 373; 44 L.J. Bcy, 63; 32 L.T. 138; 23 W.R. 433, L.JJ.; 4 Digest (Repl.) 124, *1109.*

Re Michael, Ex parte Michael (1891), 8 Morr. 305, D.C.; 4 Digest (Repl.) 143, *1286.*

Appeal from the dismissal by the learned judge sitting at Bristol County Court of a joint petition for the bankruptcy of N. A. Jones, presented by Associated Newspapers, Ltd., who claimed £281 6s. 7d., and Messrs. George Newnes, Ltd. who claimed £39 12s.

On Mar. 8, 1912, a meeting was called of the creditors of a firm of advertising agents of which N. A. Jones was the sole partner. It was agreed at this meeting that the debtor should immediately execute a deed of assignment for the benefit of his creditors to a trustee. Associated Newspapers, Ltd., were not represented at this meeting but a representative of Messrs. George Newnes, Ltd., was present but did not have instructions to assent to any deed.

On Mar. 21 the trustee notified the creditors of the decision of the meeting, and asked for assents to the proposed deed, and on Mar. 25 the Associated Newspapers, Ltd., signed a form of assent. On April 1, however, not being satisfied with certain statements in the debtor's statement of affairs, the Associated Newspapers, Ltd., revoked their assent and demanded the return of the signed document. The trustee sent back the form of assent on April 2, declaring his intention not to accept the deed without the assent of all the principal creditors, and urging them to decide whether to assent to the deed or to file a petition. No deed having meanwhile been executed, on April 19 Messrs. G. Newnes, Ltd., and the Associated Newspapers, Ltd., presented a joint petition for £320 18s. 7d. This petition, which alleged as acts of bankruptcy the circular letter of Mar. 12, the statement at the meeting on Mar. 18 and the letter of the trustee of April 2 came on for hearing in the Bristol County Court on June 7. The proposed deed of assignment was not executed at the date of the hearing of the petition, but some deed was subsequently executed. The county court judge dismissed the petition on the ground that, although the debts and acts of bankruptcy were admitted, the Associated Newspapers, Ltd., had disqualified themselves from relying on those acts of bankruptcy by assenting to the proposed deed, and that Messrs. G. Newnes, Ltd., whether they had assented or not, had not a sufficient debt to support a petition.

Oscar Kühn for the petitioning creditors.
Hansell for the debtor.

PHILLIMORE, J.—This case raises an interesting point. A debtor called his creditors together and at the meeting submitted a statement of affairs, showing a deficiency of approximately £2,600. Those creditors present at the meeting thereupon resolved that the debtor should immediately execute a deed of assignment for the benefit of all the creditors, and a trustee was appointed and requested to inform the absent creditors of the decision of the meeting and to obtain their assent to the proposed deed. Thereupon the trustee prepared a form of assent, and it is important to notice that this assent was to a made, and not to a proposed, deed. These forms of assent were shortly afterwards sent out, and in due course certain of the creditors signed them and returned them to the trustee. Among those who assented were the Associated Newspapers and Messrs. George Newnes, two of the principal creditors.

Putting aside for the moment the assent of Messrs. George Newnes, I will deal first with the assent of the Associated Newspapers. A few days after their assent to the deed, they discovered that a certain Mr. W. H. Jones had until recently been a member of the firm of Jones Bros., and, not being satisfied with the position as disclosed in the debtor's statement of affairs, they decided to revoke their assent. Accordingly they requested the trustee to accept their revocation and to return the signed assent; and on the following day the trustee, whether authorised or not, accepted their revocation and returned the document, at the same time intimating that he would not proceed with the execution of the deed, unless the principal creditors assented, and suggesting that the creditors had two alternatives—either to accept the deed or to file a petition. Acting on this suggestion, Messrs. George Newnes and the Associated Newspapers presented a joint petition, relying on three acts of bankruptcy—namely, the circular convening the meeting, the debtor's statement at that meeting, and the letter of the trustee to the Associated Newspapers. I do not think that the letter of the trustee could be relied upon as an act of bankruptcy, as it was not a document leading up to a proposed deed within the meaning of the decisions in *Re Woodroff* (1) and *Re Hawley* (2); but, nevertheless, all three acts of bankruptcy were admitted at the hearing of the petition. The county court judge held, and it has been contended by counsel for the debtor, that a creditor who has assented to a proposed deed cannot revoke his assent, although at the time when he revoked that assent no deed was executed, and that consequently he cannot found a petition on any acts of bankruptcy consisting of acts or statements leading up to or connected with the execution of such a deed. But in all the cases relied upon there has been an existing deed, and those cases only decide that a creditor who has assented, either expressly or impliedly, to a made deed, is thereby estopped from relying on that deed or the acts or statements leading up to its execution as acts of

bankruptcy upon which to found a petition because, as was said by LORD CAIRNS in *Re Stray* (3) (2 Ch. App. at p. 378):

> "inasmuch as under the statute the petitioning creditor is obliged to allege that the act in question is a fraudulent act, any person who has been a participator or sharer in the fraud cannot be heard to claim any benefit or advantage from the act."

When there is an existing deed and a creditor assents to it, his signature may form part of the consideration for the assents of other creditors, and therefore such assent once given is doubtless irrevocable. But until a deed is executed a creditor may at any time change his mind and revoke an assent, and, having done so, he is in no way estopped from founding a petition upon acts of bankruptcy consisting of the acts and statements leading up to the proposed deed. Therefore I hold that the Associated Newspapers could revoke their assent to the proposed deed, and, having done so, could rely on these admitted acts of bankruptcy.

A further point has been raised. It has been contended that Messrs. George Newnes assented to the deed and did not revoke their assent, and that, consequently, they are estopped from relying on these acts of bankruptcy, and that this estoppel involves the other joint petitioners, the Associated Newspapers. The question whether Messrs. Newnes assented to the deed and subsequently revoked that assent was never discussed in the county court, because, whether Messrs. Newnes were estopped or not, their debt was too small to support a petition. I am inclined to think that Messrs. Newnes were estopped, and I should so decide if it were material to the point in issue. But this infirmity in the title of Messrs. Newnes in no way affects that of the Associated Newspapers, and an estoppel which might prevent the one joint petitioner from relying on these acts of bankruptcy has no force to preclude the other joint petitioner from founding his petition thereon and obtaining a receiving order against the debtor. For these reasons this appeal will be allowed, and a receiving order will be made on the petition of the Associated Newspapers.

LORD COLERIDGE, J.—I agree. If a creditor recognises a deed by assent express or implied, he must be taken to recognise the preliminaries leading up to the execution of the deed, in such a way as to be estopped from relying on them hereafter as acts of bankruptcy. Here there is no proof that any deed was executed, or that the alleged deed was the deed to which the creditors assented. The Associated Newspapers assented to an immediate deed, but before any deed was executed they revoked their assent. Up to the moment of the execution of the deed the creditor is entitled to revoke his assent, and therefore the Associated Newspapers, having done what they were entitled to do, cannot be estopped from relying on these acts of bankruptcy. I think that probably Messrs. George Newnes were estopped from so doing, but that estoppel did not affect the other joint petitioners, and the receiving order ought to be made on their petition alone.

Solicitors: *Slark, Edwards & Cobban*; *W. H. Brown & Son*, Bristol.

[*Reported by* D. W. CORRIE, ESQ., *Barrister-at-Law.*]

HACKNEY FURNISHING CO., LTD. *v.* WATTS

[KING'S BENCH DIVISION (Phillimore and Bray, JJ.), April 30, May 9, 1912]

[Reported [1912] 3 K.B. 225; 81 L.J.K.B. 993; 106 L.T. 676; 28 T.L.R. 417]

Hire-Purchase—Distress—Exemption—"Goods comprised in any hire-purchase agreement"—Termination of agreement—Sufficiency of a demand for possession—Need for owners to show title to re-take goods—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 1, *s.* 4.

Section 4 of the Law of Distress Amendment Act, 1908, provides, inter alia, that the provisions of that Act, shall not apply to goods comprised in any hire-purchase agreement.

The plaintiffs, who were the owners of certain goods, let them to D. on hire-purchase terms set out in an agreement cl. 6 (a) of which provided that, in the event of the hirer being in arrears with the payment of instalments, or in breach of the agreement, or if the goods were seized in pursuance of legal process, "the owners shall thereupon, without formal demand, be entitled to resume possession of" the goods. D. fell into arrears with the payment of instalments and the plaintiffs wrote purporting to terminate the agreement. A few days later D. telephoned to the plaintiffs proposing terms which the plaintiffs refused. The plaintiffs issued a writ against D. for detention of the goods and damages, and D. informed the plaintiffs that he would fight the case and entered an appearance. Subsequently, the defendant, who was D.'s landlord distrained on the goods which had remained on the premises. D. informed the plaintiffs' solicitor of the distress and said he would not contest the action further. The plaintiffs then served the defendant with a declaration under s. 1. of the Law of Distress Amendment Act, 1890, that D. had no right of property or beneficial interest in the goods. The defendant claimed that the goods were not protected from distress as they were comprised in a hire-purchase agreement and fell within s. 4 of the Act. The plaintiffs contended that after demand for possession the goods ceased to be comprised in a hire-purchase agreement, and that in any event D.'s conduct amounted to a repudiation of the agreement.

Held: the plaintiffs could not recover the goods without showing their title to do so under the agreement, and, therefore, the demand for possession alone did not prevent the goods remaining in the order and disposition of D; there had been no repudiation of the hire-purchase agreement by D. as his acts were consistent with an allegation on his part that he had not made default and was entitled to retain possession under the agreement, and, therefore, the hire-purchase agreement was still in existence and the goods when distrained on were still comprised in a hire-purchase agreement within s. 4 of the Act.

Notes. Considered: *Jay's Furnishing Co.* v. *Brand & Co.*, [1914–15] All. E.R. Rep. 811. Distinguished: *Smart Bros., Ltd.* v. *Holt*, [1929] All E.R. Rep. 322. Considered: *Drages, Ltd.* v. *Owen*, [1935] All E.R. Rep. 342. Referred to: *Druce & Co., Ltd.* v. *Beaumont Property Trust, Ltd.*, [1935] All. E.R. Rep. 404.

As to distraint upon goods comprised in an hire-purchase agreement in general, see 19 HALSBURY'S LAWS (3rd Edn.) 559 et seq; and for cases see 18 DIGEST (Repl.) 294 et seq. For the Law of Distress Amendment Act, 1908, see 6 HALSBURY'S STATUTES (2nd Edn.) 170.

Case referred to:

(1) *London Furnishing Co., Ltd.* v. *Soloman* (1912), ante, p. 860; 106 L.T. 371; 28 T.L.R. 265, D.C.; 18 Digest (Repl.) 295, *423*.

Appeal from a decision of the deputy judge sitting at the Brentford County Court in an action brought by the plaintiffs against the defendant to recover the sum of £13 2s. as money had and received by the defendant to the use of the plaintiffs, which sum had

been paid under protest to the defendant by the plaintiffs in order that the defendant would release the plaintiffs' goods on which he had distrained. Alternatively, the plaintiffs claimed the same amount as damages for illegal distress on their goods.

By a hire-purchase agreement dated Sept. 27, 1909, and made between the plaintiffs, as owners of the goods hired, and H. G. Duval, as hirer, the hirer agreed, inter alia:

"2. To punctually pay to the owners without previous demand, the monthly rent of £3 for the hire of the said articles, commencing this date, the first of such monthly payments to be made on the 27th day of October next, and so on month by month so long as the hirer sees fit to continue the hiring. . . . 5. To keep the said articles free and exempt from legal process. 6. (a) In case any of the said rent shall be in arrear, or in case the hirer commit any breach of this agreement, or suffer any such breach to be committed, or if the said articles shall be seized or taken under colour or in pursuance of any legal process, the owners shall thereupon, without formal demand, be entitled to resume possession of the said articles (without prejudice to the owners' right to recover rent and damages for breach of this agreement up to the date of such retaking), and for that purpose full power and liberty are hereby given to the owners, their servants, agents, assigns and their agents, to enter into any house or premises and retake the said articles. . . . 6 (c) To regularly and punctually pay the rent, rates, and taxes of the house, building, or apartments in which the said articles of furniture and effects shall lawfully be for the time being, and to produce or forward by post to the company, their agents or servants, the receipt for such payment of rent whenever required by them or any of them so to do, and to keep the said articles of furniture and effects free and exempt from all legal process . . . ."

The owners agreed, inter alia, that:

(d) Should the owners retake the said articles by virtue of the terms of this agreement, the hirer shall have the right either (i) to buy the said articles within twenty-eight days provided the hirer pay a sum which together with the previous payments equal the sum of £86 10s., and in addition pay the expenses of and incidental to such repossession, such payments to be made within twenty-eight days after such repossession as aforesaid, or (ii) to resume the hiring provided the hirer pay arrears of hire up to the date of repossession and present a guarantor to the satisfaction of the owners, and pay the expenses of, and incidental to, the retaking and removal of the said articles within twenty-eight days after such repossession."

W. de B. Herbert and *Schwabe* for the plaintiffs.
Ennis and *Lazarus* for the defendant.

Cur. adv. vult.

May 9, 1912. **BRAY, J.** read the following judgment of the court.—This action was brought by the Hackney Furnishing Co. against Mr. Watts, landlord of No. 3, Blomfield Mansions, Shepherd's Bush, for wrongfully distraining on some goods on those premises which the plaintiffs claimed belonged to them. The county court judge decided in favour of the defendant, and the plaintiffs appeal from that decision. The facts are as follows. On Sept. 27, 1909, by a hire-purchase agreement of that date, the plaintiffs let the goods to one Duval. The agreement entitled the owners to resume possession of the goods if Duval made default in payment of any of the instalments and in certain other events. On Oct. 4, 1911, Duval being in arrear in payment of some instalments, the plaintiffs wrote to him a letter of that date. That letter purported to terminate the hiring agreement, a power which the owners had not got, but I think it is fair to read it as purporting to determine the bailment and claiming to have repossession of the goods. A few days after (the evidence does not show how many) Duval telephoned to the plaintiffs proposing terms which the plaintiffs refused. On Oct. 16, the plaintiffs issued a writ against Duval for detention of the goods and damages. Duval appeared, and, at an interview with the plaintiffs' solicitors, said he should fight. On Nov. 6 the defendant as landlord distrained on the goods which still remained on the premises. Duval informed the plaintiffs' solicitor of the distress, and said he should not contest the action further. The plaintiffs then served the defendant with a declaration under s. 1 of the Law of Distress Amendment Act, 1908. The defendant claimed to hold the goods under s. 4, which

provided that the Act should not apply to goods comprised in any hire-purchase agreement. A

These goods at any rate had been comprised in a hire-purchase agreement and had come into the possession of the tenant under that agreement. Why are they not comprised in a hire-purchase agreement within the meaning of the section? Is there any reason for not adopting the natural meaning of the words? It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. B The words must not be strained so as to further restrict his rights. The reason for s. 4 would seem to be this. The owner has voluntarily and for his own gain placed the goods where they could be distrained; the so placing them tends to induce the landlord to give credit to the tenant, and the tenant presumably under such an agreement has a substantial interest in the goods which ought to be available to the landlord. If a demand of possession by the owners is sufficient to make the goods no longer comprised C in the hire-purchase agreement, there is no reason for the provision that the statute shall not apply to goods in a hire-purchase agreement. Until demand of possession goods comprised in a hire-purchase agreement are in the order and disposition of the tenant and come within the later words. It is said that after demand of possession the goods are to be deemed no longer comprised in the hire-purchase agreement. But the agreement is not dead; the owner cannot recover his goods without showing his title to do so under D the agreement. He has voluntarily parted with the possession; he has to show a right to re-take possession. These considerations lead us to consider the decision of the Divisional Court in *London Furnishing Co.* v. *Solomon* (1). In that case the landlord was not represented and the court had not the advantage of hearing arguments in support of the view we are now suggesting. Under these circumstances we do not think we are bound by that decision. The court there held that after demand of possession E the goods were no longer comprised in a hire-purchase agreement within the meaning of s. 4. For the reasons we have given we do not think that was right. Counsel for the plaintiffs further argued that the conduct of Duval amounted to a repudiation of the hire-purchase agreement and that that agreement was at an end. We do not think the facts support that contention. Duval's acts were consistent with an allegation on his part that he had not made default and was entitled to retain possession under the agree- F ment. To prove a repudiation by one party entitling the other to rescind, clear evidence is required. If this point was raised at the trial the county court judge must have found there was no repudiation, because he finds that the agreement was still in existence. The county court judge based his judgment in favour of the defendant partly on a clause (d) in the hire-purchase agreement which entitled Duval in case the owners re-took possession either to buy the goods or resume the hiring within twenty-eight days G after re-possession on his fulfilling certain conditions. We do not think it necessary to decide whether the existence of this right alone would entitle the landlord to distrain. It may be that the true view of clause (d) is that it does not enlarge the estate or interest of the hirer, but only gives him a right in contract, and that if the goods are not for other reasons to be deemed to be comprised under the hire-purchase agreement, clause (d) will not keep them under it. It is sufficient to decide, as we do, that in the circumstances H of this case the hire-purchase agreement was still in existence and the goods when distrained on were comprised in a hire-purchase agreement within the meaning of s. 4. The appeal must, therefore, be dismissed with costs.

Solicitors: *H. E. Tudor*; *R. R. G. Norman.*

[*Reported by* P. B. Durnford, Esq., *Barrister-at-Law.*] I

Re BEAVAN (No. 1). DAVIES, BANKS & CO. *v.* BEAVAN

[CHANCERY DIVISION (Neville, J.), November 10, 1911]

[Reported [1912] 1 Ch. 196; 81 L.J.Ch. 113; 105 L.T. 784]

Mentally Disordered Person—Maintenance—Loan—Right of lender to recover loan, charges and interest.

In 1904 a testator became mentally incapable of managing his own affairs. Prior to this date he had an account with a bank, which was overdrawn, into which his income was paid. After 1904 the testators' son, with the permission of the bank, continued this account and opened a second account into which the testator's income from certain freehold property was paid. The overdraft was continued and the testator and his family were maintained by this money. On the testator's death in 1906 his estate was proved to be insolvent and a receiver was appointed. The bank claimed the amount of the overdraft together with interest and charges against the estate and against the son.

Held: a person who lent money to someone who was maintaining a lunatic, which money was spent on providing necessaries for the maintenance of the lunatic, had an equity to stand in the shoes of those creditors for necessaries supplied for the maintenance of the lunatic who had been paid out of the money advanced by the lender; accordingly the bank was entitled to recover such moneys as had been paid from the overdraft for the provision of necessaries and an account should be taken of that sum, but, as the bank's right was merely to stand in the shoes of those creditors, it was impossible for it in addition to receive the charges for obtaining the loan.

Notes. As to the liability of a mentally disordered person to pay for necessaries, see 29 HALSBURY'S LAWS (3rd Edn.) 408–409, and for cases see 33 DIGEST 133 et seq.

Cases referred to in argument:

Williams v. *Wentworth* (1842), 5 Beav. 325; 49 E.R. 603; 33 Digest 133, *100*.

Re Rhodes, Rhodes v. *Rhodes* (1890), 44 Ch.D 94; 59 L.J.Ch. 298; 62 L.T. 342; 38 W.R. 385, C.A.; 33 Digest 134, *104*.

Action brought by creditors, Davies, Banks & Co., bankers, against Samuel S. Beavan, Thomas N. Beavan, Francis A. N. Beavan, and Charles H. Beavan, executors of the estate of John Griffith Beavan deceased, and against the deceased's son Samuel S. Beavan personally. The plaintiffs claimed to recover an amount of an overdraft together with interest and other charges. In a creditors' action for the administration of the estate of the deceased an order was made directing inquiries as to debts and in the course of this inquiry this claim was referred into court for decision.

The case is only reported on the liability of the estate.

Peterson, K.C., and *F. Thompson* for the claimants.

Jenkins, K.C., *Owen Thompson*, and *Maugham* for the defendants.

NEVILLE, J.—I think I ought to say a few words about this case because one or two points have been mentioned. The circumstances are these: The testator was living with four daughters and a son in a house which he occupied until his death. In the year 1904 he was rendered incapable of managing his affairs as the result of a stroke of paralysis, and he died on Nov. 13, 1906. He had kept an account with the plaintiff bank into which all his income had been paid, which was mainly derived from the rents of certain real estates that he held, that account being from time to time overdrawn. The payments in went to the reduction of the overdraft when the audits took place and the rents of the tenants were paid. Upon the occurrence of the illness, which rendered the testator incapable, his son applied to the bank to continue the account and to allow the overdraft to continue, and this they consented to do. From that time until his death the family of the testator and the testator himself were maintained by money provided in that sense by the bank. An overdraft was allowed, the rents continuing to be paid in. Now the estate has proved to be insolvent, and the question is how far the claim

by the bank for the amount of their account can be justified. I ought to add that there is another account in respect of a loan of £500 which was intended for and probably applied for the purpose of repair of one of the estates; and that is included in the claim of the bank. A

It has been argued that the bank are not entitled to claim against the estate at all, but can only look to Mr. Samuel Beavan, who is the person with whom they agreed to continue the loan; and I have to consider how far the bank are entitled to claim against the estate. The matter is one which must in the view I take result in an account, and it is quite obvious that I cannot take the account in court. But it appears to me, and I think there is no dispute, that in law a person maintaining another of unsound mind is entitled to recoupment from his estate in respect of necessary expenditure, having regard to the position in life of the person of unsound mind. Starting with that, the question arises, What is the right of one who lends money to the person who is maintaining the lunatic, where that money is applied in the provision of necessaries for the maintenance of the lunatic? It appears to me that no legal right arises as a result of the lending—no legal right in favour of the lender. But I think that an equity arises, and I think that that equity is to stand in the shoes of those creditors who, being creditors for necessaries supplied for the maintenance of the lunatic, have been paid out of the money advanced by the lender. That is an equity which applies in many cases, and I think it applies equally in the present case. B C D

Then it was argued that, in addition to that, there was a right on the part of the bank to recover the charges and interest which, had they been dealing with a person of sound mind, they would have been entitled to charge. It does not seem to me that that contention can prevail. I think that, inasmuch as the equity which is to be applied is merely the right to stand in the shoes of the creditors, who are paid off, it is imposible that, in addition to that, there should be a right to receive the charges which have been paid for obtaining the loan. For instance, suppose an interest-bearing debt had been paid off, the lender, having a right to stand in the shoes of the creditor, would have a right to stand in his shoes with regard to interest as well as principal; but where the debt is not interest-bearing, I think he can only be admitted to the extent to which his money had been applied in discharging the claim of the creditor. E F

I think, therefore, the matter with those points made out must go to the master, and I think the account should be how far the money provided by the bank was expended in necessaries for the testator and family, having regard to his position in life. I think that there should be added, "and in the protection of his estate" or "ordinary protection of his estate."

Solicitors: *Field, Roscoe & Co.*, for *Careless*, Llandrindod Wells; *Dixon, Weld & Co.*; *Chubb & Pettitt*, for *Andrews, Barrett & Wilkinson*, Weymouth. G

[*Reported by* F. Porter Fausset, Esq., *Barrister-at-Law.*]

A

Re BEAVAN (No. 2). BEAVAN *v.* BEAVAN

[CHANCERY DIVISION (Neville, J.), November 10, 1911]

[Reported [1912] 1 Ch. 202; 81 L.J.Ch. 115; 105 L.T. 785]

B *Limitation of Action—Acknowledgment—Insanity of debtor—Acknowledgment by person undertaking management of debtor's estate.*

An agreement not to plead the statutes of limitation and an acknowledgment of a debt given by a person who undertakes the management of the property of a person of unsound mind cannot prevent the statutes running in favour of the person of unsound mind, there being no agency and no capacity on the part of the manager

C to act for the person of unsound mind.

An acknowledgment of a testator's debt by his executors in the list of debts scheduled to their affidavit for probate is not an acknowledgment made to the creditor, but to the court, and does not prevent the statutes running.

Notes. The relevant statutory provisions dealing with acknowledgment are ss. 23, 24, and 25, of the Limitation Act, 1939.

D Followed: *Lloyd* v. *Coote and Ball*, [1915] 1 K.B. 242. Referred to: *Bowring-Hanburys Trustee* v. *Bowring-Hanbury*, [1943] 1 All E.R. 48.

As to an acknowledgment of a debt and the period of limitation, see 24 HALSBURY'S LAWS (3rd Edn.) 297 et seq.; and for cases see 32 DIGEST 352 et seq. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

E (1) *Smith* v. *Poole* (1841), 12 Sim. 17; 10 L.J.Ch. 192; 59 E.R. 1036; 23 Digest (Repl.) 361, *4301.*

(2) *Stamford, Spalding and Boston Bank Co.* v. *Smith*, [1892] 1 Q.B. 765; 61 L.J.Q.B. 405; 66 L.T. 306; 56 J.P. 229; 40 W.R. 355; 8 T.L.R. 336; 36 Sol. Jo. 270, C.A.; 32 Digest 390, *716.*

(3) *Re Emmett, Jenkins* v. *Emmett* (1906), 95 L.T. 755; 23 Digest (Repl.) 361, *4302.*

F Also referred to in argument:

Godwin v. *Culley, Edwards and Godwin* v. *Culley* (1859), 4 H. & N. 373; 157 E.R. 886; 32 Digest 369, *529.*

Grenfell v. *Girdlestone* (1837), 2 Y. & C. Ex. 662; 1 Jur. 940; 160 E.R. 560; sub. nom. *Greenfell* v. *Girdlestone*, 7 L.J. Ex. Eq. 42; 32 Digest 355, *377.*

Howcutt v. *Bonser* (1849), 3 Exch. 491; 18 L.J. Ex. 262; 154 E.R. 939; sub. nom.

G *Howkett* v. *Bonsor*, 13 L.T.O.S. 97; 32 Digest 399, *777.*

Action brought by Mrs. E. Beavan, widow of a testator, John Griffith Beavan, against Samuel S. Beavan, Thomas N. Beavan, Francis A. N. Beavan, and Charles H. Beavan, executors of her husband's estate for the sum of £574 and interest lent by her to the testator in April, 1895, in order to permit the testator to put his account with a bank in credit, and to pay off an outstanding debt.

H The debt was acknowledged by an IOU dated Jan. 2, 1900. The testator became mentally incapable in 1904, and it was agreed between Mrs. E. Beavan and her sons that her eldest son Samuel S. Beavan should manage the testator's affairs while he was incapable. In December, 1904, Samuel S. Beavan having been approached on behalf of his mother with respect to this debt made a payment to her of £5 15s. on account of the debt and gave her an acknowledgment of the amount due. This payment was

I made by cheque dated Dec. 29, 1905, payable to Mrs. Beavan and signed "for J. G. Beavan, S. S. Beavan." The acknowledgment was in the following form:

> "December 19, 1905.—We, the undersigned, agree not to plead the Statute of Limitations against an IOU dated April 19, 1895 for £574 with interest at 4 per cent. from that date given by John G. Beavan to Emily Beavan and acknowledged by the said J. G. Beavan on Jan. 2, 1900.—S. S. Beavan, C. H. Beavan."

A further payment was made to Mrs. Beavan by S. S. Beavan on Jan. 2, 1906, by means of a cheque drawn in the same manner and for the same amount as that of Dec. 29, 1905.

There were also cheques drawn by S. S. Beavan in favour of Mrs. Beavan in May and August, 1906, which were said to be on account of the debt in question.

In March, 1907, after the testator had died, the executors included the debt with interest to date in the list of the testator's debts scheduled to their affidavit for probate. In a creditor's action for the administration of the estate of the deceased an order was made directing inquiries as to debts and in the course of the inquiry this claim was referred into court for decision.

Dighton Pollock for the claimant.
Peterson, K.C., and *F. Thompson* for the defendants.

NEVILLE, J.—I think it is quite impossible to hold that an agreement and acknowledgment given by a person who undertakes the management of the property of a person of unsound mind can possibly operate to prevent the Statute of Limitations running in favour of the person of unsound mind, because quite clearly there was no agency and no capacity on the part of the manager to act for the person of unsound mind at all. Therefore, until we get to the date of the death, it seems to me nothing could happen to prevent the Statute of Limitations from continuing to run.

The only question is whether after the death of the testator the executors have acknowledged the debt so as to give Mrs. Beavan a right to make a claim for the money in the action, and that really depends upon whether I can treat *Smith* v. *Poole* (1) still as law. *Smith* v. *Poole* (1) is, I think, a direct authority, or as near as may be a direct authority, that an acknowledgment of this kind is a sufficient acknowledgment within the statute. The question is whether the law is so now. I think after what has been said in many cases, notably in *Stamford, Spalding & Boston Bank Co.* v. *Smith* (2) by Lord Herschell, in which it is laid down in the clearest possible way that the acknowledgment must be to the creditor or his agent, it is impossible to think that *Smith* v. *Poole* (1) is any longer law, and I think it would be wrong to follow it, because, although it is a decision of a court of co-ordinate jurisdiction, still there have been other decisions since which in principle are totally opposed to the decision which you find there.

In the case before Kekewich, J.,—*Re Emmett, Jenkins* v. *Emmett*, (3)—a different point was decided. That was where the judgment debtor was one of the executors, and the others in making the debt included the debt due from him, and it was held that that did not amount to an acknowledgment. I am not prepared to say that I think that is consistent with the law as laid down in *Stamford, Spalding & Boston Bank Co.* v. *Smith* (2). It obviously is distinguishable from the case which I have before me, and, therefore, all I hold now is that I am not bound by and cannot follow the decision in *Smith* v. *Poole* (1), but must apply the principle laid down by Lord Herschell, and I cannot hold this affidavit to be an acknowledgment of the debt, inasmuch as it was not made to the creditor. It has been suggested that there might be evidence given that the affidavit was communicated to Mrs. Beavan or to her son Charles as her agent, but I may say that there is no such evidence before me now and I think it would be unfortunate to admit evidence on this particular point at this stage of the argument. I may say I do not think it would make the slightest difference if it were shown that the affidavit came to the knowledge of the creditor, or if he was consulted as to the amount of the debt due. The real question is, To whom was the acknowledgment made? I think it is clear the acknowledgment was made to the court and not to anybody else at all. I think, therefore, that the claimant fails.

Solicitors: *Field, Roscoe & Co.*, for *Careless*, Llandrindod Wells; *Dixon, Weld & Co.*; *Chubb & Pettitt*, for *Andrews, Barrett & Wilkinson*, Weymouth.

[*Reported by* F. Porter Fausset, Esq., *Barrister-at-Law.*]

LIVERPOOL COMPENSATION AUTHORITY *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Horridge, J.) December 17, 18, 1912]

[Reported [1913] 1 K.B. 165; 82 L.J.K.B. 349, 108 L.T. 68; 29 T.L.R. 169]

Licensing—Compensation—Determination by Commissioners of Inland Revenue—Right of compensation authority to appeal—Licensing (Consolidation) Act, 1910, (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 19, 20, 21,—*Finance Act*, 1894, (57 *&* 58 *Vict.*, *c.* 30), *s.* 10.

When the compensation authority and the persons interested in licensed premises have failed to agree the amount of compensation to be paid in respect of the non-renewal of a licence and the matter is determined by the Commissioners of Inland Revenue under s. 20 (2), of the Licensing (Consolidation) Act, 1910, [now s. 17 (3) of Licensing Act, 1953: 33 HALSBURY'S STATUTES (2nd Edn.) 164] the compensation authority have no right of appeal from the decision of the commissioners.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed. The provisions dealing with compensation and the compensation authority are now to be found in ss. 15, 17, and 18, of the Licensing Act, 1953.

As to compensation payable on non-renewal, see 22 HALSBURY'S STATUTES (3rd Edn.) 574 et seq; and for cases see 30 DIGEST (Repl.) 60 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142. For the Finance Act, 1894, see 9 HALSBURY'S STATUTES (2nd Edn.) 347.

Cases referred to in argument:

R. v. *Middlesex Justices* (1832), 3 B. & Ad. 938; 1 L.J.M.C. 68; 110 E.R. 345; 30 Digest (Repl.) 64, *471.*

Re Sidebotham, Ex parte Sidebotham (1880), 14 Ch.D. 458; 49 L.J. Bcy. 41; 42 L.T. 783; 28 W.R. 715, C.A.; 4 Digest (Repl.) 250, *2267.*

R. v. *Andover Justices* (1886), 16 Q.B.D. 711; 55 L.J.M.C. 143; 55 L.T. 23; 50 J.P. 549; 34 W.R. 456; 2 T.L.R. 546, D.C.; 30 Digest (Repl.) 64, *475.*

Draper's Co. v. *Hadder* (1892), 57 J.P. 200; 9 T.L.R. 36, D.C.; 33 Digest 407, *1171.*

Re Hardy's Crown Brewery Co., Ltd. and St. Philip's Tavern, Manchester (1910), 103 L.T. 308, 520, C.A.

Re Lamb, Ex parte Board of Trade, [1894] 2 Q.B. 805; 64 L.J.Q.B. 71; 71 L.T. 312; 10 T.L.R. 575; 38 Sol. Jo. 667; 1 Mans. 373; 9 R. 636, C.A.; 4 Digest (Repl.) 234, *2100.*

R. v. *I. R. Comrs., R.* v. *Glamorgan Justices, Ex parte Davies*, [1910] 1 K.B. 851; sub. nom. *R.* v. *I. R. Comrs., Ex parte Glamorganshire Compensation Authority, R.* v. *Glamorganshire Compensation Authority, Ex parte Davies*, 79 L.J.K.B. 497; 102 L.T. 505; 74 J.P. 148, D.C.; 30 Digest (Repl.) 58, *436.*

Appeal by the Liverpool Compensation Authority against a decision of the Commissioners of Inland Revenue as to the amount of compensation which ought to be paid to certain persons who had an interest in certain licensed premises in the city of Liverpool upon the refusal of the licensing justices to renew the licence.

The petition of appeal was presented pursuant to s. 10 of the Finance Act, 1894, the main ground of appeal being that the amount awarded was excessive.

An objection was taken at an earlier stage of the proceedings that the compensation authority had no right to appeal from the decision of the Commissioners as they were not parties aggrieved within s. 10 of the Finance Act, 1894, and on July 26, 1912, HAMILTON, J., made an order that the question as to whether the compensation authority were aggrieved parties should be determined by a judge as a preliminary point of law, and the petition set down for the purpose of such question of law being argued and determined. Leave was also given for any persons interested in the premises affected to attend and argue at the hearing of the question, and all proceedings were, in the meantime, stayed.

By the Finance Act, 1894, s. 10 (1):

"Any person aggrieved by the decision of the commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the commissioners or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by Rules of Court, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the commissioners the excess shall be repaid."

By the Licensing (Consolidation) Act, 1910, s. 19:

"(1) Where the licensing justices, on the consideration by them, in accordance with this Act, of applications for the renewal of justices' licences, are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon. (2) The compensation authority shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices), an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

By s. 20:

"(1) Where the compensation authority refuse the renewal of an old on-licence a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of the Licensing Act, 1904, and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence), and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises. (2) The amount to be so paid shall, if an amount is agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and is approved by that authority, be that amount, and, in default of such agreement and approval, shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal, under s. 10 of the Finance Act, 1894, to the High Court, as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by the compensation authority: Provided that, in the case of the holder of the licence, regard shall be had not only to his legal interest in the premises or trade fixtures, but also to his conduct and to the length of time during which he has been the holder of the licence; and the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises. (3) If on the division of the amount to be paid as compensation, any question arises which the compensation authority consider can be more conveniently determined by the county court, they may refer that question to the county court in accordance with rules of court to be made for the purpose. (4) Any costs incurred by the Commissioners of Inland Revenue on an appeal from their decision to the High Court under this section shall, unless the High Court order those costs to be paid by some party to the appeal other than the commissioners, be paid out of the amount to be paid as compensation."

By s. 21:

"(4) Any sums paid to a compensation authority in respect of the charges under this section, or received by the compensation authority from any other source for the

payment of compensation under this Act, shall be paid by them to a separate account under their management and the moneys standing to the credit of that account shall constitute the compensation fund. (5) Any expenses incurred by the compensation authorities in the payment of compensation under this Act, or otherwise in the exercise of their powers or the performance of their duties as compensation authority, and such expenses of the licensing justices incurred with respect to the matter of the reference to the compensation authority of the question of the renewal of the old on-licences, or the grant of new on-licences, as the compensation authority may allow, shall be paid out of the compensation fund, and the compensation authority, in the exercise of their powers, shall have regard to the funds available for the purpose."

The Solicitor-General (*Sir John Simon, K.C.*) and *Lowenthal* for the respondents.

Ross Brown (*Rigby Swift, K.C.*, with him), for the owners and the licensee of the premises.

Sir Alfred Cripps, K.C., and *Wootten* for the appellants.

Cur. adv. vult.

December 18, 1912. **HORRIDGE, J.,** read the following judgment.—The question in this case is whether or not the compensation authority under the Licensing (Consolidation) Act, 1910, for the city of Liverpool are persons aggrieved within s. 10 of the Finance Act, 1894. This seems to me to depend upon what is the position of the compensation authority as regards the fixing of the compensation to be paid on the taking away of licences. In my view, if they are to be regarded as an authority who have merely to pay out of their funds the amount fixed by an independent body—namely, the Commissioners of Inland Revenue—they are not a party aggrieved, but if they are entitled to appear as parties before the Commissioners of Inland Revenue and to litigate and contest the amount to be paid in their capacity as guardians of the compensation funds, they are parties aggrieved.

By s. 19 of the Licensing (Consolidation) Act, 1910, provisions are made for the reference to the compensation authority by the licensing authority of licences in respect of which the refusal of renewal is suggested, and the compensation authority are to decide as to the question of renewal, but any refusal to renew is made subject to the payment of compensation, the licences being continued until such compensation is paid. Section 20 (1) provides for the mode in which the compensation is to be assessed, but no question as to this arises on the argument of the present preliminary point. By s. 20 (2), if the compensation authority approve of the amount asked for and agreed to by the persons collectively interested in the property, that amount is to be the compensation, but in default of such agreement and approval the compensation is to be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal, under s. 10 of the Finance Act, 1894, to the High Court as on the valuation of an estate for the purpose of estate duty. By r. 31 of the Statutory Rules and Orders, 1910, made under the Act of 1910, it is provided that if the amount of compensation money remains to be determined by the Commissioners of Inland Revenue, the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue accompanied by a statement of the names and addresses of the persons entitled to compensation. The form of this notice appears at p. 21 of the rules and is numbered form 11.

What, then, is the position of the compensation authority when a matter has been referred to the Commissioners of Inland Revenue? It was contended by Counsel on behalf of the petitioners that s. 21 (4) and (5) show that the compensation fund is a fund of which the compensation authority are made trustees, and it is their duty to see that a larger amount is not awarded than what they think right. I do not think there is anything in those sub-sections which is in any way inconsistent with the position that, although they may have certain duties imposed upon them, their only duty as regards the actual payment of compensation is, when they have failed to approve the amount themselves, to pay the amount fixed by the Commissioners of Inland Revenue (if not altered on appeal by the parties interested in the licence) out of the compensation funds placed at their disposal. I incline to think that some light is thrown on the subject by

the determination of the Commissioners of Inland Revenue having to be made in the same manner and subject to the like appeal as under the Finance Act, 1894, s. 10. Under that Act there is no party in the position of the compensation authority, and the only parties to the appeal are the subject, as appellant, and the Commissioners of Inland Revenue as respondents. If it was intended to have a litigation between the compensation authority and the persons entitled to the licence, I think provision would have been made for the compensation authority to be made respondents in the event of an appeal by the parties interested in the licence, and a corresponding provision for the persons interested in the licence to be respondents on an appeal by the compensation authority. It is admitted on both sides that under the provisions of the Finance Act, 1894, the only appeal that is given in this case is an appeal to which the Commissioners of Inland Revenue are the only respondents. It also seems to me to be important to notice that there are no provisions for the compensation authority appearing before the Commissioners of Inland Revenue on the fixing of the compensation. The only provisions that throw any light upon the procedure before the Commissioners of Inland Revenue are s. 7 (5) and (8) of the Finance Act, 1894, whereby the value of any property is to be ascertained by the commissioners in such manner and by such means as they think fit. No doubt the Commissioners of Inland Revenue make proper inquiries, as shown in the form produced to me which is sent by them to the compensation authority asking for certain information, but I do not think this is in any way treating the compensation authority as a party to any contest before them. The fact stated in para. 9 of the petition, that the clerk of the compensation authority did attend before the valuer appointed by the Commissioners of Inland Revenue does not seem to me to affect the legal rights of the parties, as I cannot find anything in the Act or the rules entitling him so to attend.

A further argument on behalf of the Crown was put before me that, inasmuch as s. 20 (4) provides that the costs of the Commissioners of Inland Revenue, unless otherwise provided for, shall be paid out of the amount to be paid as compensation, it could never have been intended that there could be an appeal to which the people interested in the licence were not parties, and could not be parties, and upon which the costs of the Commissioners of Inland Revenue are given out of compensation money payable in that particular case. Upon the best consideration that I can give to the whole of the Act and the Finance Act, 1894, I have come to the conclusion that the compensation authority are not in any sense of the word parties entitled to litigate the amount of the compensation money settled by the Commissioners of Inland Revenue, and that they are not parties aggrieved within s. 10 of the Finance Act, 1894, but their duty is merely to pay out of the compensation fund such amount as shall be settled by the Commissioners of Inland Revenue subject to the appeal given to persons interested in the licence.

The preliminary question left for my decision must be answered in the negative. I think it follows from this decision that the petition must be dismissed.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *E. C. Sanders*, Liverpool; *Solicitor of Inland Revenue*; *Godden, Son & Holme.*

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

ROWE BROTHERS & CO., LTD. *v.* CROSSLEY BROTHERS, LTD.

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), December 10, 11, 1912]

[Reported 108 L.T. 11; 57 Sol. Jo. 144]

Arbitration—Stay of legal proceedings—Question of law arising for decision—Impossibility of severance from facts—Power of arbitrator to ascertain facts and then state Special Case—Arbitration Act 1889 (52 & 53 *Vict., c.* 49), *s.* 4.

On an application for a stay of proceedings under s. 4 of the Arbitration Act, 1889, on the ground that the contract in respect of which the action was brought contained a clause requiring that any dispute arising thereon should be referred to arbitration by an expert, neither side to appear before the arbitrator by solicitor or counsel, it appeared that a question of law which arose could not be segregated from the facts and that it could not be answered without the ascertainment of facts for which the expert was a competent and reasonable tribunal.

Held: when the facts had been ascertained the question of law could be stated by the arbitrator for the opinion of the court in the form of a Special Case, and in the circumstances the proceedings would not be stayed.

Sale of Goods—Reliance on skill and judgment of seller—Delivery of goods—Goods not according to contract—Advice and warranty of quality—One contract, not two—Sale of Goods Act, 1938 (56 *and* 57 *Vict., c* 71), *s.* 14 (1).

Per FARWELL, L.J.: Where a buyer relies on the seller's skill or judgment on a purchase of goods under s. 14 (1) of the Sale of Goods Act, 1893, there is not, first, a contract by the seller to give good advice, and, secondly, a contract by him to provide goods in accordance with that advice, so that the buyer can sue with regard to breaches of both contracts. The whole transaction is one contract, and the buyer can sue for only one breach, that of the implied warranty of quality.

Notes. The Arbitration Act, 1889, was repealed by the Arbitration Act, 1950, (29 HALSBURY'S STATUTES (2nd Edn.) 89), s. 4 of which provides for a stay of court proceedings where there is a submission to arbitration and s. 21 provides for the statement by the arbitrator of a Case for the opinion of the court.

Applied: *Metropolitan Tunnel and Public Works, Ltd.* v. *London Electric Rail Co.*, [1926] Ch. 371. Referred to: *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337.

As to a stay of proceedings and stating a Special Case, see 2 HALSBURY'S LAWS (3rd Edn.) 21–28, 38–41, and for cases see 2 DIGEST (Repl.) 477 et seq., 579 et seq. As to implied terms as to quality of goods sold, see 34 HALSBURY'S LAWS (3rd Edn.) 51–55, and for cases see 39 DIGEST 438 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Willesford* v. *Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.JJ.; 2 Digest (Repl.) 482, *370.*

(2) *Seligmann* v. *Le Boutillier* (1866), L.R. 1 C.P. 681; 2 Digest (Repl.) 478, *349.*

(3) *Re Carlisle, Clegg* v. *Clegg* (1890), 44 Ch.D. 200; 59 L.J.Ch. 520; 62 L.T. 821; 38 W.R. 638; 2 Digest (Repl.) 489, *416.*

(4) *Lyon* v. *Johnson* (1889), 40 Ch.D. 579; 58 L.J.Ch. 626; 60 L.T. 223; 37 W.R. 427; 2 Digest (Repl.) 483, *382.*

(5) *Bonnin* v. *Neame*, [1910] 1 Ch. 732; 79 L.J.Ch. 388; 102 L.T. 708; 2 Digest (Repl.) 482, *374.*

(6) *Turnock* v. *Sartoris* (1889), 43 Ch.D. 150; 62 L.T. 209; 38 W.R. 340, C.A., 2 Digest (Repl.) 494, *438.*

Also referred to in argument:

Sissons v. *Oates* (1894), 10 T.L.R. 392, D.C.; 2 Digest (Repl.) 500, *479.*

Randegger v. *Holmes* (1866), L.R. 1 C.P. 679; 2 Digest (Repl.) 489, *414.*

Jackson v. *Barry Rail Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest (Repl.) 499, 477. A

Appeal by the plaintiffs against a decision by CHANNELL, J., in an action brought by them (i) to recover damages for negligence on the part of the defendants in advising the plaintiffs as to the kind of plant suitable for the plaintiffs' business of white lead manufacturers having regard to their requirements—namely, a constant and regular supply of power, hot air, and pure carbonic acid gas. (ii) To obtain a declaration that a contract made between the plaintiffs and the defendants and contained in various documents was not binding on the plaintiffs, and that the plaintiffs were entitled to rescind the same (inter alia), on the grounds that (a) the plaintiffs entered into the contract in consequence of the negligent advice of the defendants, and (b) the defendants had declared their inability to carry out the contract, and for the return of the money paid by the plaintiffs to the defendants under the contract. (iii) For trespass and taking of the plaintiffs' steam and using the same for the defendants' own purposes without the knowledge of the plaintiffs. (iv) Alternatively for damages for breach of the contract. B C

In 1909 the plaintiffs required new plant for their works as manufacturers and merchants of white lead, &c. For the purposes of their business they required (inter alia) a constant and regular supply of power, hot air free from impurities, and pure carbonic acid gas. In October, 1909, the plaintiffs invited tenders for a suction gas engine from 150 to 200 B.H.P. The defendants communicated with the plaintiffs, and, after being informed of their requirements and shown over their works, they recommended a bituminous gas producer plant for the purpose of running the engine, which they told the plaintiffs would answer their requirements and supply in conjunction with the engine not only the power required, but also as by-products a constant and regular supply of pure hot air and pure carbonic acid gas. The plaintiffs said that, relying on the defendants' assurance and advice, they entered into a contract with the defendants for the supply of the bituminous gas producer plant and engine which they had advised the plaintiffs would answer their requirements and supply the by-products before referred to. The contract was contained in various documents (including a specification of the work to be done) dated Nov. 11, 1909, Nov. 29, 1909, and Dec. 2, 1909. The letter of Nov. 29, 1909, was in the following terms: D E F

> "Messrs. Rowe Brothers & Co., Ltd., Liverpool.—Dear Sirs,—Reverting to our recent correspondence, specially our note of Nov. 13, with which we sent you a schedule of prices, and our detailed specification of Nov. 16 of our type "AA" engine and bituminous slack suction plant, with which we inclosed a schedule of shafting details, we now beg to gather up particulars and give you the same herewith. The fuel consumption guarantee you will find on the third page of the specification, also our guarantee as to operating with bituminous coal. We trust you will find everything in order and that we may be favoured with your very esteemed order, which you can be assured would receive our special attention. We would try to give you every satisfaction.—Your truly, Crossley Brothers, Ltd." G

The tender which accompanied the letter of Nov. 29, 1909, contained the following description of the machinery referred to in that letter: H

> "One Crossley horizontal type "AA" producer gas engine with one bituminous suction plant, exhaust air heater, gas engine driven air compressor for starting, shafting, &c., for the sum of £1,729 (one thousand seven hundred and twenty-nine pounds) net. Terms: 50 per cent. on delivery of the goods on site, 25 per cent. after one month's satisfactory running, and the balance after three months' satisfactory running. Exceptions: As mentioned in the specification." I

The conditions of the tender which formed part of the same contained the following material clause:

> "6. Disputes.—Should any dispute arise, the same is to be referred to arbitration by an engineer to be appointed by the president of the Institution of Mechanical Engineers, whose decision shall be final, neither side to appear before the arbitrator by solicitor or counsel."

The tender was accompanied by the specification referred to. The letter of Dec. 2, 1909, was in the following terms:

"Messrs. Crossley Brothers, Ltd., Liverpool.—Dear Sirs,—With reference to our conversation over telephone, we confirm the order for gas engine, &c., as per your letter of Nov. 29 which embodies your letters of Nov. 13 and 16. We note you guarantee to have the plant running before the end of the first week in April and that you will do your best to expedite delivery, and we are hoping you will be able to improve on your promise by two or three weeks.—Yours truly, Rowe Brothers & Co., Ltd."

The defendants supplied the engine and plant referred to, but the same, according to the plaintiffs' allegations, had not and could not be made to work steadily or efficiently, and had not and could not be made to perform or comply with the conditions upon which the defendants advised and assured the plaintiffs. On May 14, 1912, the defendants wrote to the plaintiffs a letter in which they stated that they had been making experiments with a view to modifying the arrangement which they put up at the plaintiffs' works for utilising the exhaust gases for carbonating purposes. The latter continues as follows:

"Our difficulty has been the elimination of the last trace of sulphur in the gas, and in this we regret to say we have not succeeded. We have succeeded in extracting 99·9 per cent. of the sulphur, but even then paper pregnated with lead was turned brown in a short time. This purified gas was then passed through another series of filters, thereby still reducing the infinitesimal quantity of sulphur contained in it, but even then the paper was slightly discoloured after a time. As we cannot hope for laboratory conditions in your factory, we are obliged to acknowledge that we cannot fulfil the carbonating portion of our contract—that is, if we are to provide an absolutely pure gas without the slightest trace of sulphur in it."

On May 15, 1912, the plaintiffs replied that the contract was indivisible, and that, but for the defendants' representations as to carbonic acid gas, they would never have placed the order with the defendants. The plaintiffs also stated that the defendants could if they liked continue their alterations to the plant, but that they did so at their own risk. The defendants continued their endeavours to make the plant and engine work until the end of June, 1912—viz., two and a half years after the date of the contract, and made various additions and alterations which as the plaintiffs alleged entirely departed from the contract specifications. But from the time that they started the engine and plant until they finally withdrew their workmen on June 28, 1912, the defendants, according to the plaintiffs' allegation, were never able to make the plant and engine work as they had advised the plaintiffs it would, or in accordance with the contract entered into by the plaintiffs upon such advice.

This action was, therefore, brought by the plaintiffs on the ground that their claim for negligence arose before the date of the contract, and could not be within the jurisdiction of the arbitrator; also that the arbitrator could not decide as to the plaintiffs' right to rescind the contract which would, if exercised, deprive him of his jurisdiction; and, further, that in view of the admitted failure to carry out the contract questions of law as to the effect of such failure must arise which were unfitted for the decision of an engineer, especially when he was deprived of the assistance of counsel and solicitors. The plaintiffs also contended that in view of the nature of the claims and disputes generally and of the character of the submission, this was a case in which the court, if it considered that the arbitrator had jurisdiction, would exercise its discretion, and refuse to stay the action. The defendants' contention, on the other hand, was that the matters in dispute and difference in the action arose out of the contract and were within the scope of the submission to arbitration contained in the contract and were fit and proper to be referred to and decided by an arbitrator to be appointed thereunder; and further that there was no sufficient reason why those matters should not be so referred and decided.

It appeared that the plaintiffs on June 27, 1912, had commenced a previous action

against the defendants founded on the same contract. All application was made by the plaintiffs to stay that action under s. 4 of the Arbitration Act, 1889, and on July, 19, 1912, an order was made staying the same. The defendants submitted that the disputes which had arisen between the plaintiffs and the defendants out of the contract were in all respects identical in the present action with the former action which had been stayed. A

The defendants further submitted that the only dispute between the plaintiffs and the defendants was as to whether the defendants had broken their contract with the plaintiffs in not delivering an engine and plant which were in accordance with the contract. That dispute was one which involved the consideration of highly technical details which ought to be determined by an engineer skilled in such matters; and that therefore there was no reason why such dispute should not be referred to arbitration in accordance with the contract between the parties. A summons was taken out on the part of the defendants asking for an order that all further proceedings in this action might be stayed pursuant to s. 4 of the Arbitration Act, 1889. On Oct. 22, 1912, the summons came on to be heard before MASTER WILBERFORCE who made an order in the terms thereof. On Nov. 5, 1912, the plaintiffs appealed to CHANNELL, J., who ordered that the plaintiffs' appeal should be dismissed, but that, if the plaintiffs desired to go on with the action as to the claim for trespass, they should be at liberty to do so, and in that case it was ordered that the master's order should be amended by making it stay the action except as to the trespass. The plaintiffs appealed to the Court of Appeal, asking that the order of CHANNELL, J., might be reversed in so far as it ordered that the plaintiffs' appeal from the order of MASTER WILBERFORCE should be dismissed, and that it might be ordered that the order of the master should be discharged. B C D

Clavell Salter, K.C., and *Hudson*, K.C., (with them *W. J. Lias*), for the plaintiffs.
Shearman, K.C., and *J. D. Crawford*, for the defendants. E

COZENS-HARDY, M.R.—This is an important and, to my mind, a difficult case which has been argued very fully and with great ability before us. But, having arrived at a conclusion upon the matter, I am not sure that I should be justified in delaying giving judgment merely for the sake of putting the same in a more clear and logical form than can be given to it at the present moment. F

The plaintiffs have issued a writ against the defendants claiming damages for negligence and a declaration that a contract made between the parties and contained in various documents was not binding on the plaintiffs. What was the contract made between the parties? It is contained in three letters and an elaborate specification. The plaintiffs are white lead manufacturers and the defendants are well-known makers of machinery. The contract contained an arbitration clause by which any dispute was to be referred to arbitration by an engineer to the appointed by the president of the Institution of Mechanical Engineers whose decision was to be final. It must not be supposed that my opinion is—not that it is in the least material what my opinion is on the matter—that such a clause is a reasonable clause in a contract of this kind, but the parties have deliberately entered into a contract containing that clause. I would only refer to what I may venture to call the classical passage which is always quoted in cases of this kind in the judgment of LORD SELBORNE, L.C., in *Willesford* v. *Watson*. (1) His Lordship said this (8 Ch. App. at pp. 479, 480): G H

> "Then we are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the legislature and the Act of Parliament [the Common Law Procedure Act, 1854: repealed, Arbitration Act, 1889] under which the court is now asked to act, have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a primâ facie duty is cast upon the courts to act upon such an agreement." I

I, therefore, approach the consideration of the question whether under the powers now conferred by s. 4 of the Arbitration Act, 1889, the court ought to stay the action which

has been commenced, and I do so having due regard to that which is clearly laid down as the proposition of law which ought to govern us.

It is said—and said very forcibly by counsel for the plaintiffs—that it is apparent that the questions which have arisen are really questions of law, and it is said that there cannot be anything more absurd than to refer to a civil engineer difficult questions arising under the law of contract as interpreted and enforced by courts of law in this country. There is no doubt considerable force in that. But the Arbitration Act, 1889, itself seems to me to furnish an answer to that. It is quite clear that that Act contemplates that the arbitrator shall deal or may deal with questions of law. He can state his award in the form of a Special Case under s. 7 (b) of the Act, and under s. 19 of that Act the arbitrator can, and the court may order him at the request of either of the parties to state in the form of a Special Case any question of law for the opinion of the court. So that on the face of the Arbitration Act, 1889, itself you do not find it is contemplated that questions of law should not be referred to arbitration. Coupled with that, you find that the arbitrator who may not be, and in a case like this cannot be supposed to be, a skilled lawyer, may in his own behalf, and even if he does not think fit, may be ordered by the court at the request of either of the parties, to state in the form of a Special Case any question of law for the opinion of the court.

I, therefore, do not think that it can be enough to say that as questions of law of a serious kind will arise here the court ought not, in the exercise of its discretion, to interfere. This is not a case in which questions of law can be kept apart from the facts of the case. If, for instance, it had been merely a question of law arising upon the construction of certain words in a lease or a contract of sale, or what not, I can quite conceive that the court might say—as the court has done in one or two cases—that there is only one question of law here, and that it is idle to refer that to arbitration, because the first thing the arbitrator would undoubtedly do would be to refer that to the court for the decision of the court as a question of law. What are the questions substantially in dispute between the parties? The contract was one for the supply of an "AA" gas engine and suction plant, the whole price of the engine and so on being £1,729. There are a great number of details given, and it is said—although it is not specified in any contract—that there was a representation made by the defendants that the by-products of the plant—the by-products by combustion—would be useful if properly treated under this machinery for the purposes of the manufacture of white lead. That is to say, carbonic acid gas would be produced and produced in a sufficiently pure state to enable it to be useful for that purpose. It is said that the defendants now admit that they cannot produce carbonic acid gas absolutely pure or so sufficiently pure as to enable the by-products when treated to be useful for the manufacture of white lead. They rely—and properly rely—upon the letter of May 14, 1912, from the defendants to the plaintiffs. [HIS LORDSHIP read that letter and continued:] It has been said on the one side that that is a repudiation of the contract. It is said that it is an acknowledgment by the defendants that they cannot complete the contract, and that that is a circumstance of such a nature that the whole contract is, at the option or election of the plaintiffs, liable to be repudiated, and that they have repudiated it. That seems to me to be a matter which cannot be answered as a question of law without ascertaining other facts, for the ascertainment of which an engineer is by no means an incompetent or unreasonable tribunal. In the first place, a difficulty unquestionably seems to be caused by an item which in the specification is put down at £33 odd, I think it is, and in one of the letters is said to be £35 or £33—I forget which it is—but an exceedingly small matter in point of cost of the whole machinery. The engine part of the machinery is the most costly. It is an engine which is useful if made according to the specification, quite apart from the mode of dealing with these exhaust products. It will be, as it seems to me, for some competent person—the engineer to whom the matter is referred—to state the facts in such a way that the tribunal before whom it may ultimately come will then be able to say: "Is this deficiency—is this mode of dealing with the exhaust products which it is said does not answer—of such a nature as to amount to a repudiation by the defendants of the whole contract." Or is it more analogous to the example which was put, I understand, by CHANNELL, J., in chambers, when his Lordship asked whether a man can

repudiate a contract to purchase a house because the vendor has not put in and says he cannot put in a particular window in a particular place. All that is a matter which it seems to me cannot be segregated as a mere question of law apart from the facts. A

Then there is another most serious matter. It is quite clear from the correspondence that there are complaints—grievous complaints—of the working of the plant quite apart from this mode of dealing with this product of combustion. It was said that the engines would not run regularly, that they would not conform to the conditions, and that they would not run several days together. Undoubtedly, there has been very great delay on the part of the defendants in delivering and making complete the plant quite apart from the carbonic acid gas being in a pure and efficient state. The defendants now say that they have remedied those complaints, but the plaintiffs say that they have not. That, again, is pre-eminently a matter for the arbitrator. B

There is another matter, too, which I cannot segregate from the facts—that the plaintiffs argue, and argue plausibly, that they had and have a right to repudiate the plant which has been delivered and has been working for a certain time. That must depend upon the evidence as to what was done with reference to this matter both before the letter of May 14, 1912, which I have read, and after that date and prior to the issue of the writ. Until those facts are fully ascertained and demonstrated, I confess myself entirely unable to see whether the plaintiffs were in a position at the time of the issue of the writ to repudiate even if they had a right to repudiate. That being so, it seems to me that CHANNELL, J., took a right course in saying that this was a case in which the Arbitration Act, 1889, ought to apply except as to the claim for trespass—which is a matter entirely severed from the rest of the case—and that that part of the action might go on if the parties desired. C D

One other matter I should mention, and that, I think, so far as I am concerned, was disposed of by an interlocutory observation. The plaintiffs seek to make out that the defendants are liable for negligence in advising the plaintiffs as to the kind of plant suitable for the plaintiffs' business. I confess that I cannot understand that. It seems to me that the argument, if it has any force at all, means that you can take a contract of sale as giving a right in tort on the ground that if the article contracted for does not answer the purpose for which it was ordered you have something more than damages for breach of contract. Damages for breach of contract are provided for by the Sale of Goods Act, 1893. But here it is not at all the case of a person being a manufacturer not being advised. It is, as I venture to suggest, a case similar to that of an intending purchaser coming to a bootmaker's shop and saying that he wants a pair of boots for a particular purpose that will stand heat and snow and all manner of other things. The bootmaker replies that he thinks that a certain pair will answer the required purposes. If they do not answer the purposes for which the intending purchaser has told the bootmaker that the boots are required, he may have an action for damages against the bootmaker for breach of contract, but he cannot treat the bootmaker's statement as a representation that the boots will answer the required purposes, so that he can say that the bootmaker was negligent in giving him that advice and then go on at the same time and say that he will sue the bootmaker for damages for breach of contract. E F G H

It is said—and this again is true—that there are or may be serious questions as to the measure of damages. I quite see that. The plaintiffs in their view are entitled not merely to the return of the money which they have paid—which is a large percentage of the contract price—but also to very large sums indeed for loss occasioned, as they say, by the breach of the contract. That again is a matter which I am quite unable—and any court must be unable—to deal with apart from the facts. If the arbitrator is wise he will find the facts, and he will make an alternative award saying that on one view the plaintiffs are entitled to so much, and on another view the plaintiffs are entitled to so much. And the court before whom the Special Case will come will then be able to give effect to his award according to what in the view of the court is the true view to be taken of the rights of the parties. Upon the whole, therefore, I see no reason to differ from the decision of CHANNELL, J. I am quite certain that a judge of the experience of CHANNELL, J., must have been aware that it was a matter for discretion, and would have used his judgment as to the mode in which that discretion should be exercised. I see no I

A reason to doubt that his discretion was well exercised, and I think that this appeal fails and must be dismissed.

FARWELL, L.J.—I am of the same opinion. On the first point argued by counsel for the plaintiffs, the facts seem to negative the idea of there having been any such double contract as is suggested—namely, a contract to give good advice, and, secondly, a con-
B tract to carry out the works in accordance with that advice. That really turns on s. 14 (1) of the Sale of Goods Act, 1893, which states that:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not),
C there is an implied condition that the goods shall be reasonably fit for such purpose." . . .

The facts as stated in the affidavits exactly answer that description, and it is impossible to hold that there is, as it were, an application to an expert for advice, and then a subsequent contract as if there were a different person carrying out the order in accordance
D with the expert's advice. It is all one contract. That disposes of the first point.

On the second point I confess that I feel very great difficulty. But there is undoubtedly a case for judicial discretion such as was exercised by my brother CHANNELL. Both my brothers in this court think that the discretion was properly exercised, and I certainly am not prepared to differ from them. It is sufficient for me to say that I am unable to say that there is a sufficient reason why the matter should not be referred to
E arbitration. The mere fact that there must be questions of law is not sufficient. Certainly WILLES, J., in *Seligmann* v. *Le Boutillier* (2), said so, and NORTH, J., in *Re Carlisle, Clegg* v. *Clegg* (3) put it on the ground which is perfectly intelligible—that there was only one question in the action, and that was a question as to the construction of the deed of partnership, as I think it was there, and there were no facts in dispute. He said it would be idle to go to arbitration when the only thing the arbitrator would do would be
F to state a Case for the opinion of the court. That is a perfectly intelligible principle which I should be very glad and ready to follow at any moment. The other case before KAY, J., of *Lyon* v. *Johnson* (4) I confess presents more difficulty. I can only say that the learned judge, having thought it within the exercise of his discretion, although there were facts to be dealt with, came to the conclusion that the case should not go to arbitration, but should remain with the court. It certainly does not, however, lay down, and does
G not attempt to lay down, a general rule. Nor would it be right for any court to attempt to limit judicial discretion by trying to lay down a general rule. The only other case referred to was the one before SWINFEN EADY, J., of *Bonnin* v. *Neame* (5). There the learned judge granted the application on various grounds. He only mentions this question about the matters of law being the principal points in dispute as being an additional reason, and of course it is a matter to be taken into consideration.

H On all these grounds I cannot see that there is any real or sufficient reason why the present case should not go to arbitration. The question of law can be stated by the arbitrator if the parties desire it, and it is after all the parties' own bargain. Whether they have or have not been wise in choosing an arbitrator as their tribunal, and in limiting their rights in the way that they have done, is for them and not for me. It may be expensive or not. It may be satisfactory or not. But it is their own selection
I of a tribunal, and I see no reason to vary it.

HAMILTON, L.J.—I am of the same opinion. As regards the first cause of action, for negligence, I can see no evidence whatever of the possible existence of such a cause of action. Its genesis is entirely explained by reason of the fact that it was necessary to issue this writ in order to get round the difficulty that faced the plaintiffs on their first writ. Their course was perfectly bonâ fide and perfectly legitimate, and is only open to criticism in respect of the fact that it is unsuccessful. I am satisfied that on the evidence here there was no negligence because it was a matter of negotiation, and in

saying that there was no negligence I am not to be understood as saying that it is at this stage for us to try the action, or at any stage. But we cannot refuse to exercise that power to stay proceedings which is the primâ facie right of the defendant to an action where there is an arbitration clause without investigating the facts alleged by the plaintiff, at least so far as to see whether there is any real or substantial cause of action outside the arbitration clause at all. There seems to me to be more than one objection to the cause of action here. There is no evidence whatever of that trust or confidence reposed in the advisers which would constitute under some circumstances a consideration, and raise a contract where the advice sought is not for pecuniary reward. In the next place, upon the facts as we have them, it is quite clear that what took place was that the intending purchasers stated their wants, and invited the intending sellers to consider them, and to offer one of their apparatuses to meet those wants. I am quite clear that, the offer having been made, it was accepted, not by way of accepting the advice of the sellers, but by accepting the goods of tradesmen. Thirdly, no damage—if there was bad advice—resulted from the advice because all that the advice led to was that the contract was entered into, and what has led to damage, if there is any, is that the contract was not performed—if it was not performed. I am satisfied, therefore, that the cause of action on negligence is non-existent, and more than that, is unsubstantial.

The next head is a claim for a declaration that the contract which contains the arbitration clause is not binding on the plaintiffs, and that the plaintiffs are entitled to rescind on various grounds. That is not on the writ, and cannot be made a ground in the statement of claim for an application to the court for the equitable relief which is known as rescission. There is not a suggestion here that there are grounds of innocent misrepresentation, and so forth, the parties still remaining in a position in which they can be restored to their original places. It is not a claim which would have been properly called an action for rescission. It is a claim the basis of which is that the defendants have broken the contract, so utterly and so confessedly as to give to the plaintiffs the right, if they choose, to refuse any longer to be bound by the contract for their part. That is to say, it is a rescission by the party and not by the court. That rescission has not taken place. It does not purport to have taken place. A few years ago a claim framed like this would have been demurable because the court would have refused to answer a question to this effect: "Will you advise me whether I have, under the circumstances, the right to declare that, as made, this contract is at an end, and then, when I have heard your declaration, I will take my own course." To that the court would have said: "No, you must take your own course. If a repudiation has been tendered to you you must elect to exercise your own judgment, and decide whether you declare the contract to be at an end or not, but there has certainly been no rescission up to the present moment." Only as recently as June 27 the plaintiffs were suing on this contract, and would have gone on to sue still but for the fact that their action was stayed. Then, rather than let it go to arbitration they discontinued it, and this writ does not change the ground and say that they have put an end to this contract, and are now suing on the basis that there is no contract. But it is a claim for a declaration that the plaintiffs may be told that they are entitled to do hereafter what, up to the present, they have not purported to do—namely, to rescind the contract. And there is no trace that I can find down to this writ itself that they have exercised their common law right of declaring the contract to be no longer binding, because the defendants have themselves intimated their inability to perform the contract either by deed or by word. That, therefore, is an answer to the suggestion made that the reference of this claim to the arbitrator would be asking the arbitrator to determine whether the contract exists or not under which alone a cause is found agreeing to refer to him.

As regard the third matter—the trespass—I will not say whether that is trivial or not. I have no opinion about it; but it is separate. It is connected with the use of steam at the plaintiffs' works. It is, however, quite a separate matter. And *Turnock* v. *Sartoris* (6), as I know by experience, is a case one constantly quotes in the hope of preventing a case being stayed on the ground that there is something in it outside the arbitration clause. That case is constantly quoted unsuccessfully because the mere addition to any writ of a separate cause of action is not of itself sufficient to prevent the rest of the action

being stayed if it is within the arbitration clause. You must within *Turnock* v. *Sartoris* (6), and the case before SWINFEN EADY, J., of *Bonnin* v. *Neame* (5) have a matter outside the arbitration clause and yet substantially raising the same facts and rights as would fall to be determined within the arbitration clause. Then, of course, the fact that some part of the action cannot be referred is very good reason for saying, though it is a matter for discretion, that the rest of the action which would involve the same matter ought not to be referred.

The remainder of the appeal turns upon the exercise of discretion. I have no doubt that CHANNELL, J., whether he said so or whether counsel invited him to do so in words, did exercise his discretion. The question for us, therefore, is whether it appears that he exercised it wrongly. In saying that, except as to the cause of action for trespass—as to which there is no cross-appeal—the matter is one in respect of which in his judgment he is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. The whole of this argument turns upon the inconvenience of submitting to a mechanical engineer questions of law. Counsel for the plaintiffs has rightly endeavoured to make the questions of law the most formidable part of the case, and reduce the questions of fact, if not to insignificance, at least to a seat in the background. But I am not able to believe that the questions of law will be as formidable as he seeks to make out and I am satisfied that for their proper comprehension a considerable familiarity with the plant and the facts is absolutely indispensable.

There has been a clear admission by the defendants in a letter that they cannot get absolutely pure carbonic acid gas out of the exhaust of this producer plant. There may be questions of law as to whether their contract binds them to do so and whether the allusion to CO_2 in the specification means the CO_2 commercially so known, or the CO_2 absolutely pure. That is not a difficult question to comprehend although there may be some difficulty in determining it. But again, there may be a question of law of some importance as to what is the materiality of their confession that they cannot get pure CO_2 out of this apparatus, upon a contract which in itself is one contract for a combined plant which produces power by the use of a particular fuel, and incidentally, and by way of by-product, is expected to produce CO_2 in whatever sense that ought to be understood. Again I desire to express no opinion at all about that. But it is plain that there is a great deal to be said, for the confession of inability as to the carbonic acid gas is a matter of such minor importance as not to amount to an admission that the contract cannot be performed in a matter which goes to the root of it. At any rate the questions of law which are raised and which the arbitrator cannot answer he can, and if ordered must, state for the opinion of the court. I have had some experience of machinery cases and my experience is, on the whole, that it is—to say the least of it—quite as difficult to make the lawyer understand engineering as to make the engineer understand the law. I am quite sure that a very small amount of goodwill on the part of the legal advisers of the laymen who will go before this mechanical engineer will enable them to present to him in a form which he can understand questions of law which he will be only too happy not to decide, and that he will, without any real difficulty, and with a high degree of personal competence, state the facts and the damages in a sufficiently alternative form to enable the matter to be disposed of upon a Case Stated, if it be necessary to do so. Even if I had not been able to see my way to what, I think, will be a relatively simple and inexpensive way of solving all the puzzles of this case, I should have felt that it required a very strong case of inconvenience to justify us in overriding the contract of the parties. Whatever opinion one may entertain of the practical wisdom of a clause expressed in these terms, it is the contract of the parties. The authorities, with regard to the personal capacity of a named arbitrator to dispose of the questions raised before him, establish on the whole that it is no easy matter to get the person whom the parties have agreed upon removed from his office merely because he is by no means an ideal judge. I think that it is a still stronger case when we are asked not to set aside the person agreed upon, but the mode of constituting the tribunal. For myself, I should certainly be slow to say that the mere prospect of an entanglement of law and fact when the parties get before the engineer was sufficient to justify a refusal to exercise to the powers under s. 4 of the Arbitration Act, 1889. The parties have made their contract and now it is their

business to disentangle the entanglement, and I do not think they will have any difficulty in doing it. I, therefore, think on this point that the discretion of CHANNELL, J., was properly exercised and that this appeal must fail.

Appeal dismissed.

Solicitors: *Cartwright & Cunningham*, for *Donnison & Edwards*, Liverpool; *Grundy, Kershaw, Samson & Co.*, London and Manchester.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. *v.* LORD GLANUSK

[KING'S BENCH DIVISION (Horridge, J.), June 6, 9, 10, 12, 1913]

[Reported [1913] 3 K.B. 335; 82 L.J.K.B. 1033; 109 L.T. 103; 29 T.L.R. 593]

Guarantee—Discharge—Failure of bank to disclose to guarantor suspicions concerning debtor's conduct.

The defendant gave to the plaintiffs a guarantee of "all moneys which might be due to the plaintiffs as bankers on any accounts whatever" from C., the defendant's agent. The plaintiffs' manager suspected that C. was paying a debt due from him to another bank by an overdraft with the plaintiffs' bank, and that he might also be defrauding the defendant, but these suspicions were not communicated to the defendant. In an action by the plaintiffs on the guarantee,

Held: there was no duty on the plaintiffs to communicate their suspicions to the defendant and their failure to do so did not release the defendant from his guarantee.

Notes. As to avoidance of guarantee on the ground of fraudulent concealment or misrepresentation, see 18 HALSBURY'S LAWS (3rd Edn.) 495 et seq., and for cases see 26 DIGEST (Repl.) 220 et seq.

Cases referred to:

(1) *Railton* v. *Matthews* (1844), 10 Cl. & Fin. 934; 8 E.R. 993, H.L.; 26 Digest (Repl.) 222, *1719*.

(2) *London General Omnibus Co., Ltd.* v. *Holloway*, ante p. 518; [1912] 2 K.B. 72; 81 L.J.K.B. 603; 106 L.T. 502, C.A.; 26 Digest (Repl.) 223, *1724*.

(3) *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109; 8 E.R. 1339, H.L.; 26 Digest (Repl.) 224, *1729*.

(4) *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593; 33 L.T.O.S. 30; 5 Jur. N.S. 499; 7 W.R. 271; 44 E.R. 1397, L.C.; 26 Digest 109, *753*.

(5) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469; 38 L.T. 478; 26 W.R. 794; sub nom. *London and Provincial Marine Insurance Co.* v. *Davies, Davies* v. *London and Provincial Marine Insurance Co.*, 47 L.J. Ch. 511; 26 Digest (Repl.) 226, *1756*.

(6) *Bank of Scotland* v. *Morrison*, [1911] S.C. 593; 26 Digest (Repl.) 220, **667*.

Action tried before HORRIDGE, J.

Holman Gregory, K.C., and *M. M. Macnaghten* for the plaintiffs.
J. Sankey, K.C., and *Eustace Hills* for the defendant.

Cur. adv. vult.

June 12, 1913. **HORRIDGE, J.,** read the following judgment.—This is an action brought to recover the sum of £3,322 1s. 2d., the amount appearing as the balance due

by the letter of the plaintiffs' solicitors dated April 15, 1913, on a guarantee given by the defendant to the plaintiffs. It was not disputed that on the face of the guarantee, which was dated Mar. 1, 1906, it was a guarantee by the defendant of all moneys which might be due to the plaintiffs as bankers on any accounts whatever from Samuel Hood Cooper Coles. At the time when the guarantee was given Coles was acting as the agent of the defendant.

The first question raised before me was whether or not I ought to rectify the guarantee so as to limit it to what were called estate accounts with the plaintiffs. I have, therefore, to ascertain whether there was any antecedent agreement that the guarantee should be so limited. The only evidence in support of this contention was the evidence of Coles himself, whose evidence, I do not hesitate to say, I cannot accept when it is in conflict with that of any other witness. On the other hand, Mr. Powell, the bank manager, stated that the guarantee was to be in respect of the whole of Coles' liabilities. The correspondence prior to the guarantee begins with the letter of Feb. 13, 1906, from Coles to Powell in which he promises to bring in some approved security in respect of the Z account, which was an account other than the estate account. I cannot, with the evidence in this position, find that any anterior agreement to limit the guarantee was made out by the defendant. I therefore hold that the agreement extends to all the indebtedness of Coles.

The second contention before me was that certain transactions which took place in March, 1907, ought to have been communicated by the plaintiffs to the defendant. These transactions were that on Dec. 22, 1906, by a letter of that date Coles had opened an account called "capital account" which Powell, the bank manager, admitted he knew was an estate account. On Mar. 12, 1907, Coles wrote to Powell stating that he had paid out of the capital account, with the defendant's approval, £1,000 to Lloyds Bank, Brecon. This £1,000 was a cheque which was drawn in favour of a gentleman called Morgan, who was the manager at Brecon of Lloyds Bank, and which, when presented, was, in the first instance, refused by Powell, who was manager of the Crickhowell branch. Powell said he refused payment of the cheque, firstly, because he did not believe in allowing Coles to increase his liabilities in order to pay his debts at another bank. He also stated that it would not, in his opinion, have been right for Coles to use money from the capital account for his own purposes and he suspected he was doing this. On Mar. 18 he wrote a letter to the manager of the Brecon branch of the plaintiffs' bank, stating he had a strong suspicion that the cheque was used to pay off some of Coles' liabilities at Lloyds, and that if that was so, the information would be of the utmost importance to the bank, and also stated that the cheque was drawn on an account opened for a special purpose and which should not be overdrawn. The manager said that he had no written answer to this letter, but that he thought he was afterwards satisfied by conversation with the Brecon manager as to the application of the £1,000. I think what the manager was doing was not considering the question of whether Coles was wrongly using the defendant's money, as he had been informed that the defendant knew of the cheque, but that he was suspicious that Coles was paying the debt to another bank by overdraft with the plaintiffs. In any case I do not think there was anything which ought to have conveyed to his mind that Coles was acting dishonestly towards the defendant, and I see no reason to doubt the fact that he was satisfied by the Brecon manager on the question he had written about.

It was contended before me that on the principle of the cases dealing with fidelity guarantees such as *Railton* v. *Matthews* (1) the bank ought to have informed the defendant of any facts which might indicate that his agent was behaving improperly towards him, but I do not think the principle of these cases applies to a bank guarantee: (see *London General Omnibus Co.* v. *Holloway* (2) and the judgment of FARWELL, L.J. (ante at p. 521) and KENNEDY, L.J. (ante at p. 523). The obligation of a bank upon a bank guarantee is laid down by LORD CAMPBELL in *Hamilton* v. *Watson* (3), and the criterion there suggested is whether there is anything which might not commonly be expected to take place between the parties who are concerned in the transaction—that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might commonly expect. Here there clearly was no

contract between the plaintiffs and Coles altering the position that Coles, according to his own evidence, opened accounts for his own convenience, all which accounts were, in my view, covered by the guarantee of the defendant. In *Wythes* v. *Labouchere* (4) LORD CHELMSFORD says with regard to a guarantee other than a guarantee of fidelity that a creditor is under no obligation to inform an intended surety of matters affecting the credit of the debtor, or of any circumstances connected with the transaction in which he is about to engage which will render the position more hazardous. In *Davies* v. *London and Provincial Marine Insurance Co.* (5) FRY, J., says (8 Ch.D., at p. 47):

> "It has been argued here that the contract between the surety . . . and creditor, is one of those contracts which I have spoken of as being uberrimae fidei, and it has been said that such a contract can only be upheld in the case of their being the fullest disclosure by the intending creditor. I do not think that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure."

The nearest case to the one in question is the Scotch case of *Bank of Scotland* v. *Morrison* (6), in which the Lord Justice-Clerk says ([1911] S.C. at p. 602):

> "Further, I am unable to find in the authorities any ground for holding that the fact that suspicious circumstances come to the knowledge of a creditor, and are not communicated at once to the cautioner, is a ground for holding a cautioner freed from his obligation. The defender founded on numerous cases, but these were practically cases of fidelity guarantees, and between such cases and those of caution to a creditor for debt there is a marked and obvious distinction"

and LORD SALVESEN says (ibid. at p. 605):

> "On a review of the decisions cited, it appears, therefore, that there is no authority for the view that it is the duty of a bank, whenever it becomes aware of any circumstances seriously affecting the credit of a customer, to communicate at once with any of that customer's friends who may have signed cash credits on his behalf or guarantees for his pecuniary obligations."

I do not think on the authorities there was any duty on the plaintiffs to communicate to the defendant the fact, if it was a fact, that Coles was defrauding him, nor do I think that upon the facts there is any satisfactory proof that the plaintiffs were so suspicious. I was not supplied on behalf of the defendant with evidence as to whether or not there was any alteration in the balance due on the total accounts in March, 1907, and the time when the defendant was called upon to make good his guarantee, but I was told that if it was held that the plaintiffs ought to have communicated to the defendant the facts I have mentioned, and that by their not doing so he was released from his guarantee the amount due at that period could easily be ascertained.

Judgment for plaintiffs.

Solicitors: *Wilde, Moore, Wigston & Co.*; *Lee & Pemberton.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

RAKUSEN *v.* ELLIS, MUNDAY AND CLARKE

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), March 16, 18, 19, 1912]

B [Reported [1912] 1 Ch. 831; 81 L.J.Ch. 409; 106 L.T. 556; 28 T.L.R. 326]

Solicitor—Duty to client—Non-disclosure of confidential information—Solicitor consulted regarding action—Change of solicitor by client—Right of solicitor's partner to act for defendants to action—Partner ignorant of previous consultation.

C There is no general rule that a solicitor who has acted in a matter for one party shall not in any circumstances subsequently act in the same matter for the opposing party, but where there is (per FLETCHER MOULTON, L.J.) a probability, or (per BUCKLEY, L.J.) a danger, that the solicitor will disclose to the opposing party confidential information which he has obtained from his original client while acting for him the court will restrain him by injunction from so doing. The court will act D according to the circumstances of the particular case, and will do what it feels to be its duty as holding the balance between the highest standard of behaviour which it requires of its officers and the practical necessities of life.

The plaintiff in an action for wrongful dismissal consulted with regard to the case M., one of the partners in a firm of solicitors consisting of two partners. The other partner, C., did not know that the plaintiff had consulted M. and knew nothing of E any communication made by the plaintiff to M. Later, the plaintiff changed his solicitors. The dispute in the action went to arbitration, and while the arbitration was continuing the defendants to the action changed their solicitors and employed C. C. was prepared to undertake not to seek from M., or use any knowledge derived from M., with regard to the action.

Held: there being in the circumstances no reasonable possibility of any mischief F resulting from the employment of C. by the defendants, the court would not grant an injunction restraining him from acting for them.

Notes. As to the obligations of a solicitor towards his client, see 36 HALSBURY'S LAWS (3rd Edn.) 95 et seq., and for cases see 42 DIGEST 91 et seq.

Cases referred to:

G (1) *Earl Cholmondeley and Damer* v. *Lord Clinton* (1815), Coop. G. 80; 19 Ves. 261; 35 E.R. 484, L.C.; 42 Digest 115, *1124.*

(2) *Bricheno* v. *Thorp* (1821), Jac. 300; 37 E.R. 864, L.C.; 42 Digest 115, *1126.*

(3) *Johnson* v. *Marriott* (1833), 2 Cr. & M. 183 ; 2 Dowl. 343; 4 Tyr. 78; 3 L.J.Ex. 40; 42 Digest 115, *1127.*

(4) *Little* v. *Kingswood Collieries Co.* (1882), 20 Ch.D. 733; 51 L.J.Ch. 498; 47 L.T. H 323; 31 W.R. 178; on appeal 20 Ch.D. 741; 42 Digest 115, *1121.*

(5) *Hutchins* v. *Hutchins* (1825), 1 Hog. 315; 42 Digest 115, *f.*

(6) *Biggs* v. *Head* (1837), Sau. & Sc. 335; 42 Digest 115, *g.*

(7) *Beer* v. *Ward, Ward* v. *Beer* (1821), Jac. 77; 37 E.R. 779; 42 Digest 112, *1086.*

Also referred to in argument:

Robinson v. *Mullett* (1817), 4 Price, 353; 146 E.R. 488; 42 Digest 115, *1125.*

I *Parratt* v. *Parratt* (1848), 2 Re G. & Sm. 258; 17 L.J.Ch. 346; 12 Jur. 740; 64 E.R. 116; 42 Digest 116, *1132.*

Davies v. *Clough* (1837), 8 Sim. 262; 6 L.J.Ch. 113; 1 Jur. 5; 59 E.R. 105; affirmed 8 Sim. 269, L.C.; 42 Digest 116, *1129.*

Rawlinson v. *Moss* (1861), 30 L.J.Ch. 797; 4 L.T. 619; 25 J.P. 661; 7 Jur.N.S. 1053; 9 W.R. 733; 42 Digest 56, *479.*

Norton v. *Cooper, Re Manby and Hawksford, Ex parte Bittleston* (1856), 3 Sm. & G. 375; 26 L.J.Ch. 313; 29 L.T.O.S. 378; 3 Jur.N.S. 259; 65 E.R. 701; 42 Digest 342, *3864.*

Appeal by the defendants against an order of WARRINGTON, J., granting an interlocutory judgment to restrain the defendants, a firm of solicitors, from acting as solicitors in certain proceedings. A

In June, 1911, Bonn, Rakusen & Co., Ltd., supported to give the plaintiff, Samuel Rakusen, three months' notice to determine his agreement with that company as sales manager and traveller. Rakusen consulted the defendants, Ellis, Munday and Clarke, a firm of solicitors, the surviving partners in which were Munday and Clarke, and requested them to advise him as to his position. He had several interviews with Munday, in which he gave confidential information in regard to the matters in dispute between himself and Bonn, Rakusen & Co., Ltd. In October, 1911, Samuel Rakusen changed his solicitors, and instructed B. A. Woolf & Co. to act for him in the matter. Acting on their advice Samuel Rakusen issued a writ in the King's Bench Division against Bonn, Rakusen & Co., Ltd., claiming damages for wrongful dismissal. After some negotiations it was agreed that the matters in dispute between himself and Bonn, Rakusen & Co., Ltd., should be referred to arbitration pursuant to the provisions of the Arbitration Act, 1889. B C

While the arbitration was proceeding Bonn, Rakusen & Co., Ltd., gave notice of change of solicitors and stated that Ellis, Munday, and Clarke had been appointed to act for them in place of the solicitors who had acted for them up to that time. Rakusen alleged that it was improper for Ellis, Munday, and Clarke to act as solicitors for Bonn, Rakusen & Co., Ltd., in the arbitration proceedings in view of the confidential information and knowledge obtained from him while they were acting as his solicitors, and that he would be prejudiced in those proceedings if they did so act. D

He commenced this action against Ellis, Munday, and Clarke claiming (a) an injunction to restrain the defendants from acting as solicitors for Bonn, Rakusen & Co., Ltd., in the arbitration proceedings between the plaintiff and that company; (b) an injunction to restrain the defendants from communicating to Bonn, Rakusen & Co., Ltd., or any other person, firm, or corporation any information in connection with the arbitration proceedings obtained by the defendants from the plaintiff or obtained by them whilst acting as the plaintiff's solicitors or in consequence of their so doing; (c) damages for breach of duty; and (d) further or other relief. E F

Rakusen then moved for an injunction until after the trial of the action or further order in the terms of the writ. On Mar. 15, 1912, WARRINGTON, J., decided that, apart from the question whether the defendants might communicate to the company confidential information obtained from the plaintiff, a firm of solicitors, who had acted for a plaintiff in a particular cause or matter ought not to be allowed to act subsequently as solicitors for the defendant. An interlocutory injunction was accordingly granted as asked. From that decision the defendants appealed. G

Cozens-Hardy, for the defendants.
Cave, K.C., and *Harold S. Simmonds*, for the plaintiff.

COZENS-HARDY, M.R.—It is of vast importance that there should be no doubt thrown upon the true position of solicitors in a matter of this kind, or of the jurisdiction of the court over solicitors. Solicitors have great privileges and they have corresponding duties. Of their privileges a better instance cannot be furnished than the absolute privilege which is conferred on them in the matter of giving evidence in the matter of, say, communications which they may make to their clients, or their clients may make to them. We expect, and, indeed, we exact, from solicitors, who are officers of the court, a higher standard of conduct than we can enforce against those who are not our own officers. A solicitor can be restrained as a matter of absolute obligation, and as a matter of general principle, from disclosing any secrets which are confidentially reposed in him. In that respect he does not very much differ from the position of any agent—any confidential agent—who is employed by a principal, but in the present case we have to consider something much further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the H I

A opposite party in the same matter under any circumstances. It is said that that is very much a general rule because of the danger which would attend the disregard of it, and that the court ought not to have regard to the special circumstances of each case. I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his B former client. In my view, however, we must treat each of these cases, not as a matter of form, not as a matter to be decided upon the mere proof of a former acting for a client, but as a matter of substance. We must come to a conclusion before we allow any special jurisdiction over solicitors to be invoked, and we must be satisfied that there is real mischief and real prejudice which in all human probability will result if the solicitor is allowed to act.

C Let me take the circumstances of the present case. There was a dispute between the plaintiff, Mr. Rakusen, and the company in whose employment he had formerly been as to whether he had been wrongfully dismissed. The defendant firm of Ellis, Munday, and Clarke were consulted by Mr. Rakusen on that point. The services of the firm were dispensed with some day in October, 1911. I have seen the bill of costs which was rendered by the firm and which has been wholly or partially paid. It has been settled in D some way or another because there is a receipt attached to the bill. It is quite clear that there was some confidential information furnished by Mr. Rakusen to the member of the defendant firm, Mr. Munday, who, and who alone, was consulted in the matter. Mr. Munday obtained information from the plaintiff, who said that he had been wrongfully dismissed by the company. Mr. Munday was thus given confidential information bearing upon the circumstances or the alleged justification of the wrongful dismissal. E It it had been a case of Mr. Munday afterwards appearing in that action for the defendants, I should have said that that was a case in which he was putting himself in a position in which he could not as an honest man discharge his duty to the defendants without consciously or unconsciously availing himself of information which he had obtained while acting for Mr. Rakusen. Such a case would, I think, be just a typical case of a person not being allowed to put himself in a position in which he could not clear F his mind from the knowledge that he had obtained. I cannot bring myself to doubt that any respectable solicitor would in those circumstances have said at once: "I am very sorry; I cannot act for you because I am familiar with the circumstances alleged by the other side, which circumstances have been communicated to me confidentially."

But what are the facts here? The communications all took place with Mr. Munday. At that time Mr. Clarke, another member of the firm of solicitors, was away for his G vacation out of the country, and he knew nothing about the matter. He has never seen any statement in the matter. Mr. Clarke has stated that he never then saw Mr. Rakusen. He had no communication with him, and knew nothing about the matter. He was really a complete stranger to the matter. Before the action was commenced, before the writ was issued, Ellis, Munday, and Clarke had ceased to be solicitors for Mr. Rakusen. In those circumstances is there any reason why Mr. Clarke, who was allowed H to watch and attend the proceedings in the arbitration (for I ought to say that the subject-matter of the action was referred to arbitration) and was allowed to attend on behalf of a shareholder before the arbitrator for some days—is there any reason why he should not be allowed to act as and to appear as solicitor for the company? In my opinion, there is no substance whatever in that objection. There is no prejudice, no mischief; and having regard to the undertaking which was given that, although the solicitors on I the record were Ellis, Munday, and Clarke, that should be changed, and Mr. Clarke should alone be the solicitor on the record, I can see no ground for allowing to continue the injunction which has been granted.

But it is right that I should say a few words upon the authorities which have been cited to us. It has been said that the law on this subject has been settled since LORD ELDON'S time when *Earl Cholmondeley and Damer* v. *Lord Clinton* (1) was decided. I have read and re-read the judgment in that case and I think that it lays down no such principle whatever. As is contended for in the present case it was, as explained by LORD ELDON in the subsequent case of *Bricheno* v. *Thorp* (2), a case in which a solicitor,

one of the members of a firm, in the middle of a litigation, discharged himself and went over to the other side. That was really a breach of contract and not merely a breach of duty. LORD ELDON and the judges whom he consulted really decided that case on a ground which is not now treated by counsel on either side, and I think is properly not treated by counsel on either side, as conclusive of the matter. LORD ELDON proceeded on the footing that a solicitor could not by discharging himself in the middle of a suit deprive the client of the right which he had by the contract of retainer to the services of that solicitor.

Our attention has been called to other cases which carry the matter further in the direction which I have indicated. There was the case before LORD ELDON of *Bricheno* v. *Thorp* (2) in which, as I have said, he explained *Earl Cholmondeley* v. *Lord Clinton* (1). He explained it substantially on the lines which I have already suggested. Then there is the case in the Court of Exchequer of *Johnson* v. *Marriott* (3), the decision in which is absolutely inconsistent with the supposed general rule that has been relied upon. There the Court of Exchequer declined to discharge a rule which had been obtained for a change of solicitors from one side to the other on the ground that there was no evidence shown of any material circumstances which would justify it.

But then it is said that HALL, V.-C., in *Little* v. *Kingswood Collieries Co.* (4) laid down some principles which are sound in law and ought to govern the decision of the court in the present case. No doubt HALL, V.-C., did lay down some principles, particularly in one passage I will read, which require consideration. The learned Vice-Chancellor there said (20 Ch.D. at p. 740):

> "Where the second transaction flows out of the first, and, from the nature of the dispute, is so connected with it as I consider this to be, the new client ought not to employ that particular solicitor in the transaction, and the solicitor ought not to accept the employment, and the case is then one in which at the instance of the former client the solicitor ought upon general principles of equity to be restrained from so acting."

HALL, V.-C., seems to have thought that the mere fact that the solicitor had once advised or acted in an early stage of the same matter ought to prevent him from ever acting for the other side quite irrespective of the circumstances of the case. That case went to the Court of Appeal, and although the decision was not formally overruled, the view of the learned Vice-Chancellor was obviously not adopted by the Court of Appeal, for the appellants' counsel were stopped at a certain stage of the argument, and counsel for the respondent (the plaintiff) were heard. The court then suggested a compromise. SIR GEORGE JESSEL, M.R., said that he thought the order of HALL, V.-C., went further than had been done in any previous case, even than the cases in Ireland, to two of which cases our attention has been called—namely, *Hutchins* v. *Hutchins* (5) and *Biggs* v. *Head* (6). Then his Lordship intimated that he thought that, although there was no law that, because a solicitor had acted for a person, he might not afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the court could always, on general principles, restrain a solicitor who threatened to disclose secrets. The Court of Appeal there laid down a distinction between an absolute duty not to disclose secrets and a duty which is not absolute but dependent on circumstances—namely, a duty not to act for an opposite party in the same litigation. The court went further. They sanctioned a compromise; indeed, they suggested a compromise, under which the solicitor was to continue to act in the litigation contrary to the injunction which was granted by HALL, V.-C. I, therefore, think that that is not absolutely an authority binding on this court on the point. It is such an intimation of opinion as to render it easy for me to say, as I do say, that I think that the judgment of HALL, V.-C., went further than can be warranted either on principle or on authority, and that it ought not to be followed.

In my opinion, without going through the other authorities to which our attention has been called, the injunction granted by WARRINGTON, J., must be discharged. But I do not wish quite to leave it there. WARRINGTON, J., has said, and it has been admitted on both sides here, that the court is dealing with solicitors of the highest position whose

honour and integrity is beyond any imputation. No possibility of the disclosure of secrets has ever been suggested. But WARRINGTON, J., merely based his judgment on the view, that it has been frequently said in this court that a solicitor as an officer of the court cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client. With great respect to WARRINGTON, J., I think that that is going a great deal too far. Many busy solicitors in this country would find it impossible to carry on their business at all if that was endorsed as the true rule. I think that solicitors of the highest honour and integrity may frequently be perfectly able to act for a new client and at the same time may be perfectly able to avoid disclosing secrets without putting any strain upon their memory, conscience, or integrity. In my opinion, therefore, the order of WARRINGTON, J., must be discharged, and this appeal should be allowed.

FLETCHER MOULTON, L.J.—I am of the same opinion. Before dealing with the case before us I want to say a few words about the action of the courts and the rights of parties in cases in which there is no question of solicitor and client, but in which the feature of confidential relationship is to be found.

In almost all businesses there must be persons in such a confidential relation to the employer or the people who are employed by him, or for such purposes in relation to the business transacted that the knowledge which they acquire is not knowledge at their disposal, but really consists of the secrets of their employer. Such employments come to an end sometimes at the choice of the employer and sometimes at the choice of the employee. Thereupon difficulties necessarily arise, because the person who is no longer in employment still has in his breast secrets which are the property of his past employer. The view that the law takes of the rights of the parties there is too clear to be disputed. The employee is quite free to go into the service of people who may be or may have been the rivals or the opponents of his past employer. The law does not say that the possession of those secrets shall cripple the employee's work or sterilise it. The employee may go into employment quite inconsistent with the employment which he had in the past. What the law says is that the employee shall not disclose or put at the service of his new employer the secrets that belong to his old employer.

In the case of the special employment of a solicitor by a client, in my opinion, the fundamental principle remains the same as in the other cases of confidential employment. I accept that with regard to this the dictum, because it was embodied in a formal judgment of SIR GEORGE JESSEL, M.R., when he said that, although there was no law that because a solicitor had acted for a person he might not afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the court could always, on general principles, restrain a solicitor who threatened to disclose secrets.

That is the law with regard to all confidential employment, and it applies to the confidential employment of a solicitor by a client. But, although the fundamental law is not different, its application is widely different in degree, and for two reasons. In the first place, the degree of the confidential character of the relation between the client and his solicitor and of the communications made by the client to the solicitor is in the eyes of the law the very highest. So high is it that the solicitor is absolutely privileged, and cannot be made to state what passed between him and his client. To that extent the solicitor is made, as it were, a part of his client for the purposes of those communications. But there is another reason, and that is that the court is not bound to take the standard of sensibility which it may feel is all that it can enforce on people in general who are in confidential relations one with another. It can put a standard of the behaviour of its own officers which is higher than would be practicable to exact from persons in other types of confidential relations. I think, therefore, that in deciding the question of what the action of a solicitor may be, although the court does not start fundamentally from a different rule, the decisions it makes are necessarily very different in many cases from the decisions that it would make were it appealed to in an action between persons who had never had any relations between one another excepting contractual relations when those contractual relations involved confidential communication. That being my view of the

law, one thing stares me instantly in the face. The court must act in each case according to the circumstances of the case. If there is a distinction between a solicitor and other persons confidentially employed, it is one of degree based on one of those two considerations that I have mentioned. The moment that you are convinced that it is one of degree it means that you must look at the facts of the case and apply to them the fundamental principles of the law modified by those two considerations to which I have referred. Therefore, the court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it must be a case where you can prove that there will be mischief, because you cannot prove anything of that sort. But I say that it must be a case where there is such a probability of mischief that the court feels that in its duty as holding the balance between the highest standard of behaviour which it requires of its officers and the practical necessities of life, it is obliged to interfere and say that a solicitor shall not act.

In the present case there is an absolute absence of any possibility—any reasonable possibility—of any mischief whatever. This is an attempt to make the court move in a matter on the most purely technical grounds where it ought to deal only with realities. Mr. Rakusen, the client, consulted Mr. Munday and only Mr. Munday. Nobody else in his firm acquired any knowledge of any communication, confidential or otherwise, to Mr. Munday other than that gentleman himself. Mr. Clarke, his partner, was away at the time, and it is admitted that he knew nothing even of the fact that Mr. Munday had been consulted, and à fortiori he knew nothing whatever of the communications which had been made to Mr. Munday. Furthermore, he is willing to undertake not to seek from his partner or use any knowledge whatever derived from his partner with regard to the matter. Nobody pretends that that gentleman will not act up to that undertaking. If we were to say that he—not his firm, but he personally—was not to act, in my opinion, we should be abusing the power that we certainly have of directing what the officers of the court should and should not do.

For these reasons—although I think that the suggestion that the name of the firm should formally be on the proceedings as the solicitors of the company was a mistake—I see no reason whatever why Mr. Clarke should not act for them, and I am perfectly satisfied that no mischief whatever will come from his so doing. I do not intend to deal with the authorities that have been cited beyond this. I want to point out that the decision in *Earl Cholmondeley* v. *Lord Clinton* (1) must be read with the authoritative explanations of it which were given by the Lord Chancellor in *Beer* v. *Ward* (7) and *Bricheno* v. *Thorp* (2). As so read, in my opinion, it will not have the effect which the learned judge in the court below gave to it in the present case. With regard to *Hutchins* v. *Hutchins* (5) one of the Irish cases—I think that that is based on a misunderstanding of the decision in *Earl Cholmondeley* v. *Lord Clinton* (1), and, with regard to *Biggs* v *Head* (6), it is quite clear there there had been in the opinion of the court a breach of the confidential relations. For these reasons I think that this appeal ought to be allowed.

BUCKLEY, L.J.—There is a general principle applicable not to solicitors only, but to confidential agents of all kinds, that confidential information shall not be used by the agent against the principal from whom, or for whom, and in whose employment, it has been obtained. There is no general rule that a solicitor who has acted in a particular matter for one party shall not, under any circumstances, subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends upon the particular circumstances of each case. Of course he will be restrained from communicating confidential information. But the respondent contends that even when there is no danger of this happening the solicitor will still be restrained from acting. Further, he maintains a still larger proposition and asserts that this doctrine extends to the partner who knows nothing of the solicitor who from his previous employment knows something. In my opinion, neither of those propositions can be maintained. In some of the reported cases the injunction sought has been an injunction to restrain the new client from employing the solicitor and an injunction to restrain the solicitor from acting. In the present case the injunction is asked only against the

solicitor. But it must not be forgotten that such an injunction, if granted, has just the same effect, so far as the client is concerned, as if the injunction were granted against him also. He cannot obtain the services of that solicitor. The question thus involves the consideration of the circumstances under which a client is to be prevented from instructing a particular solicitor. The circumstances, I think, are these. The jurisdiction is a jurisdiction to restrain the solicitor from giving the new client any assistance against the old client by reason of knowledge acquired as solicitor for the old client. If to insure that result it is shown to be reasonably necessary to restrain the new client from employing him, the injunction will be granted, but on no other ground could such an injunction be granted as against the client.

Counsel for the defendants has asserted this general principle—which he says is to be found in the authorities—that when a solicitor has acted for a client in a particular matter, he or his partner cannot act against him in anything relating to that matter; and that this principle is true irrespective of the particular circumstances of the case. I am of opinion that there is no such principle. There is no law that because a solicitor has acted for a client in a matter he may not afterwards act against him in the same matter. It depends on the circumstances whether he shall not be allowed to act or not. The learned judge from whom this appeal is brought I find has said this:

> "It has been frequently urged in this court that a solicitor, as an officer of the court, cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client. And I think that the principle which has been laid down by the courts is that in such a case as that the court does not inquire what information the solicitor may have or what information he may communicate. He is presumed to have been in confidential relationship with his client, and he will not be allowed to put himself into confidential relationship with another client opposed to his first client."

With great deference to the learned judge, I think that that is erroneous in point of law. The cases, I think, have established this. As between the court and the solicitor who is an officer of the court there is the most ample jurisdiction to restrain any mischief resulting from the communication of confidential information obtained in the employment by one client to his detriment in the employment by another client. As regards *Earl Cholmondeley* v. *Lord Clinton* (1), I think that the best summary of the whole result of that case is to be found in LORD ELDON'S own subsequent statement of what alone he decided. In *Bricheno* v. *Thorp* (2) he said that *Earl Cholmondeley* v. *Lord Clinton* (1) was no more than that a gentleman discharged himself from being solicitor for Lord Clinton, and the question was whether the court would permit him to turn his back on his client and to go into the service of the person against whom he had been employed. When *Earl Cholmondeley* v. *Lord Clinton* (1) is carefully read, it will be found that LORD ELDON and the judges whom he consulted were all basing their views upon this as being, in their opinion, the one cardinal feature of that case—that the solicitor had discharged himself. They drew, I think, the inference that, having discharged himself, he was going into the employment of a new client, with the result, or the possible result, or the anticipated result, that there would be a breach of the confidential duties which he owed to his former client. Of course, he owed his former client the duty not to disclose that which he had learned confidentially. But there is no duty in a solicitor to abstain from serving another client in the same matter if there is no breach of that relationship. The only other case to which I wish to refer is *Little* v. *Kingswood Collieries Co.* (4). It seems to me that the principles upon which HALL, V.-C., there purported to act were so shaken by that which was decided in the Court of Appeal that it may be said that the judgment of the learned Vice-Chancellor cannot be relied upon. It will be noticed that that case is a final blow to any such doctrine as counsel for the plaintiff propounded here, namely, that the solicitor cannot act under any circumstances, because there the court approved a compromise under which he was to act. That, therefore, cannot be improper and wrong. Although it is stated that the obervations were made to some extent in the course of the argument, it seems to me from the fact that the appellants' counsel were stopped, from the observations which were made, and from the compromise which the

court approved, plainly to follow that the principles for which counsel for the plaintiff has argued here cannot be maintained.

There is only one further matter which I want to mention. The learned judge in the court below was proceeding on the footing, and we are proceeding on the footing, that in the present case the actual danger of communication of secrets will not arise. Those are the learned judge's words. In that state of facts it appears to me that the granting of an injunction is an impossible course. The whole basis of the jurisdiction to grant the injunction is that there exists—or, I will add, may exist or may be reasonably anticipated to exist—a danger of a breach of that which is a duty, an enforceable duty, a duty not to communicate confidential information. But directly you have negatived the existence or possible existence of any such danger, in my opinion the whole basis and substructure of the possibility of injunction is gone. I think, therefore, that the order made by WARRINGTON, J., ought to be discharged.

Appeal allowed.

Solicitors: *Ellis, Munday & Clarke*; *B. A. Woolf & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

R. *v.* WIGAND

[KING'S BENCH DIVISION (Ridley and Avory, JJ.), May 2, 1913]

[Reported [1913] 2 K.B. 419; 82 L.J.K.B. 735; 109 L.T. 111; 29 T.L.R. 509]

Practice—Contempt of court—Disobedience to order of court—Absence of personal service—Evasion of service by person in contempt—Issue of writ of sequestration—R.S.C. Ord. 43 *r.* 6.

A wife left her husband's house and took with her their child, about four years of age. The husband took the child back to his house, and a judge of the King's Bench Division, B. made an order in chambers that the husband should deliver the child into the custody of its mother, and should not remove the child out of the jurisdiction. On the husband's appeal this order was confirmed by the Divisional Court, subject to the husband having access to the child on certain days in the week, and on his undertaking not to remove the child out of the jurisdiction, which undertaking was given on his behalf. The husband subsequently and before the order of the court was personally served on him, in breach of the undertaking went to Germany and took the child with him. The wife applied for a writ of attachment and for an order for a writ of habeas corpus. The Divisional Court made an order to bring the child before the court on the following morning, and granted a rule nisi for attachment for disobedience of the order of the judge in chambers. On an application to make absolute the rule for attachment and for an order that a writ of sequestration should issue,

Held: as the husband had full knowledge of the order made by the court and had gone out of the jurisdiction thereby evading personal service of the order, the court had jurisdiction to issue a writ of attachment for his disobedience to the order made by the judge and for his breaking his undertaking given to the court, and to issue a writ of sequestration, notwithstanding the absence of personal service of the order.

Notes. Referred to: *Re Suarez, Suarez* v. *Suarez*, [1916–17] All E.R. Rep. 641.

Cases referred to:

(1) *Gordon* v. *Gordon*, [1903] P. 141, 72 L.J.P. 33; 89 L.T. 73; on appeal [1904] P. 163;

73 L.J.P. 41; 90 L.T. 597; 52 W.R. 389; 20 T.L.R. 272; 48 Sol. Jo. 297, C.A.; 16 Digest (Repl.) 79, *809*.

(2) *Allen* v. *Allen* (1885), 10 P.D. 187; 54 L.J.P. 77; 33 W.R. 826; 16 Digest (Repl.) 67, *660*.

(3) *Miller* v. *Miller* (1870), L.R. 2 P. & D. 54; 39 L.J.P. & M. 38; 22 L.T. 418; 18 W.R. 585; 21 Digest 596, *1781*.

Also referred to in argument:

Pratt v. *Inman* (1889), 43 Ch.D. 175; 59 L.J.Ch. 274; 61 L.T. 760; 38 W.R. 200; 6 T.L.R. 91; 21 Digest 595, *1768*.

Re Tuck, *Murch* v. *Loosemore*, [1906] 1 Ch. 692; 75 L.J.Ch. 497; 94 L.T. 597; 22 T.L.R. 425, C.A.; 16 Digest (Repl.) 62, *596*.

Hyde v. *Hyde* (1888), 13 P.D. 166; 57 L.J.P. 89; 59 L.T. 529; 36 W.R. 708; 4 T.L.R. 586, C.A.; 16 Digest (Repl.) 68, *661*.

Rules Nisi for a writ of habeas corpus and for a writ of attachment for contempt of court in disobeying an order made by a judge with respect to the custody of a child.

Disputes arose between a Mr. Wigand and his wife. Mr. Wigand, the father of the child—a girl about four and a half years old—was a German, and the mother, Mrs. Wigand, was a Frenchwoman. The husband and wife lived in this country, and on Mar. 7, 1913, the wife left her husband's house and went to her mother's house, taking the child with her. The husband sent some friends to the house where his wife and child were and forcibly took the child back. Mrs. Wigand then obtained a writ of habeas corpus directing her husband to bring the child before the court, and on April 21, 1913, BAILHACHE, J., in chambers made an order that the child should be delivered up to the wife, with liberty to the husband to have access to the child on Saturday afternoons and to take it out during those afternoons, both husband and wife undertaking not to remove the child out of the jurisdiction of the court.

The husband appealed against this order to the Divisional Court, and on April 28 the court affirmed the order of BAILHACHE, J., except as to the right of access to the child, which was varied by giving the father the right of access to the child on Wednesdays, Saturdays, and Sundays, from two to five o'clock p.m., on his giving an undertaking not to remove the child out of the jurisdiction, which undertaking was given. It appeared that the father came to the house where his wife was living on Wednesday, April 30, and took the child out for a walk, but the child had not been returned to the mother as under the order of the court it was the father's duty to do, and it was apprehended that the child was, or might be, taken to Germany.

Application was made on behalf of the mother of the child for a writ of attachment and for a fresh order for a writ of habeas corpus, and on May 1 the Divisional Court made an order to bring the child before the court on the following morning and granted a rule for the husband's attachment for disobedience to the order of BAILHACHE, J. Application was then made that the rule for attachment should be made absolute, and that the order of BAILHACHE, J., should be enforced by a writ of sequestration. Neither the order nor the rule for the writ of attachment had been served personally on the husband owing to his having left the country; but he had been present in court when the order of BAILHACHE, J., was made on April 21, and the undertaking not to remove the child out of the jurisdiction had been given by his authority. It also appeared that the husband had a partner and a business in this country, and it was contended that a writ of sequestration should issue as a means of bringing pressure to bear upon the husband.

Order 43., r. 6, of the Rules of the Supreme Court provides:

> Where any person is by any judgment or order directed to pay money into court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds

of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery. A

Theobald Mathew for Mrs. Wigand in support of the rules.

The respondent did not appear.

RIDLEY, J.—In this case, which has raised a difficult point of practice, we think after some consideration that we ought to make the rule nisi for attachment absolute, and B that we ought to make an order for the issue of a writ of sequestration as well. The respondent had full knowledge that he was disobeying the order of the court and that he was breaking his undertaking given to the court, the fact being that he had left the country, well knowing that proceedings would be taken against him, in order that he might keep possession of the child. That is, I believe, the ground and the reason on which we can act. In these circumstances, although under r. 6 of Ord. 43, there C ought to be personal service on the respondent before a writ of sequestration should be issued, and although there has not been personal service, yet when it can be shown that the person is purposely keeping out of the way in order to evade service, then the writ of attachment ought to be issued and also a writ of sequestration.

In *Gordon* v. *Gordon* (1), where the respondent removed a child out of the jurisdiction with the full knowledge that the child ought not to be removed, and where she had given D an undertaking not to remove the child, a writ of attachment was issued. The question was raised whether or not there could be an order of attachment against her on an ex parte application, and Sir Francis Jeune, P., said that his difficulty was that it was not shown that the exact order had been disobeyed as she had not been served with it, and he said:

"I think, on the whole, that there is a valid order, and that you may take both a writ of attachment and an order for committal." E

That seems to me to be an authority to a great extent for the proceeding in the present case, where the facts are very similar, because the respondent with full knowledge of the order that was made by the court has removed the child out of the jurisdiction. In *Allen* v. *Allen* (2) the court ordered a writ of sequestration to issue although there had F been no personal service and no previous order of attachment. It was argued in support of the motion for a writ of sequestration that it was clear that the respondent was evading personal service, and that the court would, therefore, dispense with it, and that it was not now necessary that an attachment should issue prior to sequestration: (*Miller* v. *Miller* (3)). For the respondent it was argued that according to the practice of the Court of Chancery personal service was indispensable (Daniell's Chancery Practice G (5th Edn.), p. 903), and that in *Miller* v. *Miller* (3) the person to be served had gone abroad. Sir James Hannen, P., said (10 P.D. at p. 187):

"I am satisfied that these orders have come to the knowledge of the respondent, and that she is keeping out of the way in order to avoid personal service. The principle of *Miller* v. *Miller* (3) applies to this case, and therefore I order the writ to issue and condemn the respondent in costs." H

It may be said that the present case is really à fortiori to that of *Allen* v. *Allen* (2), because the respondent is not merely keeping out of the way to avoid personal service, but he has absolutely left the country beforehand. Under these circumstances I think the writ of sequestration ought to issue.

AVORY, J.—I am of the same opinion, and, in order to prevent any possible misunderstanding, I merely wish to add that it is for contempt in disobeying the order of I Bailhache, J., and for breaking his undertaking which was given to the court on Monday last not to remove the child out of the jurisdiction that the writ of sequestration will be issued.

Rule absolute for attachment, and order for issue of writ of sequestration.

Solicitors: *Munton, Morris, King, Gavan Duffy & Co.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

SUGDEN *v.* LEEDS CORPORATION

[HOUSE OF LORDS (Viscount Haldane, L.C., the Earl of Halsbury, Lord Kinnear, Lord Atkinson and Lord Mersey), February 6, 7, 14, April 3, 1913]

[Reported [1914] A.C. 483; 83 L.J.K.B. 840; 108 L.T. 578; 77 J.P. 225; 29 T.L.R. 402; 57 Sol. Jo. 425; 11 L.G.R. 662; 6 Tax Cas. 211]

Income Tax—Annual payment—Profits and gains brought into charge—Undertakings of municipal corporation—Interest on loans of corporation—Deduction of tax—Accounting for tax deducted.

A person assessed to income tax can retain the tax which he has deducted from the interest paid to a creditor only if the interest is effectively charged on and is lawfully payable out of the taxable income.

In accordance with the Municipal Corporations Act, 1882, a municipal corporation provided a "borough fund" in aid of which it was empowered to make a "borough rate." The corporation was also an urban sanitary authority, and its expenses in that character were payable out of a "consolidated fund" maintained by a "consolidated rate" levied under statutory authority on a basis different from that on which the borough rate was levied. As a municipal corporation it owned undertakings in respect of which it had raised loans, the interest on which was charged on the profits of the undertakings, and if necessary the borough fund. Any surplus income from such undertakings was paid into the borough fund. As a sanitary authority it owned other undertakings, the profits of which were paid into the consolidated fund in a similar manner. Where money was borrowed for the purpose of undertakings owned as a sanitary authority, interest was charged first against income from such undertakings, and secondly against the consolidated fund. The profits of these latter undertakings were not sufficient to pay the interest due on the loans raised in respect of them, and the corporation transferred a sum from the borough fund to meet such deficiency.

Held: it was not lawful to pay the interest out of the borough fund, and, therefore, the corporation was bound to account for the income tax which it had deducted from the interest so paid.

L.C.C. v. *A.-G.* (1), [1901] A.C. 26 and *A.-G.* v. *L.C.C.* (2), [1907] A.C. 131, explained.

Notes. Considered: *Sterling Trust* v. *I.R. Comrs.*, *I.R. Comrs.* v. *Sterling Trust* (1925), 12 Tax Cas. 868. Applied: *Dickson* v. *Hampstead Borough Council* (1927), 91 J.P. 146. Considered: *A.-G.* v. *Metropolitan Water Board*, [1927] All E.R. Rep. 526; *Fenton's Trustee* v. *I.R. Comrs.*, [1936] 1 All E.R. 116. Referred to: *Coman* v. *Rotunda Hospital, Dublin*, [1921] 1 A.C. 1; *Birmingham Corpn.* v. *I.R. Comrs.*, [1930] All E.R. Rep. 699; *I.R. Comrs.* v. *Dalgety & Co.*, [1930] 1 K.B. 1; *Luipaad's Vlei Estate and Gold Mining Co.* v. *I.R. Comrs.*, [1930] 1 K.B. 593; *I.R. Comrs.* v. *Crawshay* (1935), 153 L.T. 457; *Trinidad Petroleum Development Co.* v. *I.R. Comrs.*, [1936] 3 All E.R. 801; *Central London Rail Co.* v. *I.R. Comrs.*, [1936] 2 All E.R. 375; *Allchin* v. *Coulthard*, [1943] 2 All E.R. 352.

As to annual payments out of profits or gains brought into charge, see 20 HALSBURY'S LAWS (3rd Edn.) 368 et seq.; and for cases see 28 DIGEST (Repl.) 191 et seq.

Cases referred to:

(1) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest (Repl.) 191, *790.*

(2) *A.-G.* v. *L.C.C.*, [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest (Repl.) 192, *791.*

(3) *Edinburgh Life Assurance Co.* v. *Lord Advocate*, 1909 S.C. 847; reversed, [1910] A.C. 143; 79 L.J.P.C. 41; 101 L.T. 826; 26 T.L.R. 146; 54 Sol. Jo. 133; 5 Tax Cas. 472, H.L.; 28 Digest (Repl.) 192, *794*. A

Also referred to in argument:

Mersey Docks and Harbour Board v. *Lucas* (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest (Repl.) 47, *179*. B

Appeal from an order of the Court of Appeal (COZENS-HARDY, M.R., and FARWELL, L.J., KENNEDY, L.J., dissenting), reported 105 L. T. 489, reversing a decision of HAMILTON, J., reported 104 L. T. 166.

The question raised by the appeal had reference to the right of the respondents to retain for their own use the tax on a sum paid by way of interest or dividends on loans contracted by the corporation amounting to £78,519 which tax the respondents had C deducted in paying the interest or dividends over to the persons entitled to them. The corporation in paying the dividends or interest on the loans had always deducted income-tax, and it appeared from the accounts kept by the corporation that £285,446 was provided by transfer to the dividend account of £146,749 from the borough fund and undertakings and profits on which were payable to the borough fund, and £138,697 from the consolidated fund and the electricity undertaking. D

It also appeared that the taxed income of the consolidated fund, including that of the electricity undertaking, amounted to £44,768, and the contention of the Crown was that as the balance of £138,697 paid from the consolidated fund—viz., £93,929—was, therefore, paid out of untaxed income, the corporation must account to the Crown for the income tax deducted by the corporation in paying interest and dividends to this account. E

The corporation, on the other hand, contended that, although they were bound as between persons rated respectively to the borough rate and to the consolidated rate to apply any surplus income of the borough fund in relief of the borough rate, yet they might for income-tax purposes treat that fund and the consolidated fund as one, and treat any taxed income received from the borough fund as applied in payment of dividends and interest payable out of the consolidated fund. The corporation admitted F their liability in respect of the tax on £15,410 being the difference between the above sums of £93,929 and £78,519. HAMILTON, J., decided in favour of the contention of the Crown, but his judgment was reversed on appeal as above mentioned.

The Attorney-General (*Sir Rufus Isaacs, K.C.*), *the Solicitor-General* (*Sir John Simon, K.C.*), and *W. Finlay* for the appellant.

Danckwerts K.C, *Ryde, K.C.*, and *Jeeves* for the respondents. G

The House took time for consideration.

April 3, 1913. The following opinions were read.

VISCOUNT HALDANE, L.C.—Broadly stated, the principle of the Income Tax Acts is to charge all income with tax, but in the hands of the same person only once. Income is brought into such charge at its source, and the burden is then distributed H among the recipients, who bear their shares of it proportionately. When the tax is payable on income which consists of the profits of property or undertakings, and out of these profits annual payments have in substance and properly been made, the person entitled to such profits, whatever in point of mere form may have been the way in which he has kept his accounts, is still charged with tax on the whole of the profits. But the Acts give him the right to deduct the tax due from the recipient in respect of the annual I payments, and, as he has himself already paid tax on the whole profits, to retain for himself the amount so deducted. If, on the other hand, the annual payments were not really and properly made out of the profits, he is treated as having received these profits undiminished, and, though still bound to deduct the tax from what he has to pay to the creditor, he must account to the Crown for what has been so deducted.

If the annual payments would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of

income, this does not affect his right to retain the amount of tax which he has deducted. On the other hand, it is not enough to entitle him to retain it that he has a merely contingent or ineffective right to pay out of the profits; this right must be of a kind which actually enables payment to be properly made out of the profits, and does not leave them practically unaffected because of the existence of some other source of income primarily and effectively applicable in discharge of the burden. In each case the question is whether the annual payments taxed are actually and properly payable out of the profit. If they are, these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax which he deducts from the annual payments before making them, as being tax which he has already paid. These propositions appear to me to result from the consideration of the Acts themselves, and their interpretation in the three cases on their construction (*L.C.C.* v. *A.-G.* (1), *A.-G.* v. *L.C.C.* (2). *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3) decided by this House in 1901, 1907, and 1910, to which reference was made during the arguments.

In the case now before the House the corporation of Leeds is the owner of various undertakings, such as waterworks, gasworks, tramways, markets, and electric lighting, and it owns certain hereditaments. The undertakings were acquired and worked under the provisions of various private Acts and Provisional Orders, excepting the electric lighting undertaking, which was owned and worked under the provisions of the Electric Lighting Act, 1882. Under the powers conferred by these Acts and Orders the corporation borrowed large sums of money. Where the money was borrowed for the purposes of an undertaking owned and worked by the corporation in its capacity of a municipal corporation, the loan was charged on, and the interest was made payable out of, the particular undertaking and the borough fund, which was dependent on the borough rate. Where the money was borrowed for the purposes of an undertaking owned and worked by the corporation in the capacity of an urban sanitary authority, the loan was charged on, and the interest was made payable out of, the particular undertaking and the consolidated fund, which was dependent on the consolidated rate. In the former case any surplus profits were earmarked for the borough fund, and so for relief of the borough rate. In the latter case any such surplus went to the consolidated fund and in relief of the consolidated rate. In no instance, at all events prior to 1901, was a loan in respect of a borough fund undertaking charged on the consolidated fund, or a loan in respect of a consolidated fund undertaking charged on the borough fund.

The corporation was duly assessed to income tax for the year ending on April 5, 1903, on the rents and profits, amounting to about £270,000, of its various hereditaments and undertakings. In paying the interest on the loans relating to these undertakings the corporation properly deducted income-tax. The amount of the interest so paid was some £285,000 being some £15,000 in excess of its rents and profits. The corporation is, of course, bound to account for the tax deducted from this excess of £15,000, which is not met by, and therefore had not been already taxed as part of, its receipts.

It is conceded by the Crown that the corporation is entitled to retain the tax deducted in paying interest to the extent to which such interest was effectively charged under the Acts and Orders referred to, on the rents and profits of the undertakings of the corporation. The dispute in the case arises as to the tax on a sum of about £78,000, as to which the corporation affirms, and the Crown denies, that it was similarly charged on these rents and profits by virtue of the Leeds Corporation (General Powers) Act, 1901.

To understand the nature of the controversy it is necessary to refer briefly to the history of the relevant legislation. The Corporation of Leeds is a municipal corporation created by a charter of Charles II, and is subject to the provisions of the Municipal Corporations Acts, 1835 and 1882. Leeds became a city in 1897. The corporation is also an urban sanitary authority, to which the provisions of the Public Health Acts apply. It has powers under the various provisional orders and Acts which have been referred to. As certain ratepayers were rated differentially, according as the rate was a "borough" or a "consolidated" rate, these ratepayers have a material interest in any question as to which fund was to be resorted to for making up a deficit arising in connection with the undertakings of the city. Under the legislation prior to 1901, as I have

already indicated, it was not permissible to charge the borough fund, and therefore the borough rate, with a loan deficit in respect of a consolidated fund undertaking, or vice versa. Under the legislation referred to the money borrowed was, as I have said, charged on the profits of the undertakings for the purposes of which it was borrowed, and also, secondarily, on either the borough rate or the consolidated rate, so that these rates were available in case of a deficiency in the profits.

The real question which arises is whether the Leeds Corporation (General Powers) Act, 1901, has so altered the principle by which the payment of the interest on loans was primarily to be made out of the profits of the respective undertakings on which they were raised that the corporation is no longer bound in such case to apply the profits specifically in discharge of the interest on the loan relating to the particular undertaking, and then to treat the balance as appropriated to the relief of the borough rate or the consolidated rate as the case may be, but has now to hold the entirety of these profits as income, charged generally with the payment out of it of interest on the whole of the loans. A further question was suggested in the arguments whether the Act of 1901 had not wholly abrogated the securities of the various lenders and substituted for them general securities over the entirety of the undertakings and revenues of the corporation, and on the rates, borough or consolidated, indifferently, such new securities ranking pari passu.

Under the legislation before 1901, no such step as to vary a specific security or to substitute for it a different one, however good, appears to have been contemplated. The intention to do so under the Act of 1901 is not an intention which one would presume lightly in the absence of clear language. But I do not think it necessary to express an opinion whether the existing securities were kept alive as primary securities with a new and general but merely secondary charge added, or whether the language used is so clear that the inference of an intention to substitute a new security for an old one, in invitum as regard the lender, is too strong to be resisted. The crucial question seems to me to be a narrower one and to arise in a different form. It is whether, even if the old securities are abrogated and a new security substituted so as to provide for the case of a deficiency, should liquidation in some form be necessary, the original statutory directions for the application of rents and profits are left standing and operative in the meantime, so that the corporation is bound to continue to apply its income from the various undertakings to the payment of interest on the loans specifically charged on them and, as regards any surplus, in relief of the particular rates and to the other purposes for which it was earmarked originally. I may add that it is obvious that, so far as the last point is concerned, those ratepayers who were rated differentially, according as the rate was borough or consolidated, had a material interest in the preservation of the old allocations and statutory directions, and, therefore, in the answer to this question.

Towards the end of his judgment HAMILTON, J. discusses some observations of LORD DAVEY in *L.C.C.* v. *A.-G.* (1). Speaking of the passage in which LORD DAVEY says that "it is enough if the interest is charged on or payable out of the taxable income, though there may be other subjects of charge," he interprets LORD DAVEY'S words as meaning that the charge on or right to pay out of the taxable income must be actually operative within what he calls "the measurable foresight of finance," and not merely contingently operative. As authority for this view he relies on what LORD MACNAGHTEN said in *A.-G.* v. *L.C.C.* (2). In the light of LORD MACNAGHTEN'S judgment, HAMILTON, J., interprets the expression, "payable out of," in LORD DAVEY'S judgment, as used, not as signifying what is in antithesis to "charged upon," but as explaining its meaning, and after saying that *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3) is not in opposition to this conclusion, inasmuch as there the company had a perfect right to treat interest as payable out of the income in question, he sums up the law as being that the person assessed can retain the income tax which he has deducted from the interest paid to his creditor only if the interest is operatively charged upon or payable—that is to say, immediately out of the taxable income.

I think that this is the proper interpretation of the effect of the three decisions of this House which have been referred to, and I now turn to the private Act of 1901 to find what application the principle so established has to the case before us. Section 33 of this Act

after authorising the corporation to borrow for various purposes, including tramways and gasworks, enacts that to provide for the repayment of principal and the payment of interest the several revenues of the corporation arising from the tramway and the gasworks undertakings are made primarily chargeable as was the case under the previous Acts. But s. 37 provides that all principal moneys shall be charged indifferently on the lands and estates, the water, the gas, and other the undertakings of the corporation, and each and all such principal moneys or any of them, whether raised before or after the passing of the Act, together with the dividends, interest, and annuities, and all other anual sums for the time being payable thereon, shall rank equally and pari passu without any priority or preference by reason of any precedence in the date of any statutory borrowing power or in the date of the raising of the money, or in the date of the money becoming owing, or in the date of this security, or any other ground whatsoever. Subsection (2) provides that the provisions of the Corporation Acts and orders authorising the raising of the principal moneys and the securities granted, issued, and subsisting in respect thereof shall be read and construed as though the charge by this section authorised had been the charge in the said provisions and securities respectively authorised and given.

The latter sub-section apparently, for the purposes of the charge authorised by s. 37, substitutes that charge for the existing charge; but the question remains: What is the meaning of the substitution of the charge so authorised? Even taking the first part of s. 37 by itself, I observed that the effect is two-fold. First, it is to constitute a general charge for the principal without any direction as to payment of interest; and, secondly, it is to make the principal and interest under the securities rank pari passu without priority or precedence on any ground. The section does not purport to repeal the statutory directions which compel the corporation to pay the interest in the case of each undertaking specifically out of the profits of that undertaking. Nor does the schedule of repeals to the Act of 1901 repeal, as one would have expected had the intention been to alter the existing rights and duties in this respect, the provisions in the older Acts containing these directions. Section 37 is at least verbally consistent with these directions remaining operative under normal conditions, and until the question of ranking had arisen, when the new charge was to be effective in place of the old charge. If this be a possible construction it is, in my opinion, a proper one, for unless it is adopted a mode of using the rates of the corporation must, as I have already pointed out, be held to be sanctioned, which will take away their rights from those ratepayers who, as I have said, are in possession of rights to differential treatment.

But the conclusion to which I have come does not rest merely on these considerations. In interpreting the provisions of a statute they have, as far as possible, to be interpreted so as to make them consistent, and unless the view which I have expressed is wrong, s. 37 would be inconsistent not only with s. 33, to which I have referred already, but with s. 47. That section directs that the yearly payments in question are to be provided by contributions from the several revenues of the corporation specifically charged with or made liable to provide the same by or under any statutory borrowing power or by any resolution of the corporation having reference to the respective borrowing powers, and if there is no such specific liability, then from the several revenues out of which the respective contributions would be properly payable, having regard to the purpose for which the borrowing powers are given, and, in default thereof or subject thereto, out of the city fund and city rate or out of the consolidated rate or highway rate, as the corporation, having regard to the provisions of this Act and the objects for which the statutory borrowing power was exercised, may consider equitable.

Section 46 directs the corporation to keep separate accounts relative to each undertaking. Section 49 provides for re-borrowing, and that any principal moneys re-borrowed are to be primarily chargeable on the same revenues and to be deemed to form the same loan as the money re-borrowed. Section 48 provides for the case of any principal money or interest being unpaid, and for a receiver being appointed and having the same power of collecting and applying the money which ought to be paid under the corporation Acts and Orders as the corporation would have had.

I am unable, after consideration of these sections, to arrive at the conclusion of the

Master of the Rolls, that the interest on the loans is no longer presently payable out of the net receipts of the particular undertakings to which they belong, and that the net receipts cannot be earmarked for that purpose. What may happen if there is default and a question of ranking has arisen we are not called on to determine. In the meantime and pending that event I think that no other income than the profits of the several undertakings and properties is operatively and effectively charged with payment of the interest on the various loans. I agree with the conclusion reached by HAMILTON, J., and KENNEDY, L.J., who was in a minority in the Court of Appeal, and I think that the appeal ought to be allowed and the judgment of the former learned judge restored, and that the respondents should pay the costs here and below. I move accordingly.

LORD ATKINSON.—I concur. The statutory enactment on which the case mainly turns is s. 24 of the Customs and Inland Revenue Act, 1888. Its construction has many times been the subject of judicial decision. Sub-section (3) deals with the payment of interest or annuities charged with the payment of income tax. The sub-section is not perhaps happily worded, but I think that its main object is clear. It was designed to protect the subject from the injustice to which he would be subjected if the tax were exacted twice over, in effect, on the same sum of money, viz., first on the acquisiton or receipt of that sum by the debtor bound to pay the interest or annuities mentioned; and, secondly, on the payment by him of practically the same sum to his creditor or creditors in discharge of that interest or of those annuities.

The words "such tax" used in the sub-section, according to the judgment of LORD MACNAGHTEN in *L.C.C.* v. *A.-G.* (1), simply mean the income tax. The "profits and gains brought into charge" may for convenience be styled the "taxed fund," and all other resources of the debtor may be styled the "untaxed fund." The first important question to determine is, what is the meaning of the words "not payable out of" this taxed fund? They cannot mean, I think, "not charged upon" the taxed fund. Every professional man who has nothing but his professional income, and every tradesman, who has nothing but the profits of his trade to live on, would be entitled to retain for his own benefit the tax which he had deducted from an annuity which he had contracted to pay if he had in fact paid it out of that income or those profits forming the "taxed fund," though the annuity was not specifically charged on anything. This is, I think, according to the invariable practice. If then these words "not payable out of" do not mean "not charged upon," it appears to me that they must mean "not legally payable out of"—that is to say, "which cannot lawfully be paid out of" the taxed fund.

If the interest or annuities were in fact, but against the law, paid out of the taxed fund, then though the tax should be deducted from the creditor it could not be retained by the debtor. He should account for it to the revenue. Of course, if the interest and annuities be charged on the taxed fund they will almost necessarily be lawfully payable out of it. This fund might, however, not be charged as the primary security, or some condition might have to be fulfilled before it could be so applied, in which case payment out of it might be illegal till the first fund was exhausted or the condition fulfilled. If this be the true view as to the meaning of these words "not payable out of," then the results of the application of the sub-section would apparently, according to the authorities, be the following: (1) Where no portion of the interest or annuities charged with the tax could be lawfully paid out of the "taxed fund," the debtor who on paying this interest or these annuities deducts the appropriate tax from his creditor or creditors must account to the Commissioners of Inland Revenue for the full amount of the tax so deducted. (ii) When only a portion of the interest or annuities can be lawfully paid out of the "taxed fund" then the debtor, though bound to deduct the tax from his creditors on the full sums paid to them, is only bound to account to the Revenue authorities for the amount of tax deducted from that portion of the interest or annuities actually paid out of his "untaxed fund." The remainder of the entire sums deducted he is entitled to retain for his own benefit. (iii) When the interest and annuities so charged may with equal legality be paid out of either the "taxed" or the "untaxed" fund of the debtor, and the "taxed fund" is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted,

to have specifically appropriated or set apart, in his own books or otherwise, the "taxed fund" to discharge this interest or these annuities, or to prove that he had in fact paid them out of the "taxed fund." It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as paid out of the "taxed fund," especially where, in the ordinary course of business, it should be applied for that purpose.

In *L.C.C.* v. *A.-G.* (1) already cited the "taxed fund" was, under regulations made under s. 15 of the London County Council (Money) Act, 1889 and approved by the Treasury, specifically appropriated to the payment of the interest on their Consolidated Stock. But it was not adequate in amount, and, therefore, that interest, when paid in full, as it was, must of necessity, to the extent of the deficit, have been paid out of the "untaxed" fund of the council, that is the rates. It was only in respect of the amount of the tax deducted on this latter sum that the county council were held bound to account to the revenue. In *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3) the "taxed fund" was fully adequate to pay all the annuities, but it was not specifically appropriated to that purpose. On the contrary, the "taxed" and "untaxed" funds were blended, and a mixed fund created. It was decided that the annuities, though in fact paid out of this mixed fund, should be taken to have been paid out of the taxed portion of it, so that the subject should not be made liable to the tax merely by reason of the form in which his books were kept, but should be put in the same position as if the "taxed fund" had been set apart to pay the claims upon it, and they had in fact been paid out of it. In both these cases the "taxed" and "untaxed" funds were charged; in the first with the payment of the interest on the stock, and in the second with the payment of the annuities. Section 24 (3) is obviously concerned with the action of the debtor and his liability to the Revenue. It has no special reference to the remedies which the creditor from whom he deducts income tax may have to recover the interest or annuities due. That is outside its purview.

In the present case the respondents, in their capacity of a municipal authority, borrowed large sums to finance certain municipal works and undertakings, such as waterworks, gasworks, tramways, &c. These were very lucrative. They yielded an income far in excess of what was necessary to pay the interest on the money so borrowed. That income was paid into the borough fund of the corporation. In their capacity of a sanitary authority they also borrowed large sums to finance certain sanitary works and undertakings (using the term "sanitary" in its widest sense) such as electric lighting, &c. These latter undertakings were not as lucrative as the municipal undertakings. The income from them was not nearly sufficient to meet the interest on the loans. The precise financial position of the corporation was this: the amount required in the year in question in this case to pay the interest on all the loans contracted was £285,446. The income from the several undertakings to finance which these loans were incurred was £270,036. There was, therefore, a deficit of £15,410. This must necessarily have been paid out of their untaxed funds, and the respondents admit that, to the extent of the tax deducted on payment of this sum, they were bound to account. The income from the sanitary undertakings was deficient by the sum of £78,519 to meet the interest on the sanitary loans. Though the consolidated rate as well as the undertakings, were charged with the payment of this interest, a rate was not struck to meet the deficit. It was admittedly not paid out of the consolidated rate. It must, therefore, I think, be taken that it was paid in fact though possibly not in form, out of the gains or profits brought into charge, i.e., the taxed funds of the corporation. I do not think that it can be taken that it was paid solely out of the borough rate.

In this condition of things the corporation, on their own initiative, and not as the result of hostile legal proceedings taken against them by creditors, met this deficit by an advance of £78,000 out of their borough fund, which they applied to the payment of the interest on the loans contracted for sanitary purposes. The borough fund is created under the provisions of the Municipal Corporations Act, 1882. By 129 of that statute it is enacted that the rents and profits of all corporate land and the interest, dividends, and the annual proceeds of all moneys, dues, chattels, and valuable securities belonging

to a municipal corporation shall be paid into the borough fund. In addition to these the city or borough rate, and, under various local Acts, the receipts from waterworks, gasworks, tramways, and other undertakings of the corporation are to be paid into the fund. By s. 140 this fund is made applicable to and is charged with the several payments specified in Sch. 5 to the Act, among which are (item 11) "all expenses charged on the borough fund by Act of Parliament or otherwise by law." In addition, in no instance up to 1901 has a loan effected in respect of a sanitary undertaking as distinguished from a municipal undertaking, been charged on, or the interest made payable out of the borough fund. On the contrary, it has invariably been charged on, and the interest made payable out of a certain other fund called the consolidated fund. The converse is equally true. In no instance has a loan contracted for a municipal undertaking been charged on the consolidated fund. The electric lighting undertaking was financed and instituted under the provisions of a public statute, the Electric Lighting Act, 1882. Section 7 and s. 31 of that Act combined provide, in effect, that the expenses of the undertakings may be defrayed out of the local rate mentioned in the schedule to the Act, which in the case of the city of Leeds is the consolidated fund. Moreover, special provisions are introduced into the different Acts under which the waterworks, tramways, gasworks, &c., were constructed to the effect that the balances not required for the undertaking should be paid into the borough fund, and that all deficiencies should be met out of that fund.

Not only, therefore, are all loans other than those obtained for sanitary purposes charged on the borough fund, but it is provided by s. 143 (1) of the Municipal Corporations Act, 1882, that if that fund be more than sufficient for the purposes to which it shall be applicable under the Act, or otherwise by law, the surplus shall be applied, under the direction of the council, for the public benefit of its inhabitants and the improvements of the borough. It is not contended that sub-s. (2) of that section applies to this case. As matters stood, therefore, before 1901 this enactment made it illegal to devote any of this surplus to the payment of the interest on the loans contracted for sanitary purposes. That interest was charged on an entirely different fund—a fund fed by a consolidated rate raised on a system of rating entirely different from that on which the borough rate is raised—namely, a differential system. The question then is, Has the local Act of 1901 impliedly repealed not only this provision of the Act of 1882, but also the provisions of the several statutes under which the municipal undertakings were authorised charging each with the payment of the loans by which it was financed as well as the interest thereon? Have the corporation been empowered on their own initiative, and without hostile pressure, to change the nature of the securities held by their creditors, without the consent of those creditors to pool, as it were, their entire loans and the securities held for the payment of them, and, without altering the system on which the consolidated rate is raised, to divert their surplus income from purposes which might lighten the borough rate to purposes which must lessen the consolidated rate?

From the reasons stated at length with the utmost clearness by HAMILTON, J., I am of opinion that the local Act has not this effect, though it may possibly extend the reach of the remedies of the creditor who, in hostile proceedings against the respondents, seeks to recover his debt or the interest due on it. I concur, therefore, in thinking that the corporation cannot retain for their own benefit the income tax which they have deducted in respect of this sum of £78,519, and are assessable for it, not for the reason, however, that the tax must be taken not to have been paid wholly or partly out of a "taxed fund" belonging to them—viz., the income from the municipal undertakings, but because it was not legally payable out of the particular fund out of which it has in fact been paid. The corporation had not, in my view, any power to devote the surplus of the income from their municipal undertakings to meet the deficit on their sanitary undertakings, and thereby to apply that surplus in relief of the consolidated rate.

I wish, however, to point out that the true import of the passages cited from the judgment of LORD DAVEY in *L.C.C.* v. *A.-G.* (1), and from the judgment of LORD MACNAGHTEN in *A.-G.* v. *L.C.C.* (2) can only be properly apprehended if they are taken in connection with the contentions of the parties in the cases to which they respectively apply. In the first case, LORD DAVEY says ([1901] A.C. at p. 46):

"The contention of the Crown is that as the interest in the Consolidated Stock is charged on the whole of the lands, rents, and property belonging to the council, and on their rates, such interest ought, for the benefit of the Crown, to be apportioned rateably over all the subjects of charge, and only a rateable proportion deemed to be paid out of their income from rents or from interest receivable by them from their own debtors. The proposition has the merit of novelty. Admittedly there is no authority for it. The attention of your Lordships was not called to any statutory enactment directing any such procedure, or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts, in order to raise a right of deduction and retention, that the interest or annual payment should be exclusively charged upon, or be payable out of, profits or gains brought into charge. It is enough if interest is charged upon, or is payable out of the taxable income, though there may be other subjects of charge."

LORD DAVEY was obviously dealing altogether with this question of apportioned rateability, and his judgment is no authority whatever for the proposition that interest must be charged what is called "effectively" on a taxed fund in order to entitle the debtor to retain what he deducts, or that if charged "ineffectively" on any fund it is not "payable" out of that fund within the meaning of s. 24 (3) of the Inland Revenue Act, 1888. I think that what it is an authority for is this: (i) That there is not to be any apportionment of rateability in favour of the Crown between two funds out of either of which the interest or annuities charged with the tax may be lawfully paid; and (ii) that in a case of a mixed fund formed from two funds, out of one of which the interest and dividend charged with the tax may be lawfully paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, that annual charges should in the first place be paid out of annual income.

The principle of apportioned rateability contended for by the Crown in that case was adopted by the Court of Session in *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3), and their decision was reversed in effect on the very principle thus laid down by LORD DAVEY as to payment in the due course of administration—i.e, that it had to be assumed that the annuities were in fact paid out of the portion of the mixed fund consisting of annual income on which they were an annual charge. In *A.-G.* v. *L.C.C.* (2) the council had to pay under sched. A income tax on the annual value of property in their own occupation. It was assessed at £118,000 per annum. This, like all the other property of the council, as well as the rates, was charged with the payment of the dividends on their consolidated stock. It had been decided in the former case that the council could not retain the tax deducted in respect of the dividends paid out of the rates, as the rates were not a "tax fund." What the council in that case contended for was that they were entitled to retain out of the amount deducted from the dividends paid out of the rates the income tax paid by them on this sum of £118,000, the annual value of the property which they occupied, that this sum should be treated as annual income, which they had, in the due course of administration, applied to satisfy the annual charges upon it. That contention was held to be unsound, but it was in reference to it that LORD MACNAGHTEN used the words on which this distinction between "effective" and "ineffective" charges has apparently been founded. He says ([1907] A.C. as p. 136):

"I cannot understand what the property in the occupation of the council has to do with the matter. It stands apart. It is quite true that this property is charged in favour of the holders of Metropolitan Stock, but the charge is not, and never can be, operative. It is suspended by a charge on the rates. The profits and gains derived from the property in the occupation of the council are charged at their source in the hands of the council under sched. A, the stream flows no further. It is enjoyed and absorbed by the council. The council must have the occupation of some property to perform their statutory duties. So long as the rates are available to meet the

demands of the stockholders, the council are secure in the full and beneficial enjoyment of the property which they occupy."

Then he proceeds to ask the question,

"What possible claim can there be to relief or indemnity from income tax in respect to this property?"

My answer to that is that there is none, because the dividends paid to the stockholders were not paid, could not be paid, and must not be taken to have been paid, out of a mere enjoyment, valued no doubt under sched. A at £118,000 per annum, but not available as money received by the council for the payment of any of their debts. It will be observed that LORD MACNAGHTEN is not dealing, in this passage, with the remedies which the creditors of the council might have to recover their debts, but with the voluntary and spontaneous action of the council in the administration of their own property. In my own view, therefore, the right of the debtor who has paid "interest or annuities" brought into charge to the income tax to retain for his own benefit the amount of the tax which he has deducted from his creditors depends upon whether he can answer in the affirmative both the two following questions: (i) Have the interest and annuities, been, in fact, paid, or must they in the circumstances of the case be taken to have been in fact paid, out of "profits and gains brought into charge" that is out of the so-called "taxed fund"? (ii) Was it lawful to pay them out of that fund? If either of these questions be answered in the negative, he must account to the revenue for the tax which has been deducted. This is, I think, the only workable rule which can be applied in practice. It inflicts no injustice on the subject. To allow him to retain the tax where he has not in the first instance paid it himself would be, in effect, to allow him to levy a tax on his creditors for his own benefit, not for that of the Crown; and if he has applied the moneys of a "taxed fund" to discharge debts liable to income tax in a way which the law forbade him to do, he is the author of his own wrong, and suffers deservedly. In the present case I think that the corporation, though they might be able to answer the first question in the affirmative, must, on the true construction of the Act of 1901, answer the second in the negative, and for that reason I think that the appeal should be allowed with costs, the judgment appealed from reversed, and the judgment of HAMILTON, J. restored, and I beg leave to move accordingly. I express no opinion on what property might, under the Act of 1901, come within the reach of the remedies of the creditors of the corporation in hostile litigation.

I have been authorised by **LORD HALSBURY** to say that he concurs in the conclusion arrived at.

LORD KINNEAR.—I concur in the judgment proposed for the reasons stated by the LORD CHANCELLOR.

LORD MERSEY.—For the reasons to be found in the judgment of the Lord Chancellor and in the judgment of LORD ATKINSON I think that this appeal ought to be allowed, and I desire to add only a few words.

The question is whether two sums of £10,510 and £83,419 respectively, making together £93,929, were payable out of profits and gains which had already been brought into charge to income tax. The Crown says that they were not so; the corporation say that they were. The two sums represent the excess of interest on loans raised in relation to certain undertakings worked by the corporation either under the Electric Lighting Act, 1882, or in their capacity of an urban sanitary authority, over the profits earned by those undertakings. The ground on which the corporation allege that the two sums have been already brought into charge is this: they say, truly, that in their capacity of a municipal corporation they work many undertakings which result in profits exceeding the interest on the loans raised in relation to them, and that these profits have been brought into tax, and they allege that they are entitled to pay the interest on the £93,929 out of these profits. In other words, they contend that the accounts of the municipal, the electric, and the sanitary undertakings ought to be lumped together for the purposes of income tax, and that when they are so lumped together it will be found that the £93,929 has been brought into charge. It may be conceded that if the accounts

A are amalgamated in this way the result will be to show, as contended, that the £93,929 has already been brought into tax, and there remains, therefore, one question only—viz., whether the corporation are entitled, as against the Crown, to deal with the accounts in this way. The answer, in my opinion, turns entirely on the true effect of the Leeds Corporation (General Powers) Act, 1901. Before this Act the profits arising from each undertaking were allotted to specific purposes, and it was not lawful to divert them from B those purposes. As the law then stood it was not possible to employ the profits of one undertaking towards the payment of the liabilities of another undertaking, but it is said that this has been altered by the Act of 1901. It is therefore necessary to examine the Act to see whether this is so.

One of the principal objects of the Act of 1901 was to enable the corporation to borrow money for the purpose of carrying out certain improvements in the city of Leeds C authorised by the Act. The sections relating to this matter are headed "Financial Provisions," and they extend from s. 32 to s. 59 inclusive. The first, and in my opinion the only, material section is s. 37. By sub-s. (1) of this section it is enacted that "all principal moneys" shall be charged indifferently upon the undertakings and revenues of the corporation, and that all such principal moneys, together with the interest payable thereon, shall rank equally and pari passu without any priority or preference. By the D interpretation section (s. 4) the expression "principal moneys" is defined as meaning

> "any moneys owing or to be owing or borrowed, or to be borrowed by the corporation under any statutory borrowing power."

Thus it appears that a "charge" in favour of all existing and future loans was created on the whole of the property of the corporation. One of the objects of this clause was, E doubtless, to secure in the amplest way the whole of the liabilities of the corporation, and thus to enable them to raise loans on the best possible terms. It appears to be a charging section and nothing more. It is not, however, very material to inquire what the section does enact; it is much more important to notice what it does not enact; and it is, in my opinion, clear that it does not enact that the method of dealing with the annual profits of the different undertakings should be altered. These annual profits were, as I F have already said, applicable by statute to certain purposes only. This sub-section does not deflect those profits from those purposes.

Sub-section (2) of s. 37 enacts that the provisions of earlier Acts authorising the raising of money by the corporation, and the granting of securities therefore, are to read as though the charge authorised by sub-s. (1) had been the charge authorised by those provisions. But this again is, in my opinion, but a charging provision, and does not G affect the statutory method of allocating the profits of the different undertakings.

I do not stop to follow the sections which follow s. 37. For the reasons to be found in the judgment of Hamilton, J., I think that their language

> "preserves instead of repeals the provisions of the earlier Acts by which it was assumed that certain dividends were properly payable out of the several revenues instead of being permissibly payable in general out of all the revenues in the aggregate." H

The Act of 1901 does not in terms, nor does it, in my opinion, by necessary implication, repeal the relevant provisions in the earlier Acts, and in the absence of such a repeal I think that the corporation are precluded from applying the profits of the municipal undertakings to aid their other undertakings. It follows that the two sums, amounting I together to £93,929, have never been brought into tax, and that in collecting the tax from the payees the corporation are not recouping themselves for a payment which they have already made, but are acting merely as the tax collectors of the Crown, and to the Crown they must accordingly account. I think that the appeal should be allowed, and the judgment of Hamilton, J., restored.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Sharpe, Pritchard & Co.*, for *R. E. Fox*, Town Clerk, Leeds.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re ALLSOP. WHITTAKER *v.* BAMFORD

[COURT OF APPEAL (Cozens-Hardy, M.R., Hamilton and Swinfen Eady, L.JJ), October 14, 16, 20, 1913]

[Reported [1914] 1 Ch. 1; 83 L.J.Ch. 42; 109 L.T. 641; 30 T.L.R. 18; 58 Sol. Jo. 9]

Trustee—Breach of trust—Limitation of action—Time when statute begins to run—Interest of plaintiff beneficiary coming into possession—Relief from liability—Honest and reasonable conduct—Obscure provision in trust instrument—Small fund affected—Money paid in breach on advice of solicitor—Payment to widow of tenant for life for support of children—Trustee Act, 1888 (51 & 52 *Vict.*, *c.* 59), *s.* 8 (1) (*a*) (*b*)—*Judicial Trustees Act*, 1896 (59 & 60 *Vict.*, *c.* 35), *s.* 3.

Acting on the advice of the solicitor to the trust, the sole trustee of a will paid the income of a share of the residuary estate of the testatrix, who died in 1887, to the widow of a tenant for life for the maintenance and support of her children instead of carrying out a direction contained in the will to accumulate the income until the period of distribution for the benefit of a class to be then ascertained. The trustee died in 1904, and similar payments were made by his representatives until 1906, when doubts arose whether the payments were proper, and they were discontinued. In 1910 the true construction of the will was determined by the court. In an action in which the administratrix of the sole next of kin of the testatrix sought to render the estate of the trustee liable for the breach of trust.

Held: (i) the case fell within s. 8 (1) (b) of the Trustee Act, 1888, the proviso to which provided that the statute should not begin to run against any beneficiary until the interest of that beneficiary was an interest in possession; the plaintiff's interest was not in possession until 1908 (21 years after the death of the testatrix), and so the statute did not bar her claim in an action begun before 1913; (ii) s. 3 of the Judicial Trustees Act, 1896 [re-enacted in s. 61 of the Trustee Act, 1925 (see 26 HALSBURY'S STATUTES (2nd Edn.) 50)] was designed to protect honest trustees, and its wide words should not be construed in a narrow sense; on a proper construction the section covered an erroneous construction by a trustee of an obscure provision in the trust instrument; in the present case, taking into account the modest size of the fund, the obscurity in the will, the advice on which the erroneous payments were made, and the person for whom and the purposes for which they were made, the trustees had acted reasonably, and, their honesty not having been called in question, they ought to be excused for the breach of trust.

National Trustees, Executors, and Agency Co. of Australia, Ltd. v. *General Finance Agency and Guarantee Co. of Australasia, Ltd.* (1) [1905] A. C. 373, *Re Grindey, Clews* v. *Grindey* (2), [1898] 2 Ch. 593, *Re Kay, Mosley* v. *Kay* (3), [1897] 2 Ch. 518, and *Re Mackay, Griessmann* v. *Carr* (4), [1911] 1 Ch. 300 applied.

Observations of KEKEWICH, J., in *Davis* v. *Hutchings* (5), [1907] 1 Ch. 356, not approved.

Notes. Section 8 of the Trustee Act, 1888, has been replaced by s. 19 of the Limitation Act, 1939; 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Applied. *Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

As to limitation of time applicable to actions in respect of trust property, see 24, HALSBURY'S LAWS (3rd Edn.) 277 et seq., and as to exemptions of trustee from liability see ibid. (2nd Edn.), vol. 32, p. 316 et seq. For cases see 32 DIGEST 491 et seq., and 43 DIGEST 992 et seq.

Cases referred to:

(1) *National Trustees, Executors and Agency Co. of Australasia, Ltd.* v. *General Finance and Guarantee Co. of Australasia, Ltd.*, [1905] A.C. 373; 74 L.J.P.C. 73; 92 L.T. 736; 54 W.R.1; 21 T.L.R. 522, P.C.; 43 Digest 994, *4360*.

(2) *Re Grindey, Clews* v. *Grindey*, [1898] 2 Ch. 593; 67 L.J.Ch. 624; 79 L.T. 105; 47 W.R. 53; 14 T.L.R. 555, C.A.; 43 Digest 996, *4373*.

(3) *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518; 66 L.J.Ch. 759; 46 W.R. 74; 13 T.L.R. 582; 43 Digest 994, *4353*.

(4) *Re Mackay, Griessmann* v. *Carr*, [1911] 1 Ch. 300; 80 L.J.Ch. 237; 103 L.T. 755; 43 Digest 994, *4361*.

(5) *Davis* v. *Hutchings*, [1907] 1 Ch. 356; 76 L.J.Ch. 272; 96 L.T. 293; 43 Digest 996, *4368*.

(6) *Re Bowden, Andrew* v. *Cooper* (1890), 45 Ch.D. 444; 59 L.J.Ch. 815; 39 W.R. 219, L.J.; 43 Digest 794, *2312*.

(7) *How* v. *Earl Winterton* (1902), 51 W.R. 562; 47 Sol. Jo. 146; 43 Digest 770, *2113*.

(8) *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 18 W.R. 387, L.C. & L.J.; 43 Digest 974, *4136*.

(9) *Thorne* v. *Heard*, [1893] 3 Ch. 530; 62 L.J.Ch. 1010; 68 L.T. 791; affirmed [1894] 1 Ch. 599; 63 L.J.Ch. 356; 70 L.T. 541; 42 W.R. 274; 10 T.L.R. 216; 7 R. 100, C.A., affirmed sub nom. *Thorne* v. *Heard and Marsh*, [1895] A.C. 495; 64 L.J.Ch. 652; 73 L.T. 291; 44 W.R. 155; 11 T.L.R. 464; 11 R. 254, H.L.; 32 Digest 386, *688*.

(10) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; 53 L.J.Ch. 419; 50 L.T. 330; 48 J.P. 84; 32 W.R. 435, M.L.; 43 Digest 884, *3273*.

(11) *Re Weall, Andrews* v. *Weall* (1889), 42 Ch.D. 674; 58 L.J.Ch. 713; 61 L.T. 238; 37 W.R. 779; 5 T.L.R. 681; 43 Digest 831, *2764*.

Also referred to in argument:

Perrins v. *Bellamy*, [1899] 1 Ch. 797; 68 L.J.Ch. 397; 80 L.T. 478; 47 W.R. 417; 43 Sol. Jo. 437, C.A.; 43 Digest 996, *4374*.

Re Twigg's Estate, Twigg v. *Black*, [1892] 1 Ch. 579; 61 L.J.Ch. 444; 66 L.T. 604; 40 W.R. 297; 36 Sol. Jo. 231; 21 Digest (Repl.) 941, *9524*.

Re Somerset, Somerset v. *Earl Poulett*, [1894] 1 Ch. 231; 63 L.J.Ch. 41; 69 L.T. 744; 42 W.R. 145; 10 T.L.R. 46; 38 Sol. Jo. 39; 7 R. 34, C.A.; 43 Digest 1014, *4542*.

Re Swain, Swain v. *Bringeman*, [1891] 3 Ch. 233; 61 L.J.Ch. 20; 65 L.T. 296; 32 Digest 495, *1567*.

Appeal from an order of WARRINGTON, J.

By her will, dated June 27, 1887, the testatrix appointed executors and trustees thereof, and after giving certain specific legacies and specifically devising certain freehold hereditaments and bequeathing an annuity she bequeathed all the residue of her personal estate to the trustees upon trust that they should sell and convert the same into money as therein directed, and upon further trust to stand possessed of the net proceeds of such sale and conversion after payment thereout of her funeral and testamentary expenses and debts upon trust to invest the same as therein mentioned. The testatrix directed the trustees to pay the net income of one equal third part of the residuary trust moneys to her nephew Robert Whittaker during his life, and to pay one other equal third part of the same income to her nephew William Whittaker during his life, and to pay the remaining equal third part of the same income to her niece Elizabeth Ann Whittaker during her life, and subject to the trust and direction thereinbefore contained, she declared that the trustees should stand possessed of as well the capital as the income of the whole of the residuary trust moneys in trust for all or any the children or child of her nephews and niece who might be living at the time of failure or determination of the trust thereinbefore contained, and the issue then living and attaining the age of twenty-one years or in the case of females marrying of any children of them, her nephews and niece, who might be then dead, such children, if more than one, taking individually and per capita in equal shares as tenants in common, and such issue taking per stirpes as representing their deceased parents in equal shares. The testatrix died on July 8, 1887, William Whittaker died on Dec. 19, 1896, leaving a widow, Louisa H. M. Whittaker, and five daughters him surviving. Thomas Orme Farmer, the surviving trustee of the will of the testatrix, made his will on Nov. 12, 1904, and thereby appointed the defendants, Louisa Orme Bamford and Alice Edgeworth Tate, executrices thereof. He died on Nov. 25, 1904.

From the death of the testatrix until the death of William Whittaker the income of the

residuary estate bequeathed by the will of the testatrix was divided into three equal parts, whereof one part was paid to Robert Whittaker, another part to William Whittaker, and the remaining part to Elizabeth Ann Whittaker. From the death of William Whittaker until the death of Thomas Orme Farmer the income of the residuary estate of the testatrix was divided into three equal parts, whereof one part was paid to Robert Whittaker, another part to Elizabeth Ann Whittaker, and the remaining part to Louisa H. M. Whittaker, the widow of William Whittaker, for the maintenance and support of the children of William Whittaker. On the death of Thomas Orme Farmer, Louisa Orme Bamford and Alice Edgeworth Tate, as his executrices, became trustees of, and acted in the trusts of, the will of the testatrix. They neglected to accumulate the one third part of the residuary trust moneys, and from time to time improperly, and in breach of trust, they paid some part (if not the whole) of such income to Louisa H. M. Whittaker. In February, 1910, the five daughters of William Whittaker took out an originating summons, to which Louisa Orme Bamford and Alice Edgeworth Tate were made defendants, for the determination whether, according to the true construction of the will of the testatrix one third part of the residuary estate of the testatrix (to the income of which William Whittaker had been entitled during his life) became distributable upon the death of William Whittaker. By an order made by PARKER, J., and dated May 26, 1910, it was declared that there was one period only for the distribution of the whole of the residuary trust moneys of the testatrix—viz., the date of the death of the survivor of Robert Whittaker and William Whittaker and Elizabeth Ann Whittaker—and that the one-third part of the residuary trust moneys did not become distributable upon the death of William Whittaker; that there was an implied direction to accumulate the income of such third part from the date of the death of William Whittaker until the time for the distribution of the residuary trust moneys arrived; and that such direction became void by virtue of the Thellusson Act immediately after the expiration of twenty-one years from the death of the testatrix. By the same order an inquiry was directed as to who were the persons entitled by virtue of or according to the Statutes of Distribution to the part of the estate of the testatrix in respect of which she died intestate. The inquiry directed by that order was duly held, and by his certificate, dated April 4, 1911, the master to whom the matter was referred found that the person so entitled under the Statutes of Distribution was Sarah Whittaker, and that she had since died [in 1892], and that her legal personal representative was Elizabeth Ann Whittaker, the plaintiff, who was the administratrix of the estate of Sarah Whittaker under letters of administration granted to her on Nov. 6, 1896. Elizabeth Ann Whittaker alleged that she had made repeated applications to Louisa Orme Bamford and Alice Edgeworth Tate for accounts of the income of the one-third part of the residuary trust moneys and of the accumulations thereof which ought to have been made by Thomas Orme Farmer and by Louisa Orme Bamford and Alice Edgeworth Tate respectively from the date of the death of William Whittaker to July 8, 1908, being the expiration of the period of twenty-one years from the death of the testatrix. Elizabeth Ann Whittaker alleged also that she had repeatedly requested Louisa Orme Bamford and Alice Edgeworth Tate to pay to her as administratrix of Sarah Whittaker the income of the one-third part and of the accumulations of such income from July 8, 1908, but that they had wholly ignored those applications and requests, and they had refused to furnish any such accounts or to make any such payment as aforesaid.

This action was, accordingly, brought by Elizabeth Ann Whittaker against Louisa Orme Bamford and Alice Edgeworth Tate claiming (i) an account of the accumulations of the income of the one-third part of the residuary trust moneys made or which ought to have been made from Dec. 19, 1896, to July 8, 1908; (ii) an account of the income of the one-third part and of such accumulations from July 8, 1908; (iii) that the defendants should replace and make good all moneys found due on taking such accounts; (iv) that the defendants should pay to the plaintiff the income of the one-third part and of such accumulations from July 8, 1908; (v) if and so far as was necessary that the trusts declared by the will of the testatrix concerning her residuary estate might be administered by the court; (vi) if the defendants did not admit assets that the estate of Thomas Orme Farmer might be administered by the court; (vii) all necessary accounts and inquiries.

By their defence the defendants pleaded the limitation of time for actions against trustees contained in the Trustee Act, 1888, s. 8, and also claimed, under s. 3 of the Judicial Trustees Act, 1896, relief against all liability to the plaintiff in respect of the matters aforesaid. On Nov. 19, 1912, the action came on for trial before WARRINGTON, J., who stated that it was indisputable that the surviving trustee and after him his representatives had committed a breach of trust. As to the defence founded upon s. 3 of the Judicial Trustees Act, 1896, in no case which had yet come before the court had that section been applied to a case where the trustee had wrongly determined for himself the beneficial rights of the parties and had acted on that determination. As to the defence founded upon the Trustee Act, 1888, s. 8 (1) (a) (b), the proviso at the end of sub-s. 1 (b) applied as much to cases which came under sub-s. 1 (a) as to those which came under sub-s. 1 (b), so that the statute did not begin to run against any beneficiary unless and until the interest of the beneficiary became an interest in possession, which in the present case was at the expiration of twenty-one years from the death of the testatrix—namely, July 8, 1908. HIS LORDSHIP accordingly ordered accounts to be taken and payment of the amounts found to be due from the defendants to the plaintiff. The defendants appealed.

Clauson, K.C. (with him *Theodore Ribton*), for the defendants.

Cave, K.C., and *Chetwynd Leech* for the plaintiff.

Cur. adv. vult.

October 20, 1913—The following judgments were read.

COZENS-HARDY, M.R.—In this case there has been an undoubted breach of trust in respect of which the defendants are liable unless they can take advantage of some statute of limitations, or can satisfy the court that there is jurisdiction to give relief under the Judicial Trustees Act, 1896, and that the circumstances are such that the court in its discretion ought to exercise that jurisdiction.

The testatrix, by her will dated June 27, 1887, gave her residuary estate upon trusts which were (stated shortly) to pay one-third of the income to each of three persons during his or her life, and upon trust for a class of children or issue of the three tenants for life. The testatrix died on July 8, 1887. One of the tenants for life died in December, 1896. The duty of the trustees was then to accumulate the income of this one-third until July 8, 1908, the period allowed by the Thellusson Act, and from that date to pay the income, including the income of the accumulated fund, to the statutory next of kin. The plaintiff is the legal personal representative of the sole next of kin. The defendants are the representatives of the last surviving executor and trustee of the will, and since his death have acted as trustees of the will. The income has not been applied since the death of the tenant for life, and until a recent date, in accordance with law. It has been paid to or for the benefit of the family of the dead tenant for life.

In these circumstances several points of law have been raised. The defendants claim the benefit of s. 8 of the Trustee Act, 1888, in respect of any breach of trust more than six years before the issue of the writ, but, in my opinion, this defence fails. Subsection 1 of that section deals with two cases para. (a) where an existing statute would be available but for the fact of the fiduciary relation; and para. (b) where no existing statute of limitations applies. In my opinion, the present case falls under para. (b) and not under para. (a). Doubts have been expressed by some judges as to whether any effect can be given to para. (a): see *Re Bowden, Andrew* v. *Cooper* (6) and *How v. Winterton, Earl* (7). With great respect, I think this view is wrong. *Burdick* v. *Garrick* (8) is a good illustration of the point. An agent may be sued by his principal for an account, and for payment of the balance, and in some circumstances a plea of the statute of limitations would have been perfectly good. If, however, the case was rested upon the ground of fiduciary relation, according to the old law the Court of Chancery would not have allowed the statute of limitations to be pleaded as a defence. In the language of LORD HATHERLEY, L.C. (L.R. 5 Ch. at pp. 240, 241):

> "I do not say that in every case in which a bill might be filed against an agent the statute of limitations would not apply, but in all cases where the bill is filed against

an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application."

In my opinion, para. (a) applies to a case like that, and enables an agent to plead the statute, notwithstanding his fiduciary relation. Other instances might be furnished, such as actions by a company against a director. I may also refer to *Thorne* v. *Heard* (9) where ROMER, J., dealt with a case in which he held para. (a) to apply: (see [1893] 3 Ch. at p. 534). If the case falls within para. (b) it is clear that the statute will not avail because the proviso at the end says that the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession. In the present case the plaintiff's interest was not in possession until 1908 so that the statute is no bar. Although it is not necessary for my decision in the present case, I think it right to add that, in my view, the proviso in question applies to the whole of sub-s. 1, and not merely to the latter part of that sub-section, that is to say to para. (b). I agree with WARRINGTON, J., on this part of the case.

The next point raised by the defendants turns upon s. 3 of the Judicial Trustees Act, 1896, which is in the following terms:

"If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same."

It is admitted that the trustees transacted honestly. The defendants contend that that section gives the court jurisdiction to relieve them from personal liability for the breach of trust, and that the circumstances, to which I must afterwards refer, are such that the court ought in its discretion to exercise the jurisdiction. The plaintiff contends that the section applies only to a case where the breach of trust arises from some executive or administrative blunder, and not to a case where money is paid to a person not entitled according to the true construction of the will. The point thus raised is of the utmost importance. Approaching the matter apart from authority, I can see no ground for narrowing or limiting the application of the wide words of the section. "Any breach of trust" are emphatic words. The statute was obviously designed to protect honest trustees, and it ought not to be construed in a narrow sense. I shrink from holding that, where trustees have divided an estate between A. and B. after taking competent advice that A. and B. are alone entitled, they cannot plead this section in answer to a subsequent claim by C. To hold this would be to render the relief given by the section almost nugatory.

There have, however, been several authorities, to which it is necessary to refer. KEKEWICH, J., in *Davis* v. *Hutchings* (5) said ([1907] 1 Ch. at p. 365):

"If a trustee has, without any default of his own, employed a defaulting agent, whom he believed to be a competent man to do certain work, and, whether competent or not, the agent turns out to be fraudulent and gets the trustee into a scrape, the trustee cannot shelter himself behind that. Why ought he to be let off? A trustee who employs an agent must, according to the ordinary rules of law, be responsible for the acts of the agent. I do not believe it was the intention of the legislature that he should be let off that. This case occurs to me: A question arises on the construction of a will whether, on a gift to nephews and nieces, the nephews and nieces of the wife as well as of the testator are intended to be included. The trustee takes the opinion of eminent counsel, and is advised that the class is restricted to the nephews and nieces of the testator. No doubt he might take the opinion of the court, and perhaps be held liable for omitting to take it; but does the taking of the opinion of eminent counsel save him from any liability if, in the event, it be determined that the nephews and nieces of the wife, on the proper construction, are included in the gift? I cannot conceive that the Act was intended to apply to a case of that sort."

With great respect I am unable to accept this view. The decision upon the facts of that particular case may have been right, but the general principles thus laid down cannot, I think, be supported. It is somewhat strange that KEKEWICH, J., in support of his view, referred to a case in the Privy Council, *National Trustees, Executors, and Agency Co. of Australasia, Ltd.* v. *General Finance and Guarantee Co. of Australasia, Ltd.* (1), which turned upon a section of a colonial Act corresponding with the section now under discussion. There a company, whose business it was to act as trustees for reward, divided an estate wrongly upon the advice of their solicitor. It was first held that the advice of the solicitor was not a defence to the action, and the court then proceeded to consider all the circumstances, and in the exercise of their discretion declined to relieve the trustees. In my opinion, that case is an authority that the court has jurisdiction to relieve when payment has been made to a wrong person although the court declined to exercise that jurisdiction. Otherwise the inquiry into the circumstances would have been irrelevant.

In *Re Kay, Mosley* v. *Kay* (3) ROMER, J., took a wider view, and held that executors, who had paid beneficiaries certain sums which an unpaid creditor sought to make them liable for, were entitled to be relieved. It was true that this was not a question of the construction of a written document, but it was in some respects stronger, for the creditor had a claim prior to any of the beneficiaries. PARKER, J., in *Re Mackay, Griessemann* v. *Carr* (4), used language which I respectfully desire to adopt ([1911] 1 Ch. at p. 307):

> "If an ordinary business man might reasonably entertain a particular view of the construction of the instrument, and the action of the trustee would have been justified if that view had been the true one, that trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong. Even where a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act."

It may be that there is no reported case in which this has been done; but in the opinion of all the members of the court this may be done in a proper case.

In the present case WARRINGTON, J., held that the Act has no application where a trustee has misconceived his duty and paid money to a person not entitled. With great respect I think he was wrong in this. The jurisdiction is, from its very width, one which must be exercised with great caution. It certainly is not enough for a trustee to say: "I thought A. and B. were entitled and I paid them accordingly." He cannot be considered to have acted reasonably if he has neglected to obtain skilled advice. In considering what is reasonable, regard must be had to the estate of which he is trustee. In a large estate it may be only reasonable that he should consult counsel of the first rank or apply by originating summons for the direction of the court, whereas it would not be reasonable to insist upon all this where the estate is small.

It remains to apply these principles to the present case. In the first place the clause of the will in question is obscure. It had to be construed by PARKER, J., and I quite understand that a different, though a wrong, view might be taken of its effect. It seems so natural that the children of the tenant for life should on his death be entitled to the benefit of his share. In the next place the total estate is small, between £4,000 and £5,000 and the one-third in question was only about £1,400. In the third place on the death of the tenant for life the then surviving trustee consulted his solicitor, Mr. Bamford, who gave evidence which was accepted by WARRINGTON, J. He advised that the children of the tenant for life had a vested interest, and that he might pay the income to the mother at least while they were infants. I should say that the family were resident in Oregon. The correspondence between the solicitor and the widow in January, and February, 1897, leaves no doubt as to what took place. The eldest child was of age and the youngest was fourteen. Payment was regularly made to the mother, who was furnished with periodical accounts. This was known to the present plaintiff, who in 1906 wrote to Mr. Bamford and urged him to let the widow have the interest without further delay, as some of the children needed it. There is no reason to doubt that the money thus paid to the widow was applied to the benefit of the family. The defendants continued this practice without taking further advice. In these circumstances, having regard to the perfect honesty of the transaction, I think we are justified in exercising the

jurisdiction conferred by the section and relieving the defendants from the breach of trust by their testator and to a small extent by themselves. WARRINGTON, J., holding that he had no jurisdiction to relieve, did not consider whether the circumstances justified relief. Had he applied his mind to the latter question and declared to give relief, I am not sure that I should have thought it right to interfere with his discretion, although it is properly matter of appeal. The case is difficult, but upon the whole I think we ought to relieve the trustees. It is admitted that there must be judgment for accounts, the precise form of which seems accurately worked out in the notice of appeal. The defendants must have the costs of the appeal, but, having regard to the conduct of the trustees in declining to account and to the correspondence which passed, I think there should be no costs in the court below.

HAMILTON, L.J.—I agree that the defendants succeed and are entitled to have the decree below varied. It is not quite clear whether WARRINGTON, J., based his decision, so far as the Judicial Trustees Act, 1896, s. 3, is concerned, upon the view that such a case as this is not within the language of the section at all, or that the current of decisions has now settled a rule not to exercise the statutory discretion upon it. Either view would, in my opinion, be erroneous. The section is expressed in terms which are comprehensive and unrestricted. Its object is remedial, and the form of the remedy is a discretionary judicial power of relieving against personal liability for "any breach of trust," provided that the trustee

> "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach."

I think that there was jurisdiction to relieve in the present case as all these conditions were fulfilled. I concur in the observations of the other members of the court with regard to the judgment of KEKEWICH, J., in *Davis* v. *Hutchings* (5), ([1907] 1 Ch. at p. 365). In my opinion, no substantial distinction in principle can be shown between *Re Kay, Mosley* v. *Kay* (3) and this case. If the court can relieve against a breach, which consists in paying A.'s legacy with money which is really due to B., C., and D. as payment of debts due to them, why in principle may not the court relieve against the breach, which consists in paying to A. for the use of B. and C. money which ought to have been accumulated for the benefit of B., C., and D. in certain events? No reason can be shown why breaches of trust, due to an erroneous construction of the instrument creating the trust, should be placed judicially beyond the pale of relief. PARKER, J. (*Re Mackay, Griessemann* v. *Carr* (4)) states ([1911] 1 Ch. at p. 307) that in such cases relief has been granted, and he clearly saw nothing to disapprove in the application of relief to such cases.

Since WARRINGTON, J., has exercised no discretion in the matter, it is for us to do so now. I need hardly say that, had he exercised his discretion, I should have been slow to interfere with it. Taking all the circumstances of the case into account, the modest size of the fund, the obscurity of the will, the position of the payers (and I see no useful distinction between that of the defendants and that of the original trustee), the advice on which the payments were made, and the person and purposes to and for which they were made, I think the case is one in which the payments were made reasonably, and as the honesty of them has not been questioned, I think that the breaches of trust ought fairly to be excused, and the relief should be granted.

This would be sufficient to dispose of the appeal, for counsel for the defendants admits that to a limited extent his clients must account. Since, however, the contention based on the Trustee Act, 1888, s. 8 (1) has been fully argued, I ought not to pass it over. As at present advised, I am far from being satisfied that the defendants can succeed on this part of their case. The proviso is an answer, if the case is rested on para. (b). Grammatically and logically it is equally a proviso upon para. (a), though, as printed in the Law Reports Statutes, it is by a typographical arrangement and by punctuation restricted to para. (b). To bring their case within para. (a) the defendants must disregard or minimise the distinction drawn in the language of the two paragraphs between limita-

A tions derived from any "existing statute" and limitations first prescribed by the statute in question. The defendants have not satisfied me that their contention can be reconciled with the division of this part of the section into two clauses; nor have they established, to my mind, in spite of the observations in *How* v. *Earl Winterton* (7), that, unless such a case as the present is within para. (a) that paragraph would be reduced to a nullity.

B **SWINFEN EADY, L.J.**—The true construction of the will of Catherine Allsop, the testatrix, was determined on May 26, 1910, by an order of PARKER, J. It was thereby declared that there was one period only for the distribution of the whole of the residuary trust moneys of the testatrix—namely, the date of the death of the survivor of Robert Whittaker, William Whittaker and the plaintiff Elizabeth Ann Whittaker—and that one-third part of the said residuary trust moneys did not become distributable on Dec. C 19, 1896, the day of the death of the said William Whittaker, but that there was an implied direction to accumulate the income of such third part from the date of the death of William Whittaker until the time for the distribution of the residuary trust moneys arrived, and that such direction became void by virtue of the Thellusson Act immediately after the expiration of twenty-one years from the death of the testatrix. The period of twenty-one years from the death of the testatrix expired on July 8, 1908. It D follows from the decision of PARKER, J., that the one-third of the income paid to the widow of William Whittaker for several years was not a payment authorised by the terms of the trust. The amount of this income should have been invested and accumulated, until the expiration of the twenty-one years.

This action was commenced on June 28, 1911, by the administratrix of Sarah Whittaker, who was the person entitled, according to the Statutes of Distribution, to the part E of the personal estate of the testatrix, in respect of which she died intestate. The plaintiff also happens to be one of the two surviving tenants for life under the will. The plaintiff's claim, which has succeeded before WARRINGTON, J., is to compel the defendants, who are the legal personal representatives of the last surviving trustee to recoup to the trust estate and replace the one-third of the income improperly paid to Mrs. Whittaker since her husband's death, with interest thereon, so that as from July 8, 1908, F being the expiration of the twenty-one years, that accumulated fund may be available to produce interest, for the benefit of the statutory next of kin, until the death of the last of the tenants for life. The defence to the claim is, first, that it is barred under the provisions of s. 8 of the Trustee Act, 1888; and, secondly, that in any case the trustees in paying the income to the widow acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in G the matter. These defences failed before WARRINGTON, J., and have been raised again before us by way of appeal.

The claim is in respect of a breach of trust to compel the defendants to make good and then retain a fund so that it may produce income for the plaintiff. This is not within any statute of limitations, and accordingly s. 8 (1) (b) of the Trustee Act, 1888, applied. The interest of the plaintiff in this fund did not become an interest in possession until July 8, H 1908, upon the expiration of the term of twenty-one years. As from that date, but not before, the income of William's one-third, and the income to arise from the accumulations of that income which ought to have been made since his death, became payable to the legal personal representative of Sarah Whittaker. As six years have not elapsed since July 8, 1908, this claim is not barred by s. 8 (1) (b). The defendants contended that para. (a) was the one applicable to their case, and not para. (b). But, in my opinion, I that contention cannot be supported. Paragraph (a) applies to cases where an existing statute of limitations would have applied, if the trustee had not occupied that fiduciary position. It embraces cases where a remedy existed and the statute of limitations could have been pleaded as a defence, but for the fiduciary position. *Burdick* v. *Garrick* (8) affords an illustration. A bill was filed against an agent for an account. It was held by the Court of Appeal that the agent in that case was in a fiduciary position, and therefore the statute of limitations had no application. But LORD HATHERLEY, L.C., refused to say that in every case in which a bill might be filed against an agent, the statute of limitations would not apply. Under para. (a) a fiduciary agent can plead the statute

(subject to the exceptions in sub-s. 1) to the like extent as if there were not any fiduciary position. Again, in a case of contract whereby trustees agree with A. B. to hold certain property upon trust and to pay to A. B. the income thereof for his life, A. B. could sue for the income on the contract, and the trustees could not by reason of their fiduciary position set up the statute of limitations. They can do so now under para. (a) subject to the exceptions in sub-s. 1. Contract and trust might co-exist, and the trust prevent the plea of the statute. Paragraph (a) alters the rule and allows in cases coming within it, the statute as a defence. The only claim of the plaintiff in the present case is a claim under a resulting trust, resulting by operation of law. The trust in the will is a trust to accumulate, and, having regard to the Thellusson Act, for the remainder of a period of twenty-one years. The future income, not being effectually disposed of by the will, results to the person entitled under the Statutes of Distribution. This is an action "brought to recover money" within para. (b), and is one to which no existing statute of limitations applies. It is based upon the breach of trust, in not duly investing and accumulating the fund. In my opinion, it is within para. (b) and not within para. (a), and the six years under para. (b) did not begin to run until the expiration of the term of twenty-one years, when the plaintiff's interest in the fund first became an interest in possession. In *How* v. *Earl Winterton* (7) the plaintiff's action was not brought within six years of the time when her annuity rested in possession. In the present case the plaintiff has sued within six years of the end of the twenty-one years' term. For these reasons I am of opinion that the plaintiff's claim is not barred by any statute of limitations nor by the Trustee Act, 1888.

There remains the question whether the defendants ought to be relieved from liability under the Judicial Trustees Act, 1896. Upon the death of William Whittaker, Thomas Orme Farmer, who was then sole surviving trustee, consulted the solicitors who had acted in the trust from the commencement, as to the destination of the one-third of the income, and was advised to pay it to the widow. The solicitors wrote to the widow in America the letter of Jan. 25, 1897, and in reply the widow, who had taken out letters of administration to her husband, wrote on Feb. 10, 1897, that the children all agreed to leave her while she lived in full possession of her husband's estate, and that they did not wish the home broken up, or anything divided. The eldest child was then twenty-one and the youngest fourteen. The income accordingly was paid by Mr. Farmer to William Whittaker's widow until the death of the former on Nov. 12, 1904, and after his death the defendants, as his legal personal representative, continued to deal with the income for a time, in exactly the same manner as their testator had done. The plaintiff was aware of this, and, indeed, on Nov. 23, 1906, wrote to the solicitors urging that the interest then due should be paid to the widow without further delay, as she was greatly in need of the money. Down to this time it does not appear that any question had been raised or any doubt expressed or felt as to the proper construction of the will. William Whittaker's children, however, then took advice, suggested that they were entitled to receive immediately the capital of the share of which their father and afterwards their mother had received the income, and the originating summons issued by them asked to have that question determined. The result of the summons was that it was determined that the capital was not then distributable, and that the income had been improperly paid to the widow.

Under these circumstances ought the defendants be relieved? It was urged by the defendants that no case had arisen in which a trustee had been excused when he had paid the wrong person—had paid A.'s money to B.; and WARRINGTON, J., stated that no case had yet come before the court, where s. 3 of the Judicial Trustees Act, 1896, had been applied when the trustee had wrongly determined himself the beneficial rights of the parties and acted on that determination. But how do the authorities stand? In *Re Kay, Mosley* v. *Kay* (3) ROMER, J., relieved from liability a trustee who had paid A.'s money to B. He had paid a legacy and income of the estate to the widow, the estate being insolvent. In *Re Grindey, Clews* v. *Grindley* (2) a question arose whether executors should have called in a promissory note for £166, the amount of which had been lost. There was a provision in the will as to maintaining the estate in the like mode of investment as at the testator's death. LINDLEY, L.J., thought the question of construction

A one of considerable difficulty, and the trustees were relieved from liability for the loss of the money. CHITTY, L.J., said ([1898] 2 Ch. at p. 601):

> "In my experience, there is no source of trouble from which trustees have become more frequently entangled in breaches of trust than obscure wills; and in dealing with this section we may take into consideration the nature of the will itself, and the
B difficulty in which it placed the trustees. There is certainly on this will a possible construction which might reasonably be entertained by ordinary business men."

Thus although the question arose on a point of the construction of the will, and one of the executors who had been desirous of calling in the note was indemnified by the other two, who acted upon their own view of what their duty was, the court relieved the defendants from liability. In *National Trustees, Executors and Agency Co. of Australasia, Ltd.* v.
C *General Finance and Guarantee Co. of Australasia, Ltd.* (1) trustees under an erroneous view of the law had paid the trust fund to the wrong person, and in considering whether or not they should be relieved from liability the court considered all the circumstances of the case, including the fact that they were paid trustees, and that they had made no attempt to recover the fund, or so much as was practicable for their cestuis que trust. If the court cannot or ought not in any case to grant relief where a trustee has wrongfully
D paid the money of A. to B., it would have been quite unnecessary to consider the matters which I have mentioned. That case is really an authority for the defendants here, that the court has jurisdiction under the Act to grant relief in such cases. Again, in *Re Mackay, Griessemann* v. *Carr* (4) PARKER, J., said ([1911] 1 Ch. at p. 307) that even where a trustee had distributed an estate on an erroneous construction of a will, he has been relieved under the Act.

E The language of s. 3 is wide; and a narrow construction ought not to be placed on it. It was intended to give power to the court to relieve an honest trustee in proper cases. The words "is or may be liable" appear to point to doubtful questions of construction. In my opinion, the case of a trustee committing a breach of trust by paying the wrong person in consequence of acting upon an erroneous construction, is within the section, and the court has jurisdiction to relieve against the personal liability. I concur in the
F view which the Master of the Rolls has expressed with regard to the observations of KEKEWICH, J., in *Davis* v. *Hutchings* (5) ([1907] 1 Ch. at p. 365). Some of these observations were inconsistent with *Speight* v. *Gaunt* (10) and with what the same learned judge had himself previously said in *Re Weall, Andrews* v. *Weall* (11). The general principles stated by KEKEWICH, J., and the very narrow and restricted construction which he proposed to put upon the Judicial Trustees Act, 1896, cannot be supported.
G The jurisdiction, however, requires great care and caution in its exercise. The procedure by originating summons to determine questions of construction is inexpensive and speedy and should be resorted to when the proper construction of an instrument is open to any serious doubt. The trustee should not in doubtful cases act upon any view without the opinion of the court being first obtained. But the amount of the fund is a matter to be taken into consideration in determining whether an originating summons should be
H issued. In the present case, the third share of the year's income was a small amount; no question was raised by anyone that the widow was not entitled to receive the money. The advice of the lawyer was taken and he did not suggest or even apparently consider that there was any doubt as to the true construction of the will, and he advised the payments to the widow which were made. The present defendants merely followed the same course as their testator. No suggestion appears to have been made that there was
I any question or any matter of doubtful construction upon which the opinion of the court should be taken. Under these circumstances, I am of opinion that the case of the present defendants and of their testator is within the Act, and that they ought to be relieved from liability for the breach of trust arising from paying income to the widow instead of investing and accumulating.

Appeal allowed.

Solicitors: *J. B. R. Conder*, for *John Bamford & Son*, Ashbourne; *Taylor, Hoare & Jelf*, for *Randolph Eddowes*, Derby.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

R. *v.* JACKSON. Ex Parte PICK

[King's Bench Division (Ridley, Pickford and Atkin, JJ.), July 29, 1913]

[Reported [1913] 3 K.B. 436; 82 L.J. K.B. 1215; 109 L.T. 175; 77 J.P. 443; 29 T.L.R. 735; 11 L.G.R. 1237]

B

Local Authority—Parish council—Chairman—New council—Position of chairman of former council pending election of new chairman—Right to occupy chair and vote—Local Government Act, 1894 (57 & 58 *Vict.*, *c.* 73), *s.* 3.

The powers conferred upon the chairman of a parish council last until his successor has been actually appointed, even though the council goes out of office and the chairman for the time being fails to secure re-election. At the annual meeting of the new council he is, therefore, although no longer a member of the council, the chairman until a new chairman is elected, and, as chairman, he is entitled to vote at such election, and also to give a casting vote as provided by the Local Government Act, 1894.

C

D

Notes. Section 3 of the Local Government Act, 1894, has been replaced by s. 48 and s. 49 of the Local Government Act, 1933: 14 Halsbury's Statutes (2nd Edn.) 383. The Local Government (Elections) Act, 1896, and the Parish Councillors (Tenure of Office) Act, 1899, are also repealed by the Act of 1933. See now, as to term of office of parish councillors, s. 50 (2) of the 1933 Act.

As to borough councils, see 24 Halsbury's Laws (3rd Edn.) 380–387, as to parish councils, see ibid., 396–399, and for cases, see 20 Digest, 134–136 (election of mayor), 141 (election of chairman of parish council).

E

Case referred to:

(1) *R.* v. *Rowlands, Ex parte Beesley* (*or Beasley*), [1910] 2 K.B. 930; 80 L.J.K.B. 123; 103 L.T. 311; 74 J.P. 453; 26 T.L.R. 658; 54 Sol. Jo. 750; 8 L.G.R. 923, D.C.; 20 Digest 139, *1143*.

F

Rule Nisi directed to one George Jackson to show cause why an information in the nature of a quo warranto should not issue against him, on the ground that he had been improperly elected and was improperly exercising authority as chairman of the parish council of Deeping St. Nicholas, in the Parts of Holland, in the county of Lincoln.

At the annual meeting of the parish council of Deeping St. Nicholas, held in 1912, one Wilkinson was elected chairman, and he remained as such up to the time of the parish councillors going out of office in April, 1913. The number of parish councillors was nine, in accordance with the provisions of the Local Government Act, 1894. Wilkinson was one of the candidates at the fresh election, but was unsuccessful. The annual meeting was held on May 5, 1913, at which all the parish councillors were present, and Wilkinson, as the chairman of the former council, presided. Two candidates for the position of chairman were put forward, Porter and Jackson, neither of whom was a member of the council, but both of whom were qualified to be parish councillors, and therefore eligible for election. On a poll being taken, five votes were given in favour of Porter and four in favour of Jackson. The chairman, Wilkinson, then claimed his right to vote, although he had not been elected a member of the council, and voted in favour of Jackson. This made the voting equal, and Wilkinson then claimed to be entitled to give a casting vote, which was also given in favour of Jackson, who was declared duly elected as chairman. It appeared that with regard to the meeting of May 5, 1913, proper notices had not been sent out, and that, therefore, the annual meeting had been irregular. The county council acting under the powers conferred upon them by the Local Government (Elections) Act, 1896, then ordered that a fresh meeting should be held, and that proper notices should be sent out beforehand. This second meeting was held on May 30, 1913, when Wilkinson again attended as chairman, and claimed to exercise his rights as on the former occasion, with the result that Jackson was elected chairman in the same manner as before.

G

H

I

By the Local Government Act, 1894, s. 3:

"A parish council . . . shall consist of a chairman and councillors, and the number of councillors shall be such as may be fixed from time to time by the county council. . . . (8) At the annual meeting the parish council shall elect from their own body, or from other persons qualified to be councillors of the parish, a chairman, who shall, unless he resigns or ceases to be qualified, or becomes disqualified, continue in office until his successor is elected."

By Part 2 of Sched. 1, to the Act, the following rules (inter alia) were made applicable to parish councils:

"(3) The first business at the annual meeting shall be to elect a chairman. . . . (9) Every question at a meeting of a parish council shall be decided by a majority of votes of the members present and voting on that question. (10) In case of an equal division of votes, the chairman of the meeting shall have a second or casting vote."

Cautley showed cause against the rule.

E. M. Pollock, K.C., and *W. Mackenzie* in support of the rule.

RIDLEY, J.—The point that has to be decided in this case is whether Mr. Wilkinson, who had been the chairman of the former parish council, but had failed to secure re-election for the new council, continued to be the chairman for all purposes until his successor was appointed, or whether, as he had failed to be re-elected, he was only entitled to preside at the election of his successor and to take no part in it except as a mere figure-head. If the former view is to prevail, then Mr. Wilkinson was quite right in giving both an original and a casting vote: if the latter view is to be taken, then he had not power to vote at all.

The whole question turns upon s. 3 of the Local Government Act, 1894, which provides for the constitution and the number of the members of the parish council—the number being fixed by the county council. The period of the office of a parish councillor is three years, as provided by the Parish Councillors (Tenure of Office) Act, 1899. Sub-s. (8) of s. 3 of the Act of 1894 says that:

"At the annual meeting the parish council shall elect from their own body, or from the persons qualified to be councillors of the parish, a chairman, who, unless he resigns . . . continues in office until his successor is appointed."

The scheme which was contemplated by the statute is that the council must consist of a chairman and councillors; the chairman may or may not be a councillor, provided only that he is a person who is, although not elected to the council, qualified to be so. In this parish council of Deeping St. Nicholas, Mr. Wilkinson had been a councillor prior to the new election in April, 1913, and he was, in fact, the chairman when the parish councillors went out of office. The new council comes into office; there are nine members, and the chairman is not a councillor. The question is, when the council retired, was the chairman to retire also, or did he retain powers in the new council in spite of the fact of his rejection at the poll? In certain cases the council may proceed to elect a new chairman, and leave the old chairman out of the matter altogether. *R.* v. *Rowlands* (1) is one in which it was held that the retiring chairman of a local board of health had no right under the Public Health Act to vote. But in the Local Government Act, 1894, there is a special provision which says that the retiring chairman shall remain in office until his successor has been appointed. And, if a chairman remains in office, he is there for all purposes. If his authority is to be limited in any way, who is to say what is the limitation imposed upon him? Any person who alleges that there is some such limitation ought to be able to point to something in the statute itself which shows that this has been provided for. But in this Act there is nothing which deprives the chairman of any of the powers which under other circumstances—that is, if he had been re-elected to the parish council—he would have enjoyed. Had he been re-elected, Mr. Wilkinson would have had the voting rights which he has exercised as chairman. By the Act itself he was still chairman when the new council met, and, as there is nothing which curtails the powers of the chairman under circumstances such as the present, I think that he was

quite right in giving his vote in the first instance in favour of Mr. Jackson, and afterwards giving him his casting vote also. For these reasons I think that Mr. Jackson was regularly elected, and the rule nisi must be discharged.

PICKFORD, J.—I agree.

ATKIN, J.—I agree.

Rule discharged.

Solicitors: *Oldman, Cornwall, & Wood Roberts*, for *M. Merry*, Spalding; *Hobson & MacMahon*, for *Calthrorp & Leopold Harvey*, Spalding.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

ROYAL BANK OF CANADA AND OTHERS *v.* REGEM

[Privy Council (Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson and Lord Moulton), December 10, 11, 12, 1912, January 31, 1913]

[Reported [1913] A.C. 283; 82 L.J.P.C. 33; 108 L.T. 129; 29 T.L.R. 239]

Canada—Alberta—Powers of provincial legislature—Statute dealing with civil rights outside province—Right of bondholders in England to recover money paid for a consideration which had failed—British North America Act, 1867 (30 & 31 *Vict.*, *c.* 3), *ss.* 91, 92.

Money Had and Received—Recovery of money paid for consideration which has failed.

The principle that money in the hands of one person, which in justice and equity belongs to another, in circumstances which render the receipt of it a receipt by the one to the use of the other, may be recovered as money had and received to the use of the true owner, applies to money paid for a consideration which has failed.

Bondholders in London had advanced money for the construction of a railway. The scheme became abortive, and the money remained in a bank in Alberta.

Held: the provincial legislature had no power to pass a statute dealing with such money, the right of the bondholders to recover it being a civil right outside the province, and not within the powers conferred on the provincial legislature by s. 92 of the British North America Act, 1867.

Notes. Applied. *Weyburn Townsite Co.* v. *Honsburger* (1918), 43 O.L.R. 451. Distinguished: *St. John and Quebec Rail Co.* v. *Jones* (1922), 62 D.L.R. 464. Applied: *Ottawa Valley Power Co.* v. *Hydro-Electric Power Co.*, [1936] 4 D.L.R. 594; *Credit Fancier* v. *Ross*, [1937] 3 D.L.R. 365; *I.O.F.* v. *R.*, [1939] 2 D.L.R. 53, 671. Distinguished: *Lovibord* v. *G.T.R.*, [1939] 2 D.L.R. 562; *Re Ogal*, [1940] 2 D.L.R. 345. Followed: *Desharnais* v. *C.P.R.*, [1942] 4 D.L.R. 605. Considered: *Fibrosa Spolka Akcyjna* v. *Fairburn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122. Applied: *Sun Life Assurance Co.* v. *Sisters Adorers of the Precious Blood*, [1943] 1 D.L.R. 596; *Re Alliance Insurance Co.*, [1946] 2 D.L.R. 772; *A. G. (Ontario)* v. *Scott* (1956), 1 D.L.R. (2d) 433; *Gray* v. *Kerslake*, [1958] S.C.R. 3. Referred to: *Sinclair* v. *Brougham*, [1914–15] All E.R. Rep. 622; *Workmen's Compensation Board* v. *Canadian Pacific Railway*, [1920] A.C. 184; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263.

As to money had and received, see 8 Halsbury's Laws (3rd Edn.) 235 et seq. and for cases see 12 Digest (Repl.) 257–262. For the British North America Act, 1867, ss. 91, 92, see 6 Halsbury's Statutes (2nd Edn.) 320, 322.

A Cases referred to:

(1) *Wilson* v. *Church* (1879), 13 Ch.D. 1; 41 L.T. 50, C.A.; affirmed sub nom. *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176; 43 L.T. 60, H.L.; 12 Digest (Repl.) 259, *2006*.

(2) *R.* v. *Lovitt*, [1912] A.C. 212; 81 L.J.P.C. 140; 105 L.T. 650; 28 T.L.R. 41, P.C.; 8 Digest (Repl.) 726, *219*.

B

Also referred to in argument:

Dobie v. *Temporalities Board* (1882), 7 App. Cas. 136; 51 L.J.P.C. 26; 46 L.T. 1, P.C.; 8 Digest (Repl.) 750, *288*.

A. G. of Ontario v. *Mercer* (1883), 8 App. Cas. 767; 52 L.J.P.C. 84; 49 L.T. 312, P.C.; 8 Digest (Repl.) 781, *451*.

C *Citizens Insurance Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; 51 L.J.P.C. 11; 45 L.T. 721, P.C.; 8 Digest (Repl.) 727, *227*.

A. G. v. *Alexander* (1874), L.R. 10 Exch. 20; 44 L.J. Ex. 3; 31 L.T. 694; 23 W.R. 255; 28 Digest (Repl.) 258, *1140*.

Prince v. *Oriental Bank Corpn.* (1878), 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41;
D 26 W.R. 543, P.C.; 3 Digest (Repl.) 184, *330*.

De Beers Consolidated Mines, Ltd. v. *Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T 221; 22 T.L.R. 756; 50 Sol. Jo. 666; 5 Tax Cas. 198; 13 Mans. 394, H.L.; 28 Digest (Repl.) 257, *1135*.

McGregor v. *Esquimalt and Nanaimo Railway*, [1907] A.C. 462; 76 L.J.P.C. 85; 97 L.T. 223, P.C.; 8 Digest (Repl.) 731, *259*.

E *Woodruff* v. *A. G. for Ontario*, [1908] A.C. 508; 78 L.J.P.C. 10; 99 L.T. 750; 24 T.L.R. 912, P.C.; 8 Digest (Repl.) 726, *218*.

Bank of Toronto v. *Lambe* (1887), 12 App. Cas. 575; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C.; 8 Digest (Repl.) 725, *214*.

A. G. for Quebec v. *Reed* (1884), 10 App. Cas. 141; 54 L.J.P.C. 12; 52 L.T. 393; 33 W.R. 618, P.C.; 8 Digest (Repl.) 723, *204*.

F *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; 63 L.J.P.C. 25; 69 L.T. 774; 10 T.L.R. 147; 6 R. 382, P.C.; 8 Digest (Repl.) 705, *126*.

Grand Trunk Railway of Canada v. *A. G. of Canada*, [1907] A. C. 65; 76 L.J.P.C. 23; 95 L.T. 631; 23 T.L.R. 40, P.C.; 8 Digest (Repl.) 706, *129*.

Madden v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626; 68 L.J.P.C. 148; 81 L.T. 276; 15 T.L.R. 484, P.C.; 8 Digest (Repl.) 728, *237*.

G *Toronto Corpn.* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52; 74 L.J.P.C. 22; 91 L.T. 700; 21 T.L.R. 45, P.C.; 8 Digest (Repl.) 709, *148*.

Crown Grain Co., Ltd. v. *Day*, [1908] A.C. 504; 78 L.J.P.C. 19; 99 L.T. 746; 24 T.L.R. 913, P.C.; 8 Digest (Repl.) 731, *260*.

Wentworth County v. *Smith* (1893), 15 P.R. 372; 3 Digest (Repl.) 185, **272*.

H **Appeal** by defendants from an order of the Supreme Court of Alberta, en banc, reported 2 D.L.R. 762, affirming the judgment of STUART, J., reported 19 W.L.R. 377, for recovery by the plaintiffs of 6,519,068.96 dollars.

Sir R. Finlay, K.C., R. B. Bennett, K.C., J. H. Moss, K.C. (both the latter of the Canadian Bar), and *W. Finlay*, for the appellants.

Buckmaster, K.C., Masten, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the
I respondents.

January 31, 1913. **VISCOUNT HALDANE, L.C.**—This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the legislature of Alberta passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action

brought by the government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Rail. Co., and the Canada West Construction Co., to recover 6,042,083.26 dollars, with interest, being the amount of the deposit held by the appellant bank. The court of first instance and the Court of Appeal of the province have given judgment for the government. It is contended by the appellants that the statute in question was not validly enacted. It is said to have been ultra vires of the legislature of the province as attempting to interfere with property and civil right outside the province, and also as trenching on the field of legislation as to banking, which by s. 91 of the British North America Act, 1867, is reserved to the Parliament of Canada. It is further said that inasmuch as the statute purported to make the deposit part of the general revenue fund of the province, it was inoperative as being an attempt to raise revenue for provincial purposes in a manner not authorised by s. 92 of that Act. In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed.

The appellant railway company was incorporated by an Act of the legislature of the province, being c. 46 of 1909, for the purpose of constructing and working a railway, to extend from Edmonton in a north-easterly direction, and to be wholly within the province. The capital was to be 7,000,000 dollars, and the company was empowered to issue bonds. By another Act of the same session, being c. 16, which received the Royal assent on the same day, Feb. 25, the government of Alberta was authorised to guarantee the principal and interest of the bonds to be issued by the railway company to the extent of 20,000 dollars a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of 5 per cent. By s. 2 it was provided that the bonds so guaranteed were to be secured by mortgage to be made to trustees, which was to cover the railway, its rolling stock and equipment, and its revenues, rights and powers. By s. 3 the form and terms of the bonds, mortgage and guarantees were to be approved by the Lieutenant-Governor in Council. By s. 4, when the guarantees were signed on behalf of the government, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By s. 5 all moneys realised by the sale, pledge, or otherwise of the bonds were to be paid for by the purchaser, subscriber, pledgee, or lender, into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the treasurer of the province, or such other credit as the Lieutenant-Governor in Council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the company and the bank holding the same, and such balance was from time to time to be paid out to the company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor in Council according to specifications to be fixed by contract between the government and the company, and in such sums as an engineer appointed by the Lieutenant-Governor in Council should certify as justified, provided that at the option of the company the moneys so paid into the bank should, instead of being so paid out, be paid to the company on the completion, as certified by the engineer to the satisfaction of the Lieutenant-Governor in Council, of sections and terminals specified. The balance of the proceeds of the bonds which might remain after the completion of the railway was to be paid over to the company or its nominees. Section 5 concluded with a provision, which appears to have been inaccurately printed, but their Lordships interpret it as bearing the meaning put on it in an Order in Council subsequently made by the Lieutenant-Governor on Oct. 7, 1909, that the balance at the credit of the special account remaining until paid out as above arranged for, was to be deemed part of the mortgaged premises under the mortgage, and not public moneys received by the province.

On Oct. 7 two Orders in Council were made by the Lieutenant-Governor. The first of these, after reciting the Incorporating Act and the Guarantee Act above referred to, approved forms of mortgage and a guarantee, authorised the proper officials to execute them, and designated the Standard Trusts Co. as the trustee under the mortgage deed.

This order, also, pending the preparation of engraved bonds, authorised the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, 7,400,000 dollars, to be exchanged for the engraved bonds in due course. By the second of these orders, after reciting that the company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the appellant bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act. By an order made on Nov. 9 the list of banks was varied, but the appellant bank remained included, and the deposit out of the proceeds of the bonds of 6,000,000 dollars, being the principal included in the amount sued for, was assigned to it. This Order recited that it was the understanding of the Government that on the proper interpretation of the last-mentioned Act the moneys in question, when paid into the banks, not being public moneys received by the province, could only be withdrawn on the terms stated in the Act. The second order of Oct. 7 had approved the terms of the preliminary bond in a form which made the principal and interest payable in London at the counting-house of Messrs. Morgan, Grenfell & Co. The terms of the bond provided that it should be secured by mortgage from the railway company to the Standard Trusts Co., and for the guarantee of principal and interest by the province. The bond was to be registered in the books of the company in London, and transfers were to be made in these books.

Shortly after the making of the two Orders in Council of Oct. 7 arrangements were made in London with Messrs. Morgan, Grenfell & Co., for the raising of the money authorised to be borrowed. To enable the transaction to be carried out, the railway company on Oct. 28 entered into a formal contract with the provincial government for the construction of at least 350 miles of the line. The contract recited the right of the company to issue bonds in proportion to mileage and terminals, and the authority of the Government to guarantee principal and interest to the extent of 20,000 dollars a mile, and further sums in respect of terminals, and provided in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued could be paid into the banks approved by the Lieutenant-Governor in Council to the credit of the treasurer of the province in a special account, and that such proceeds should from time to time be paid out to the railway company on engineers' certificates. The balance of the proceeds after completion of the railway and terminals was to be paid over to the railway company. By a deed of the same date made between the railway company, the Provincial Government, and the Standard Trusts Company, a company incorporated under the law of Manitoba, and having its head office outside the province, the railway company mortgaged its property to the trusts company to secure the bonds for the sum of 7,400,000 dollars, and interest at 5 per cent. repayable on Jan. 1, 1959, and the government guaranteed payment of principal and interest. The security expressly included not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on Nov. 22, the railway company entered into a contract with the appellant construction company, which had been incorporated under Dominion statutes, and had its head office outside the province, for the construction of the railway, and the railway company agreed to pay to the construction company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of Mar. 8, 1910.

Under the arrangements with Messrs. Morgan, Grenfell & Co., the preliminary bond for 7,400,000 dollars already referred to was taken up by them. A letter of Oct. 11, 1909, from the deputy provincial treasurer of the province to Messrs. J. P. Morgan & Co., of New York, shows the method adopted by the government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co., as agents for the government. That firm was to transfer to or hold this bond for Messrs. Morgan, Grenfell & Co., the immediate takers up of the bond issue in London. The purchase money was to be deposited to the credit of the provincial treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York the money which was to be applied and secured in accordance with the statutes, Orders in Council, and contracts already referred to, was paid in instalments in New York, the

part with which the appellant bank is concerned being received by its house in New York, and credited to the provincial treasurer to the railway special account. The bank had its head offices in Montreal and was incorporated under Dominion law. The account at Edmonton in Alberta was opened there in accordance with the arrangements already referred to. No money in specie was sent to the branch office which the bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account. It is plain that all these transactions were carried out for the purposes and on the faith of the statutes, Orders in Council, contracts, and mortgage deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the government at this period meant the appellants to understand that it would adhere strictly to the terms of its guarantee. The construction company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the bank made advances, and the construction company assigned to the bank as security its interest in the proceeds of the bond issue.

The second chapter of the history of the events which resulted in the appeal before their Lordships opened in March, 1910. There appears to have been public uneasiness about the action of the government in entering into the arrangements above described, and, in the event, a Royal Commission of inquiry was appointed. While it was sitting there was a change of government. The new administration introduced and passed two statutes, and on the validity of the first of these the question to be decided in the appeal turns. This statute, which became law on Dec. 16, 1910, after setting out in its preamble that the railway company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the treasurer of the province or otherwise, and comprising (inter alia) the 6,000,000 dollars and accrued interest in the appellant bank, should form part of the general revenue fund of the province free from all claim of the railway company or their assigns, and should be paid over to the treasurer without deduction. It was also provided that notwithstanding the form of the bonds and guarantee the province should as between itself and the railway company be primarily liable on the bonds and should indemnify the company against claims under them. By another statute passed at the same time any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to might submit a claim to the government to be reported on to the legislature.

On the day of the passing of these Acts a notice was served on behalf of the treasurer of the province on the appellant bank claiming payment of 6,042,083.26 dollars and interest, and a cheque was presented to and refused by the bank. A claim against the bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was launched immediately, claiming, on behalf of the Crown and the provincial treasurer, the sum above mentioned from the appellant bank, and the railway company and the construction company were subsequently joined as defendants. The main defence pleaded was the invalidity of the first of the two statutes of 1910, and the bank also claimed a lien for advances to the construction company. The case was tried before STUART, J., who held that the proceeds of the bonds were within the province, and that the matter was one of a local nature in the province. He therefore decided that it fell within class 16 of s. 92 of the British North America Act, 1867, and not within s. 91, and that accordingly, the statute having been validly passed, there should be judgment for the plaintiffs. The appellants appealed to the Court of Appeal which dismissed the appeal unanimously. The CHIEF JUSTICE held that the statute was probably authorised by classes 10 and 16 of s. 92, and certainly by class 13, relating to property and civil rights. He also decided against the appellants on the further points which they made that the Act trenched on the subject of banking legislation in s. 91, and that it was invalid as being confiscatory and not an authorised way of raising a provincial revenue. BECK, SCOTT, and SIMMONS, JJ., decided against the appeal on substantially

A the same grounds, though the two latter learned judges differed from the rest of the court on a minor question as to interest.

Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such B as this it was in the power of that legislature to repeal subsequently any Act which it had passed. If this were the only question raised the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change the position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the C judgments of the learned judges in the courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

It is a well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, D the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid, for a consideration that has failed. It applies as was pointed out by BRETT, L.J., in *Wilson* v. *Church* (1) when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his E use. *Wilson* v. *Church* (1), which was affirmed in the House of Lords under the name of *National Bolivian Navigation Co.* v. *Wilson* (1), is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign government in virtue of which the bondholders were to have the benefit of certain customs duties. The foreign government, finding that the railway had not been made, revoked the concession. The trustees, to whom the money had been F paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations carry out the scheme substantially. It was held that, while the government had a right to revoke the concession which could not be questioned, the effect of its so doing was to vary materially the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed, must G be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money. The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the Orders in Council, and by H the contracts and mortgage of that year. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton, in the province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head I office, which retained control. It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province and the legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *R.* v. *Lovitt* (2) where the point decided was, in reality, quite a different one. In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to

preclude the bank from fulfilling its legal obligation to return their money to the bondholders whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910 infringed the provisions of s. 91 of the British North America Act, 1867, by attempting to deal with a question relating to banking, and by trenching on the field already occupied by the Dominion Banking Act. It was also contended that the appropriation of the deposits to the General Revenue Fund of the province was outside the powers assigned to the provincial legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions, and of other points which were made during the arguments of counsel.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the action dismissed. The respondents must pay the costs here and in the courts below.

Solicitors: *Lawrence, Jones & Co.*; *Blake & Redden.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re BEAVAN DAVIES. BANKS & CO. *v.* BEAVAN

[Chancery Division (Neville, J.), July 23, 24, 1913]

[Reported [1913] 2 Ch. 595; 83 L.J.Ch. 109; 109 L.T. 538; 58 Sol. Jo. 31]

Executor—Retainer—Executor-surety—No right of retainer until payment by executor-surety of principal debt.

There can be no retainer by an executor-surety in respect of a right to indemnity out of the testator's estate. The right of retainer only arises where there is a debt, and a surety has no debt against his principal until he has paid off the principal debt. When an executor-surety has paid off the principal debt his right of retainer arises, but only in respect of assets actually in his hands at the time he pays off the debt or assets coming to his hands thereafter.

An executor was surety for a testator who died insolvent. Creditors commenced an administration action against the executors, a receiver was appointed, and the usual order made. The executor had not paid the debt for which he was surety, but he claimed to exercise his right of retainer in respect of it over the assets of the testator's estate.

Held: as the executor had not paid the debt, he had no debt against the estate in respect of which he could exercise his right of retainer.

Re Orme, Evans v. *Maxwell* (1) (1883), 50 L. T. 51, applied.

Re Giles, Jones v. *Pennefather* (2), [1896] 1 Ch. 956, *not followed.*

Notes. Referred to: *Re Harris, Davis* v. *Harris*, [1914] 2 Ch. 395.

As to right of retainer, see 16 Halsbury's Laws (3rd Edn.) 307–311, and for cases see 23 Digest (Repl.) 373 et seq.

Cases referred to:

(1) *Re Orme, Evans* v. *Maxwell* (1883), 50 L.T. 51; 23 Digest (Repl.) 380, *4507.*

(2) *Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956; 65 L.J.Ch. 419; 74 L.T. 21; 44 W.R. 283; 40 Sol. Jo. 257; 23 Digest (Repl.) 378, *4480.*

(3) *Re Richardson, Ex parte St. Thomas's Hospital Governors*, [1911] 2 K.B. 705; 80 L.J.K.B. 1232; 105 L.T. 226; 18 Mans. 327, C.A.; 5 Digest (Repl.) 726, *6285.*

(4) *Re Harrison, Latimer* v. *Harrison* (1886), 32 Ch.D. 395; 55 L.J.Ch. 687; 55 L.T. 150; 34 W.R. 736; 23 Digest (Repl.) 378, *4470.*

(5) *Re Allen, Adcock* v. *Evans*, [1896] 2 Ch. 345; 65 L.J.Ch. 760; 75 L.T. 136; 44 W.R. 644; 40 Sol. Jo. 583; 23 Digest (Repl.) 381, *4510.*

(6) *Ferguson* v. *Gibson* (1872), L.R. 14 Eq. 379; 41 L.J.Ch. 640; 23 Digest (Repl.) 374, *4449.*

Also referred to in argument:

Re Mitchell, Freelove v. *Mitchell*, ante p. 187; [1913] 1 Ch. 201; 82 L.J.Ch. 121; 108 L.T. 34; sub nom. *Re Mitchell, Truelove* v. *Mitchell*, 57 Sol. Jo. 213; 26 Digest (Repl.) 131, *929.*

Trevor v. *Hutchins*, [1896] 1 Ch. 844; 65 L.J.Ch. 738; 74 L.T. 470; 44 W.R. 417; 40 Sol. Jo. 403, C.A.; 23 Digest (Repl.) 387, *4578.*

Re Illidge, Davidson v. *Illidge* (1884), 27 Ch.D. 478; 53 L.J.Ch. 991; 51 L.T. 523; 33 W.R. 18, C.A.; 23 Digest (Repl.) 355, *4243.*

Ascherson v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318; 26 Digest (Repl.) 130, *915.*

Richmond v. *White* (1879), 12 Ch.D. 361; 48 L.J.Ch. 798; 41 L.T. 570; 27 W.R. 878, C.A.; 23 Digest (Repl.) 376, *446.*

Lethbridge v. *Mytton* (1831), 2 B. & Ad. 772; 9 L.J.O.S. K.B. 330; 109 E.R. 1332; 43 Digest 797, *2351.*

Further Consideration of an action tried by NEVILLE, J.

By an indenture, dated June 18, 1888, made between the testator John Griffiths Beavan of the first part, the defendant Samuel Sydney Beavan of the second part, and Frances Mary Jane Hampden of the third part, the testator as tenant for life and S. S. Beavan as tenant in fee in remainder mortgaged certain property to F. M. J. Hampden to secure the sum of £3,000 therein expressed to be paid to the testator and S. S. Beavan. The testator and S. S. Beavan thereby covenanted to repay the said sum with interest at 4 per cent. The sum of £3,000 was in fact paid to the testator only, and he alone had the benefit of it. By his will, dated May 22, 1900, the testator appointed his four sons, the defendants S. S. Beavan, T. N. Beavan, F. A. M. Beavan, and C. H. Beavan, executors, but only S. S. Beavan, T. N. Beavan, and F. A. M. Beavan proved the will. The testator died on Nov. 13, 1906, without having repaid the sum of £3,000 due on the mortgage of June 18, 1888. His estate proved to be insolvent, and in July, 1908, the plaintiffs, a firm of private bankers, claiming to be creditors of the estate, commenced this action on behalf of themselves and all other creditors of the testator against the four executors as defendants. On Nov. 21, 1908, an order was made for certain accounts and inquiries, including an account of the testator's debts, an account of his personal estate come to the hands of the executors who proved the will, and an inquiry as to what the testator's outstanding personal and real estate consisted of. The further consideration of the action was adjourned. By an order made on July 4, 1908, the defendant T. N. Beavan was appointed interim receiver of the testator's estate, and by a subsequent order made in November, 1908, his receivership was continued. By his certificate, dated June 5, 1913, the master certified the amount of the testator's debts, and stated that the defendant S. S. Beavan was entitled to be indemnified out of the estate of the testator against payment of the sum of £3,000, the amount of the mortgage of June 18, 1888, which the defendant S. S. Beavan was liable to repay. He further stated that S. S. Beavan was entitled to be indemnified against all interest and mortgagees' costs payable by virtue of such mortgage, and to be repaid the interest already paid by him since the death of the testator, amounting to £691 1s. 2d., which the master had allowed to S. S. Beavan in his account of the testator's debts. It was further stated in the certificate that the defendants S. S. Beavan and T. N. Beavan were entitled to exercise their right of retainer as executor rateably as between themselves in respect of their debts (and S. S. Beavan claimed to be entitled to retain the sums in respect of

which he was entitled to be indemnified as mentioned above) out of certain legal assets of the testator which the master therein enumerated. The point in dispute on this further consideration was as to whether the defendant S. S. Beavan had the right to exercise his executor's right of retainer in respect of the assets which he had collected or which still remained in his hands in respect of the sum of £3,000 for which he was liable on the mortgage.

Peterson, K.C., and *F. Thompson* for the plaintiff.

Bramwell Davis, K.C., and *Lyttelton Chubb* for the executor S. S. Beavan.

Owen Thompson, for the executors F. A. M. Beavan, who proved, and C. H. Beavan, who did not prove, the will.

F. Maugham for the defendant T. N. Beavan.

NEVILLE, J.—The point I have to decide here is one of considerable difficulty owing to the position in which I find the authorities. I should have thought that nothing was clearer than this, that the right to retain was a purely legal right which has always been recognised in equity so far as it existed in law and no further, and has never been extended either to equitable assets or, I should have thought, to equitable claims, except so far as they were equitable rights which were recognised and acted upon by the courts of law, so that it would be a claim which in an action or proceeding at law would have validity given to it. If that were all I had to deal with, I should feel little difficulty about the case because, in the present case, the executor has an equitable right or had an equitable right against the testator, and has an equitable right against his estate, or may have an equitable right against his estate, in respect of his suretyship, arising from the fact that he joined in a covenant to pay a creditor who was a creditor of the testator himself, and therefore he was a surety and not a principal debtor, and has certain rights over against the principal debtor.

Re Richardson, Ex parte St. Thomas's Hospital Governors (3)—particularly the judgment of FLETCHER MOULTON, L.J.—shows quite clearly the right to indemnity. Such a right as the surety has against the principal debtor at law does not arise until the surety has discharged the debt. It is quite true that the surety has, in addition, certain equitable rights which he can enforce in a court of equity, but they are purely equitable, and are not included in the equities, or equitable rights, which had been recognised by the courts of law with regard to retainer. The rule is clear that the court of equity will not extend the right of retainer, but will simply recognise it where it exists. If that is so, then primâ facie there can be no right of retainer in the present case in respect to this mortgage debt because until payment—which has not taken place—there was no legal liability upon the estate to the executor. But I have been referred to cases which, I confess, raise a question of considerable difficulty.

In *Re Orme, Evans* v. *Maxwell* (1), the question arose before KAY, J., and he held that there was no right of retainer until after the payment of the debt by the surety, but he gave an opportunity to the surety to pay off the debt with the view that, when he had done so, he might have the advantage of retainer out of the assets of the testator in his hands. I think that I ought to follow *Re Orme* (1) if it applies. I do not see that it is contrary to any principle of law or equity, and it seems not an unreasonable thing to allow. I think I ought to follow it. But in *Re Harrison, Latimer* v. *Harrison* (4) PEARSON, J., decided that, in such a case, where there was a payment off by the surety of the debt of the principal debtor, he could only set up a right of retainer in respect of assets which he held at the time when the debt to him arose, and that, inasmuch as in this case he had parted with all the assets before he had discharged the debt, there was no right of retainer, and I do not see any reason why this should not be perfectly good law. Until you have the conditions on which the right of retainer depends—that is, the money in the hands of the executor and the debt existing at the same time so that the executor can be presumed to have paid his own debt—you do not get the right of retainer at all, and where there are no assets at the time the debt arises in the hands of the executor I do not see what he is to exercise his rights of retainer upon; and therefore in *Re Orme* (1) what was done by KAY, J., would have had no advantage unless there

had been assets in the executor's hands at the time he had the opportunity of making the payment. No difficulty is created by the judgment of CHITTY, J., in *Re Allen, Adcock* v. *Evans* (5), because in that case there was a covenant entered into by the principal debtor with the surety to pay the debt on a certain day, and CHITTY, J., upon the authorities that had been cited to him, held that this created an immediate right in the surety to recover the whole amount of the debt as soon as it became payable, and, that being so, of course there was a right to prove upon the covenant against the estate for the whole of the debt. This, therefore, does not seem to me to militate against any rule which I have been in the habit of supposing applied to retainer.

Then comes *Re Giles, Jones* v. *Pennefather* (2), before KEKEWICH, J., which goes a very great deal further because it gives relief to the executor by way of retainer in a case where no debt exists at all, but nothing more than an equitable right to indemnity against the principal debtor. Now, I know to no authority prior to *Re Giles* (2) in which it has ever been held that the equitable right to indemnity is the subject-matter of retainer by the executors. I rather gather that KEKEWICH, J., was actuated by an idea which has been presented to me in argument that in equity useless forms will not be insisted upon, and that therefore, if you had a right such as that exercised by KAY, J., of giving the executor an opportunity of paying the debt before you decided his right to retainer, it was unnecessary to go through the form, but that you might provide for the immediate payment of the debt to the creditor and so give effect to the right to the retainer which the executor claims. But it seems to me that this is a totally different thing from the equity to which KAY, J., was only giving effect, which was to a right of retainer in respect of a legal debt which arose upon the payment off of the creditor, whereas KEKEWICH, J., was giving effect to an equitable right, and which was never anything more than an equitable right, in respect of which there never was any right of retainer at all, the right of retainer being a purely legal doctrine. Consequently I think that *Re Orme* (2) and *Re Giles* (2) are in direct conflict, one judge holding that there must be payment and the other judge holding that there need not be payment in order to entitle the executor who was a surety to retain in respect of the obligation or liability of his suretyship.

In addition to these there is the case of *Ferguson* v. *Gibson* (6) before WICKINS, V.C., which no doubt presents a difficulty. In that case, by inference, one would suppose that the learned Vice-Chancellor thought that an executor who was a surety had a right of retainer in respect of the estate, the right, of course, only being exercised against creditors in an equal degree. But it appears to me he would have held there was no right if the case had been a case between executors pure and simple and creditors. He did not so decide because the point was not before him. It is an expression of opinion and not a decision.

The question is: What ought I to do under these circumstances, the authorities appearing to me to be at variance? I think I ought to give effect to what I believe to be the principle underlying the right of retainer—i.e., that the right of retainer cannot be supported except in a case where there is a legal debt, or something that would be recognised by a court of law as proper subject-matter for retainer. Until payment there is not a debt which has ever been treated as the subject-matter of retainer. Therefore at present the executor has not a right to claim a retainer in respect of his surety of £3,000. Then comes the question whether I ought to give him the opportunity to pay in order that he may exercise his right. It would be futile to direct anything of the kind with regard to retainer, because, with the present case there can be no doubt that if the doctrine of *Re Harrison* (4) is to be applied, as I should apply it, the executor if he pays is only entitled to his right of retainer, and would be only entitled in respect of assets actually in his hands. But there are now no assets in his hands which are sufficient to satisfy his right of retainer. Therefore, what I must do is to declare that the executor has no right to retain in respect of the debt of £3,000.

Solicitors: *Field, Roscoe & Co.*, for *E. P. & A. L. Careless*, Llandrindod Wells; *Dixon, Weld, & Co*; *Chubb & Pettitt*, for *Andrews, Barrett & Wilkinson*, Weymouth.

[*Reported by* DOUGLAS D. JONES, ESQ., *Barrister-at-Law.*]

A

LEES *v.* LOVIE

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Pickford and Avory, JJ.). May 17, 1912]

[Reported [1912] 2 K.B. 425; 81 L.J.K.B. 978; 107 L.T. 165; 76 J.P. 372; 28 T.L.R. 441; 23 Cox, C.C. 92]

B

Licensing—Club—Register—Club struck off—Right to be re-registered—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 95, *s.* 110.

A club was struck off the register under s. 95 of the Licensing (Consolidation) Act, 1910 [see now s. 27 (1) of the Licensing Act, 1961: 41 HALSBURY'S STATUTES (2nd Edn.) 701]

C

Held: the club, having once been struck off the register, was not entitled to be re-registered.

Per PICKFORD, J.: The action of a clerk to justices in registering a club is merely ministerial. He has no discretion whether or not he should register a club in respect of which an application for registration is made.

D

Notes. Considered: *Ashton* v. *Wainwright*, [1936] 1 All E.R. 805.

As to registration of clubs and striking off register, see 5 HALSBURY'S LAWS (3rd Edn.) 276, and for cases see 8 DIGEST (Repl.) 670–674.

Case Stated by Willesden, Middlesex, justices.

An information, dated June 1, 1911, was laid by the respondent, Sub-Divisional Inspector George Lovie, of the Metropolitan Police, against the appellant, James Lees E of the Willesden Radical Club, Willesden Green, for that he, the appellant, "on May 4 in the year 1911 on the premises of an unregistered club, to wit, the Willesden Radical Club, Willesden Green, aforesaid, did supply intoxicating liquor to William Thomas Ellis, contrary to s. 93 of the Licensing (Consolidation) Act, 1910." The information was heard by justices at Willesden on July 13, 1911, when the following facts were proved or admitted: (i) that the Willesden Radical Club and Institute Society, Ltd. F (a society registered and incorporated under the Industrial and Provident Societies Act, 1893) was in the month of Jan., 1903, placed upon the register of clubs kept in accordance with the provisions of the Licensing Act, 1902, and remained upon such register until April 21, 1910; (ii) that upon April 21, 1910, by order of a court of summary jurisdiction for the petty sessional division of Willesden it was ordered that the club should be struck off the register and that the premises occupied by it should not be used for the G purpose of any club requiring registration under the Licensing Act, 1902, for a period of six months, the ground for the order being that the club was not conducted in good faith as a club, and there was frequent drunkenness on the club premises; (iii) that on appeal Middlesex Quarter Sessions ordered that the order the subject of the appeal be confirmed, but be modified to the extent

H

> "that one of the grounds contained in the order, namely, 'that it is not conducted in good faith as a club' be quashed, and that 'three' calendar months be substituted for 'six' calendar months, as the period for which the premises occupied by the said club shall not be used for the purpose of any club which requires registration under the Licensing Act, 1902";

(iv) that on Oct. 26, 1910, application was made to the clerk to the justices of the petty I sessional division of Willesden to enter the Willesden Radical Club and Institute Society, Ltd., upon the register of clubs kept under the Licensing Act, 1902, and a return was made, and the proper fee tendered in intended compliance with the provisions of the Licensing Act, 1902, but the clerk refused to make the entry; (v) that on Jan. 5, 1911, application was made to the clerk to enter the Willesden Radical Club and Institute Society, Ltd., upon the register of clubs kept under the Licensing (Consolidation) Act, 1910, and a return was made in intended compliance with the provisions of the Licensing (Consolidation) Act, 1910 (s. 92 (4)), and the proper fee for registration tendered, and it

was intimated to the clerk by a letter dated Jan. 11, 1911, on behalf of the Willesden Radical Club and Institute Society, Ltd., that he was bound to register it as usual during January, and that in the event of the police taking proceedings the club would defend them, and thus have the matter submitted for judicial consideration; (vi) that on April 5, 1911, the clerk entered the Willesden Radical Club and Institute Society, Ltd., upon the register and dated the entry as of Jan. 5, 1911; (vii) copies of the entry and the rules of the society registered at the time of such entry were annexed to and formed part of this case; (viii) that the Willesden Radical Club and Institute Society, Ltd., whose name was so placed upon the register, was the same society or club and of the same name as mentioned in para (i), and occupied the same premises and had the same secretary and the same objects as the society or club whose name had been struck off the register under the order of April 21, 1910. The rules were the same, except that r. 6 had been amended in May, 1910, and the membership had decreased from 690 at the beginning of 1910 to 493 in 1911; (ix) that on May 4, 1911, upon the premises of the Willesden Radical Club and Institute Society, Ltd., intoxicating liquor was supplied by the appellant to one William Ellis, who was the secretary and a member of the society, for consumption upon the premises by Ellis and a guest of Ellis, and was paid for by Ellis, the appellant receiving the money.

At the hearing before the justices it was contended on behalf of the respondent that the offence charged in the information had been committed by the appellant, and that in the circumstances above set forth there had been no effective or lawful registration within the Licensing (Consolidation) Act, 1910. On behalf of the appellant it was contended that the club was not, on May 4, 1911, an "unregistered club" within the meaning of the Act. The justices by a majority were of opinion that there had been no effective or lawful registration within the Act, and, further, that in any event, the Act did not contemplate or permit the re-registration of a club which had been lawfully struck off the register of clubs. They found as a fact that the present club was the same club as that ordered to be struck off the register on April 21, 1910, and they convicted the appellant accordingly.

By the Licensing (Consolidation) Act, 1910:

"Section 93 (1) [see now Licensing Act, 1961, s. 25]. If any intoxicating liquor is supplied or sold to any member or guest on the premises of an unregistered club, the person supplying or selling the liquor, and every person authorising the supply or sale of the liquor, shall be liable to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding fifty pounds, or to both . . . Section 95 (1) [see now Licensing Act, 1961, s. 27 (1)]. Where a club has been registered in pursuance of this Act, a court of summary jurisdiction on complaint in writing by any person may, if they think fit, make an order directing the club to be struck off the register on all or any of the following grounds, namely—(a) that the club has ceased to exist, or that the number of members is less than twenty-five; or (b) that it is not conducted in good faith as a club, or that it is kept or habitually used for any unlawful purpose; or (c) that there is frequent drunkenness on the club premises; or (d) that illegal sales of intoxicating liquor have taken place on the club premises . . . Section 110. In this Act, unless the context otherwise requires, the expression "unregistered club" means a club which requires to be registered under this Act, but is not so registered, or which has been struck off the register of clubs."

Scott Fox, K.C. (*T. Cuthbertson* with him) for the appellant.
Danckwerts, K.C., & Bodkin for the respondent.

LORD ALVERSTONE, C.J.—This case is by no means free from difficulty. It is one of those cases in which the arguments on both sides are very evenly balanced, because it is quite impossible to say that some rather strange results may not follow whichever view we take. On the whole, however, I have come to the conclusion that this conviction was right, and that the appeal fails.

In the first place it must be remembered that there is an express finding in para (viii) of the Case:

"that the Willesden Radical Club and Institute Society, Ltd., whose name was so placed upon the register, was the same society or club and of the same name as mentioned in para. (i) aforesaid, and occupied the same premises and had the same secretary and the same objects as the society or club whose name had been struck off the register." A

Therefore, no question arises here as to any fresh organisation, and, when I have dealt with the merits of the case I shall have to point out that it is not a very difficult thing so to re-arrange a club that it may become a registered club without having the right to be re-registered. It seems to me that the Act does not contemplate re-registration of a club that has been struck off the register. It is to be observed that registration is practically automatic, that is to say, when a club desires to become a registered club under s. 91 of the Licensing (Consolidation) Act, 1910, it has to fulfil the conditions specified in s. 92. When those conditions are fulfilled, practically speaking, the club automatically becomes a registered club. There is no officer who exercises a discretion whether a club shall be registered if the conditions contained in s. 92 are complied with. Further, there is a discretion given under s. 95 as to the striking off of a club; it is, in my opinion, a sound argument to say that the court of summary jurisdiction has an absolute discretion under that section to strike a club off the register if they think fit. That, to a certain extent, answers what was a very strong argument of counsel for the appellant, that it would be ridiculous, if a club had become unpopular and the membership had fallen below twenty-five, that it should not be registered again if it had a larger number of members. It seems to me, under ordinary circumstances, if there was a prospect of the club getting back its number of members the justices would not strike it off the register on the ground that the numbers had fallen below twenty-five. B C D E

What we have really got to decide here is what is the conjoint meaning of s. 93 and s. 110. Section 93 creates the offence of supplying or selling on the premises of an unregistered club contrary to the provisions of the Act, and s. 110 in its last clause contains these words:

"The expression 'unregistered club' means a club which requires to be registered under this Act, but is not so registered, or which has been struck off the register of clubs." F

I say at once that there is a good deal in the view suggested by counsel for the appellant that probably the framer of that section dealt with the first registration of clubs under the opening words, and with clubs that had been struck off the register, without thinking what would be the consequence of holding that the club struck off the register could never be a registered club again. However that may be, the words are, in my opinion, too strong for us to adopt any other construction. They are quite general: "The expression 'unregistered club' means a club which requires to be registered under this Act, but is not so registered." I do not see why that should not include the case of a club which has been going on for a long time and is not registered, that is to say, is not on the register. If that is so, then we have got a strong argument for saying that the words "or which has been struck off the register of clubs" were inserted with a view to preventing re-registration or preventing a club which has been struck off from ever becoming a registered club. It is a heavy punishment no doubt, but at the same time the resources of civilisation will not fail to find means for a club getting on the register again very soon afterwards. G H

Having regard to the fact that there is no provision for re-registration, and that there is a statement that a club which has been struck off the register is deemed to be or is an unregistered club, and that the only section in which the question of unregistered clubs is of any importance is s. 93, on the whole I come to the conclusion that the contention of counsel for the respondent is right, and that the Act meant to say that if a club has so conducted itself that the justices have under s. 95 ordered it to be struck off the register, it is not to be treated as being a registered club again. The fact that they may add to an order striking the club off the register a provision that the premises shall not for a limited time be used for the purposes of any club rather supports the same view, because if the I

A club could directly get registered again and the magistrates did not make an order—as they need not do—that the premises should not be used for the purposes of a club for a limited time, then the result would be that the club would practically get on the register directly, and at once become a registered club again. Balancing the arguments on the one side and on the other, I come to the conclusion that it was intended in the Acts of 1902 and 1910 to treat it as a punishment that a person may not sell intoxicating liquor B on the premises of an unregistered club under s. 93, and that that shall include the case of a club which has been struck off the register. It may have been thought that when a club has so conducted itself that the magistrates have thought fit to strike it off the register, it ought to be treated as a club which is an unregistered club for all time. I have already said that on either side one can find ridiculous cases as the result of finding either way, but, at the same time, looking at the object of the section, which I gather C from the Act itself, and the terms of the legislation, I come to the conclusion that there is no discretion as to re-registration, and that the Act did intend to say that a club which has been struck off the register shall continue, so long as it is the same club, to be an unregistered club. I think, therefore, the appeal must be dismissed.

PICKFORD, J.—I am of the same opinion. I think that either construction gives D rise to considerable difficulties and considerable inconveniences, but I am considerably impressed by the fact that there is no provision at all for re-registration. It does not seem to me to be provided for in the Act. It seems to me that the action of the clerk to the justices in registering a club is merely ministerial. I do not think that he has any discretion or can consider whether he should register the club or whether he should not. Under those circumstances I cannot help thinking that, if it was intended that the club E struck off the register should be re-registered, there would have been some provision providing conditions and circumstances under which it would be entitled to re-registration. It can hardly be supposed that the Act intended that a club which was struck off the register for what was an offence—because I think with one exception all the grounds of striking off in s. 95 are for offences of different descriptions—should be entitled to go the next week, or perhaps the next day, and as of right get itself re-registered. Without F going through the other grounds with which my Lord has dealt, I agree that this appeal should be dismissed.

AVORY, J.—I have felt the same difficulty in arriving at the conclusion to which I have come that the judgments that have just been delivered represent the correct view of this Act of Parliament.

G The question which the justices had to decide was whether intoxicating liquor was being sold on the premises of an unregistered club. In fact, at the time when the liquor was sold the premises were entered upon the register, and it is necessary, therefore, to see whether they were a registered club within the meaning of the Act. Turning to s. 110, I have come to the conclusion that the meaning of that definition is that premises which have been at any time struck off the register of clubs, are unregistered clubs. I H am also influenced in coming to this conclusion by the fact that under s. 95, where the justices strike a club off the register for any of the reasons which are there set out, if the argument for the appellant is right, there is apparently nothing to prevent a club from being put formally on the register again the next day, notwithstanding that the justices may have made an order, as in this case, that those same premises shall not be used for the purpose of any club within a specified period. It would be a grotesque result if the I same club can be re-registered for the same premises when there is an order standing that those same premises shall not be used for the purpose of any club within a specified period. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Marcus & Francis ; Wontner & Sons.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

LONDON FURNISHING CO., LTD. *v.* SOLOMON

[King's Bench Division (Darling and Bucknill, JJ.), February 22, 1912]

[Reported 106 L.T. 371; 28 T.L.R. 265]

B

Hire-Purchase—Distress—Exemption—Goods held under hire-purchase agreement—Agreement terminated by owners, but possession not re-taken—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *ss.* 1, 2.

The plaintiffs let furniture to L. under a hire-purchase agreement, by cl. 6 of which L. agreed "regularly and punctually" to pay the rent of the premises in which the furniture was kept. By cl. 8 it was provided that "if the hirer does not duly perform and observe this agreement the owners may retake possession of the said furniture". It came to the notice of the plaintiffs that L. had fallen into arrears with her rent, and they wrote to L. terminating the agreement on the ground of her breach of the hire-purchase agreement. They did not, however, re-take the furniture, but they served a notice on the defendant, L.'s landlord, under s. 1 of the Law of Distress Amendment Act, 1908, claiming the goods and stating that L. had no beneficial interest therein. Despite this notice the defendant put in a distress for the furniture.

C

D

Held: once the plaintiffs had determined the agreement the goods were no longer held "under a hire-purchase agreement" and L. had no further interest in them; it was, therefore, not necessary for the plaintiffs to have re-taken possession of the goods, and their notice to the defendant sufficed to protect the goods from seizure for arrears of rent.

E

Notes. Not followed: *Hackney Furnishing Co.* v. *Watts*, ante p. 790. Referred to: *Jay's Furnishing Co., Ltd.* v. *Brand & Co.* (1914), 83 L.J.K.B. 505.

As to distress at common law, see 12 Halsbury's Laws (3rd Edn.) 100 et seq.; and for cases see 18 Digest (Repl.) 294 et seq. For the Law of Distress Amendment Act, 1908, ss. 1, 2, 4, see 6 Halsbury's Statutes (2nd Edn.) 172.

F

Appeal from the decision of His Honour Judge Grainger at Southwark County Court by the plaintiffs, London Furniture Co., Ltd., whose furniture, which had been let to one Mrs. Lund, had been levied as distress by the defendant, one Solomon, Mrs. Lund's landlord.

By s. 1 of the Law of Distress Amendment Act, 1908: "If any superior landlord shall levy . . . a distress on any furniture, goods, or chattels of (a) any under-tenant . . . (b) any lodger, or (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, for arrears of rent due to such superior landlord by his immediate tenant such . . . other person aforesaid may serve such superior landlord . . . with a declaration in writing . . . setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property . . . of such other person aforesaid. . . ."

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By s. 2 it is provided that any distress of goods after service of such a declaration shall be an illegal distress.

Schwabe for the plaintiffs.

The defendant did not appear.

I

DARLING, J.—In this case I think the appeal must be allowed. What happened was that one Mrs. Lund had hired some goods of the plaintiffs under a hire-purchase agreement, and she did not perform the terms of the agreement. Thereupon the plaintiffs had the right to put an end to the agreement, and they exercised their right on Sept. 12. From that moment Mrs. Lund had no interest in the goods at all. It is true they were not removed, but they were no more hers than any articles left by a stranger on the premises would be hers. They belonged to the plaintiffs, and Mrs. Lund had no

beneficial interest in them. It is true that the plaintiffs had the right under cl. 8 of the agreement to do that which without that clause they could not have done—i.e., enter on the premises and take possession of the goods. But the goods were just as much theirs although they did not go and take them as if they had gone to the premises and attempted to do so. These being the goods of a third party they would be liable to be seized for arrears of rent unless notice was given to the landlord under the Law of Distress Amendment Act. The plaintiffs duly gave that notice. The only thing they did not do was to exercise their powers under cl. 8 of the agreement. Because they did not do that the county court judge held that Mrs. Lund held them under the hire-purchase agreement, and still possessed an interest in the goods which entitled the landlord to distrain on them. In that I think he was wrong, and that being so the appeal must be allowed.

BUCKNILL, J.—I agree. What happened in the present case was this: There was a hiring agreement and a default on the part of the hirer, which gave the owners of the goods the right to re-take possession of them. They gave notice that they were going to re-take the goods, and they sent a van for the purpose, and, but for the fact that they were not allowed to remove the goods, they would have re-taken them. They did their best to do so, and gave notice to the landlord before they seized that the hirer was in arrear with her payments, and that she had no beneficial interest in the goods. In these circumstances the learned judge held that the only remedy open to the plaintiffs under the agreement was to re-take the goods, which physically they were unable to do. In so holding I think he was wrong, and the appeal must accordingly be allowed and judgment entered for the plaintiffs.

Appeal allowed.

Solicitors: *J. B. & G. S. Beirnstein.*

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

WILLIAM PICKERSGILL & SONS LTD *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE CO., LTD., AND ANOTHER

[KING'S BENCH DIVISION (Hamilton, J.), July 29, 30, 1912]

[Reported [1912] 3 K.B. 614; 82 L.J.K.B. 130; 107 L.T. 305; 28 T.L.R. 591; 57 Sol. Jo. 11; 12 Asp. M.L.C. 263; 18 Com. Cas. 1]

Insurance—Marine insurance—Assignment of policy—Concealment from insurers by assignor of material fact—Innocent assignee—Liability of insurers—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 50 (2).

The defence of the concealment of a material fact put forward in an action on a policy of marine insurance in a good defence against an innocent assignee of the policy. Such a policy arises "out of the contract" within the meaning of s. 50 (2) of the Marine Insurance Act, 1906.

Notes. Considered: *Zurich General Accident and Liability Insurance Co.* v. *Morrison*, [1942] 1 All E.R. 529. Referred to: *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to assignment of marine insurance policies, see 22 HALSBURY'S LAWS (3rd Edn.) 108–110 and for cases see 29 DIGEST 90–92. For Marine Insurance Act, 1906, s. 50, see 13 HALSBURY'S STATUTES (2nd Edn.) 38.

Cases referred to:

(1) *British Standard S.S. Co.* v. *World Marine Insurance Co.* (1912), Times, July 10; 29 Digest 173, *1298*.

(2) *Pellas* v. *Neptune Marine Insurance Co.* (1879), 5 C.P.D. 34; 49 L.J.Q.B. 153; 42 L.T. 35; 28 W.R. 405; 4 Asp. M.L.C. 213; C.A.; 29 Digest 295, *2407*.

(3) *Blackburn, Low & Co.* v. *Vigors* (1886), 17 Q.B.D. 553; 55 L.J.Q.B. 347; 54 L.T. 852; 5 Asp. M.L.C. 597, C.A.; reversed (1887), 12 App. Cas. 531; 57 L.J.Q.B. 730; 36 W.R. 449; 3 T.L.R. 837; 6 Asp. M.L.C. 216, H.L.; 29 Digest 174, *1308*.

(4) *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corpn.* (1867), 2 Ch. App. 391; 36 L.J.Ch. 222; 16 L.T. 162; 15 W.R. 414, L.J.J.; 3 Digest (Repl.) 283, *849*.

Also referred to in argument:

Pickard v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032*.

Re Hercules Insurance Co., Brunton's Claim (1874), L.R. 19 Eq. 302; 44 L.J.Ch. 450; 31 L.T. 747; 23 W.R. 286; 10 Digest (Repl.) 798, *5185*.

Action in the Commercial Court tried by HAMILTON, J., without a jury.

The plaintiffs claimed as assignees of insurance policies on the steamship the *British Standard*, subscribed to by the defendants on the basis of total loss of the steamship. In Sept. 1909, the plaintiffs, who were shipbuilders in Sunderland, contracted with T. Browne & Co., of Cardiff, to build a steamship for £32,500. By way of security for the balance owing T. Browne & Co., on April 16, 1910, mortgaged the vessel and covenanted to assign the policies thereon to the plaintiffs. The policies were not assigned, but on April 14, 1910, T. Browne & Co.'s brokers, Gardner, Mountain & Co., informed the plaintiffs that they held the policies at the plaintiffs' disposal. Among the policies held was one subscribed to on April 22, 1910, by the defendants for £1,698 upon hull and materials valued at £20,000 and machinery and boilers valued at £12,000. The adventures and perils insured against included perils of the seas. When this policy was made T. Brown & Co. had also an insurance with clubs on disbursements and management for £6,500 in respect of the *British Standard*, which insurance had not been disclosed to the defendants. The amount of such non-disclosed over-insurance for disbursements amounted to over £6,000. On May 25, 1910, the *British Standard* was totally lost, and the British Standard S.S.C, a company formed by T. Browne & Co. to work the steamer, brought an action against the World Marine Insurance Co., Ltd., under a policy subscribed by them. HAMILTON, J., held that the policy was voidable on the ground that T. Browne & Co. had concealed the fact that they had effected other insurances in disbursements for £6,500 in addition to those disclosed to the defendants in that action.

Bailhache, K.C., and *Leck* for the plaintiffs.

Leslie Scott, K.C., and *Mackinnon* for the defendants.

HAMILTON, J.—I need not recite the facts of the insurance of the *British Standard*, but may refer to my judgment in *British Standard S.S. Co.* v. *World Marine Insurance Co.* (1). I need not go through, again, the evidence that led me then, and leads me now, to the conclusion that there was at the time the policy now sued on was effected a concealment from the defendants of highly material facts, namely, that there was a very large insurance upon disbursements, or a risk which would be ordinarily described as disbursements over and above the insurance on disbursements that was in course of negotiation or intended to be negotiated in London, and that the amount of such extra insurance was very excessive. By agreement in this case certain considerable parts of the evidence in the previous case have been admitted. The substantial modifications by the evidence in this case are two: first that, as against the evidence of Mr. Symons with regard to matters that might be taken into account as justifying the insurances on disbursements, that there might be considered a sum of over £2,000 for appreciation of the value of the steamer over and above its builder's contract price, I have now what I had not before, namely, the evidence of Mr. Tamplin, who is very experienced in these matters, and I have no hesitation in relying upon him on such a point in preference to Mr. Symons, and in saying, therefore, that as a fact there was no substantial appreciation between the date

of the contract and the date when the insurances were effected. To that extent, therefore the ability of the plaintiffs to justify the £11,500 of disbursement insurances is diminished. I am satisfied that to the extent of upwards of £6,000 there was an over-insurance—I think in proportion to the amount that might properly have been insured on disbursements, a very large over-insurance; in any case so large as to be material in the judgment of an underwriter. The principle is that the underwriter must have the opportunity of deciding for himself whether the knowledge of the material fact would affect him or not, and whether or not this very large over-insurance relatively speaking would have affected the mind of the particular underwriter or not in a particular way, I am clear that the underwriter in question was entitled to have the fact discovered to him. In this case, however, no evidence has been given with regard to the £8,000 insurance on freight. For the purposes of this case, therefore, I assume that that insurance was justified by the assured's interest in the freight, and that there was no over- and at the same time no under-insurance as far as freight is concerned.

There was one further piece of evidence in the present case. It is here said by Mr. Secretan, whose evidence I accept because I think that his recollection is full and accurate, that he was expressly told by Mr. Hall that the owners had selected an excellent captain, with a clean record, and one whom Mr. Storey had approved. In fact Captain Braun may have been an excellent captain. He certainly had excellent recommendations. He had not an absolutely clean record, owing to the losses of the *Frankfort* and the *Rook* about 1881 or 1882. But I do not rely upon that misrepresentation for the purposes of this judgment, because I think, having regard to the way in which Mr. Storey treated his knowledge of the three subsequent casualties, and the way in which Mr. Secretan has spoken of his real objection to the captain being that he was the managing owner's brother, and the distant date at which the *Frankfort* and the *Rook* casualties occurred, I am not warranted in saying that the misrepresentation here was so material as in itself to avoid the insurance. Assuming, therefore, that I find that the hull policy is effected by a concealment of material facts with regard to the over-insurances on disbursements, the question that is raised is whether, in the circumstances of this case, that is an answer to the present claim which is brought by the builders of the vessel. This is not one of those cases in which the person giving instructions to the insurance broker intended that the insurance ordered should apply for the benefit of the mortgagor and the mortgagee both. It is not one of those cases, therefore, in which the mortgagee is within the category of the persons who are mentioned in the Lloyd's policy, and are interested in the company's policies as persons having an insurable interest whom it is intended by this insurance originally to cover.

The building contract imposed upon the building owners the obligation to insure the vessel and to keep her insured with underwriters, clubs, or companies such as might reasonably be approved by the mortgagees, with the right in the mortgagees, in default to insure at the expense of the mortgagors, and with the obligation upon the mortgagors to pay premiums and bear the expense of keeping the vessel insured. Accordingly, at the time when the vessel was completed, and the bill of sale granted to the owners and a mortgage in statutory form granted by the owners back to the builders, which is April 16, 1910, there was executed as well a contemporaneous deed of covenant of the kind in question carrying out the obligations of the building contract, concurrently with the delivery of the vessel, to hand to the builders a first mortgage and an assignment of a good and approved policy of insurance. The policy in question, which was put on the slip in January, but which is only signed on April 22, was effected for the purpose of satisfying those covenants, and although it was not formally assigned to the plaintiffs, Messrs. Gardner, Mountain & Co., the brokers who had possession of the policy, undertook, by the direction of the British Standard Co. for the benefit of the plaintiffs, to hold the policies for them so as to satisfy their rights as mortgagees. The argument accordingly is raised that, this being a case in which the policy after being effected by and on behalf of the owners is assigned by the owners to the mortgagees by way of supplementary security, the rule of law ought to be that a defence which would have been good against the owners, the assignors resting upon concealment of material facts, is not available to the underwriters against the assignees, the mortgagees of the policy.

Attention has been drawn properly enough to the hardship which the plaintiffs have sustained by reason of the fact that, having trusted the British Standard Co. to make the proper disclosures, the policy is disputed because the proper disclosures were not made. I am quite satisfied, however, that that is a risk which is certainly not of a character that ought to affect my judgment in deciding whether the defence of concealment is available against the plaintiffs or not. Whatever hardship may be inflicted on the plaintiffs in this case, the case is exceptional; whereas to hold the contrary, and in favour of the plaintiffs to exclude the defendants from raising this defence, would, in my judgment, revolutionise the position of underwriters, and entirely shake the basis upon which their business is done, which is that they are entitled to rely as against all persons interested now or hereafter in the policy upon proper disclosure and true representations having been made when the policy was first negotiated.

Reliance is placed upon the Marine Insurance Act, 1906, s. 50 (2). It is pointed out that the words of the Act of 1868 have not been repealed textually, although the Act is repealed by the Act of 1906. There are other differences between s. 1 of the Act of 1868 and s. 50 (2) of the Act of 1906, but in particular the words in the Act of 1868 were:

> "The defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected,"

whereas in the present Act, after the words "to make any defence," the words "arising out of the contract" are inserted. The argument is that this codification expresses the conditions and the whole of the conditions under which and under which alone the defendant defending himself against the assignee of a policy is to be entitled to set up defences. If by the insertion of these words "arising out of the contract" the legislature intended to deprive underwriters of the right of setting up concealment against an assignee, and leave them with that remedy only against the assignor of the policy, under the form of codification the legislature in fact enacted a drastic and far-reaching alteration in the law of marine insurance. One asks oneself whether no other explanation of these words is to be found consistently with the intention of the legislature, which is clearly expressed, to codify the law relating to marine insurance. I think that quite adequate effect is given to the intention of the legislature by reference to *Pellas* v. *Neptune Marine Insurance Co.* (2), which was decided in 1879, which resulted in the addition of these words so as to give the effect of the section of 1868 as interpreted in that case and as constituting the law prior to 1906.

Furthermore, the words are "arising out of the contract," and I think that I am bound by the authority of the Court of Appeal in *Blackburn, Low & Co.* v. *Vigers* (3) and of the House of Lords in the same case, and particularly the opinion of LORD WATSON, to hold in accordance with what has long been stated by the majority of approved text-writers that the rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition precedent contained in the contract itself to the liability of the underwriter to pay, and therefore the defence that that condition has not been performed whereby the underwriter is entitled to avoid a policy is itself a defence which raises out of the contract—not, it is true, out of any written words in the contract, but one which arises out of the contract itself, because a condition precedent to the underwriters' liability implied in that contract has not been performed. If that is so, it becomes unnecessary to discuss at length the alternative argument advanced that, apart from the Act altogether, the rule with regard to marine insurance policies ought to be that the defence of concealment is not available against an innocent assignee for value of the policy itself. If s. 50 contains the law and all the law upon this point, I think upon the clear construction of it that it entitles the defendant in this case to set up this defence, because it arises out of the contract sued upon.

Counsel for the plaintiffs has, however, contended that there is reason for placing marine insurance policies in the category of instruments which, though transferable, are transferable without being attended by all the equities that would be enforceable against the transferor. No authority admittedly can be cited in support of this proposition,

A but the explanation offered is that such a case as the present arises but rarely, and therefore the occasion for discussing the matter may never have arisen until now. The principle upon which it must be put must, I think, be that cited from the argument in *Re Agra and Masterman's Bank* (4), which is that from the nature of the instrument, or the terms of the contract, or both, some instrument may be intended by the parties to it to be assignable free from equities, at any rate in favour of a transferee taking full value B without notice.

The instances of such instruments as have been cited are so different from the present case that detailed reference to them does not appear to me to be profitable. I can see nothing in the language of this instrument or in the language of any marine insurance policy to indicate an intention that, although assignable, it is to be assignable with special limitations with regard to the equities in favour of the underwriter. The term of the C contract in this case—that

> "the person named as affecting the insurance or his assigns doth promise and agree, with the said Robert Gardner, Mountain, & Co., Ltd., their executors, administrators, and assigns that the company shall be subject and liable to pay"

—is in itself absolutely neutral, equally consistent at the very least with its being an D assignment which in the usual course is subject to all the defects in title of the assignor or an assignment that is free from those defects. The nature of the transaction is one which lends no colour to the suggestion that there should be this quasi-negotiability attaching to an instrument which, after all, is only a promise of indemnity, the action upon which, as has been stated in the *Pellas Case* (2), is an action for unliquidated damages in case of nonpayment. I have not been able to extract from the argument advanced any reason for making this qualification in this particular case. There is no E trace of any history of a practice of merchants to attach to this instrument this peculiarity. There is no decision upon the point. The only appeal in its favour rests upon the hardship which the plaintiffs suffer in this individual case. The price at which I should accede to that appeal would be, in my judgment, upsetting the business of insurance, and inflicting quite unwarrantable hardship upon underwriters. Therefore, F with great respect to the argument, I am unable to accede to it, and I think that it is unfounded. The result is, therefore, that there is judgment for the defendants with costs.

Solicitors: *Pritchard & Sons*, for *Simey & Iliff*, Sunderland; *Waltons & Co.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

SCHWEDER *v.* WORTHING GAS LIGHT AND COKE CO.

[CHANCERY DIVISION (Eve, J.), October 29, 1912]

[Reported [1913] 1 Ch. 118; 82 L.J.Ch. 71; 107 L.T. 844; 77 J.P. 41; 57 Sol Jo. 44; 11 L.G.R. 17]

Highway—Dedication—Dedication of sub-soil—Sub-soil lower than eighteen inches from surface—Gas undertaking—Water undertaking—Gasworks Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 15), *s.* 7.

Where land has been dedicated to the public for highway purposes by a landowner no part of such land or its sub-soil can, for the purposes of gas undertakings, be held to be "land not dedicated to public use" under s. 7 of the Gasworks Clauses Act, 1847.

Semble: The same principle applies to the use of such land by water undertakings.

By s. 6 of the Gasworks Clauses Act, 1847 the undertakers were authorised to break up the soil of streets within the limits of their special Act and to lay down pipes and other works therein for the purpose of supplying gas to the inhabitants of such district. By s. 7 it was provided that nothing in the Act should authorise the undertakers to lay down any pipes or other works "in any land not dedicated to public use without the consent of the owners or occupiers thereof." The plaintiff was the owner of land on both sides of a road dedicated to the public, and had bored and built a tunnel thereunder for his own purposes. The defendants, in pursuance of their statutory powers, proposed to place a gas main and other works extending to a depth of 5 ft. below the surface of the road on each side of the tunnel, but, owing to the height of the tunnel building, this main would have to be carried up at right angles and then pass over the building at a depth of 3 in. from the surface of the roadway, with the result that the main would extend some 6 in. beyond a distance of 18 in. from the surface of the road. It was agreed that 18 in. was a depth of soil below the surface sufficient for the proper maintenance of the roadway. The dispute between the parties was whether the soil to a greater depth than 18 in. from the surface was "land not dedicated to public use."

Held: as the road was dedicated to public use no part of it could properly be held to be "land not dedicated to public use" within s. 7 of the Gasworks Clauses Act, 1847, and the defendants were entitled to lay their gas main at a greater depth than 18in. from the surface of the road.

Notes. Sections 6–12 of the Gasworks Clauses Act, 1847, in common with the remainder of that Act were repealed by the Gas Act, 1948, Sched. 4, but were substantially re-enacted by Sched. 3 to the Act of 1948.

Applied: *Porter* v. *Ipswich Corpn.*, [1922] 2 K.B. 145. Referred to: *Newcastle-under-Lyme Corpn.* v. *Wolstanton, Ltd.*, [1946] 2 All E.R. 427.

As to owner's right to soil of highways, see 19 HALSBURY'S LAWS (3rd Edn.), 64–70; as to current gas supply code, see 18 HALSBURY'S LAWS (3rd Edn.) 334–338; and for cases see 26 DIGEST (Repl.) 340–343, 25 DIGEST 471–473. For Gas Act, 1948, Sched. 3, see 10 HALSBURY'S STATUTES (2nd Edn.) 860.

Cases Referred to:

(1) *Rangeley* v. *Midland Rail. Co.* (1868), 3 Ch.App. 306; 37 L.J.Ch. 313; 18 L.T. 69; 16 W.R. 547, L.JJ.; 26 Digest (Repl.) 326, *444*.

(2) *Marriott* v. *East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70; 78 L.J.Ch. 141; 99 L.T. 958; 72 J.P. 509; 25 T.L.R. 59; 7 L.G.R. 477; 26 Digest (Repl.) 342, *603*.

Also referred to in argument:

Thompson v. *Sunderland Gas Co.* (1877), 2 Ex.D. 429; 46 L.J.Q.B. 710; 37 L.T. 30; 42 J.P. 198; 25 W.R. 809, C.A.; 25 Digest 473, *21*.

Battersea Vestry v. *County of London and Brush Provincial Electric Lighting Co., Ltd.*, [1899] 1 Ch. 474; sub nom. *St. Mary, Battersea, Vestry* v. *County of London and Brush Provincial Electric Lighting Co.*, 68 L.J.Ch 238; 80 L.T. 31; 15 T.L.R. 175; 63 J.P. Jo. 84, C.A.; 26 Digest (Repl.) 342, *606.*

Finchley Electric Light Co. v. *Finchley U.D.C.*, [1903] 1 Ch. 437; 72 L.J.Ch. 297; 88 L.T. 215; 67 J.P. 97; 51 W.R. 375; 19 T.L.R. 238; 47 Sol. Jo. 297, C.A.; 26 Digest (Repl.) 343, *613.*

Ex parte Lewis (1888), 21 Q.B.D. 191; 57 L.J.M.C. 108; 59 L.T. 338; 52 J.P. 773; 37 W.R. 13; 4 T.L.R. 649; 16 Cox, C.C. 449, D.C.; 26 Digest (Repl.) 327, *458.*

Hadwell v. *Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, *191.*

Tunbridge Wells Corpn. v. *Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest (Repl.) 345, *624.*

Normanton Gas Co. v. *Pope and Pearson, Ltd.* (1883), 52 L.J.Q.B. 629; 49 L.T. 798; 32 W.R. 134, C.A.; 26 Digest (Repl.) 342, *605.*

Bellamy v. *Liverpool United Gas Light Co.* (1904), 68 J.P. 540; 2 L.G.R. 1182; 25 Digest 472, *20.*

Taff Vale Rail. Co. v. *Pontypridd U.D.C.* (1905), 93 L.T. 126; 69 J.P. 351; 3 L.G.R. 1339; 26 Digest (Repl.) 299, *201.*

Foley's Charity Trustees v. *Dudley Corpn.*, [1910] 1 K.B. 317; 79 L.J.K.B. 410; 102 L.T. 1; 74 J.P. 41; 8 L.G.R. 320, C.A.; 26 Digest (Repl.) 339, *585.*

Action brought by the plaintiff, the owner and occupier of land lying on both sides of a road known as Goring Lane, in the parish of Goring, Sussex, against the defendants, a company incorporated by the Worthing Gas Act, 1868, for an injunction to restrain the defendants from laying down any pipes or other works in any of the plaintiff's land forming part of the sub-soil of Goring Lane, and not being land dedicated to the public use and from otherwise trespassing on the plaintiff's land.

By the Worthing Gas Act, 1907, s. 7, the defendants were empowered to exercise the powers of the Gasworks Clauses Act, 1847 with respect to the breaking up of streets for the purpose of laying gas mains in the parish of Goring. In 1909 the plaintiff, who had previously deposited with the East Preston District Council the necessary plans, commenced to build, and in Sept. 1910 had practically completed, a tunnel or subway under Goring Lane leading from his land on the north side to his land on the south side of the road. In Dec. 1910 the defendants under their statutory powers commenced laying two gas pipes or mains through the concrete overlying the plaintiff's tunnel. In an action of the same title reported at 105 L.T. 670, the plaintiff obtained a mandatory injunction from EVE, J., requiring the defendants to abate the trespass committed to the plaintiff's tunnel but the operation of the injunction was suspended on the defendants undertaking to give the plaintiff not less than seven clear days' notice of their intention to commence any new works over the tunnel with a plan of the same. The defendants accordingly submitted plans to the plaintiff from which it appeared that a gas main was to be placed horizontally at a depth of 5 ft. below the surface of the road on both sides of the tunnel, then carried up at right angles and again horizontally over the tunnel building, but not in keeping therewith, at a depth of 3 in. from the surface of the road. The result would be that where the main passed over the plaintiff's tunnel it would be laid some 24 in. below the surface of the road. It was agreed that a depth of 18 in. from the surface of the road was amply sufficient for the purpose of the maintenance and support of the road by the local authority, the East Preston District Council, for road purposes, but their consent had not been obtained to the plan submitted to the plaintiff. The plaintiff contended that his land underlying Goring Lane was 'land not dedicated to public use' within the meaning of s. 7 of the Gasworks Clauses Act, 1847, except to such a reasonable distance downwards as was necessary to enable the district council to make and keep in repair a road sufficient for the traffic of the district, and that the proposed works would extend into land belonging to the plaintiff and not dedicated to public use. The defendants maintained that they were empowered by statute to lay down pipes in land dedicated to public use.

By the Gasworks Clauses Act, 1847:

"Section 6. The undertakers . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act . . . and lay down and place within the same limits pipes, conduits, service pipes, and other works . . . and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets . . . do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers. Section 7. Provided always that nothing herein shall authorise or empower the undertakers to lay down or place any pipe or other works into, through . . . or in any land not dedicated to public use without the consent of the owners or occupiers thereof."

P. O. Lawrence, K.C., and *Bryan Farrer* for the plaintiff.
Cozens-Hardy, K.C. (*Macmorran, K.C.*, with him) for the defendants.

EVE, J. (after stating the facts).—The plaintiff takes exception to what is proposed to be done by the defendants on the ground that it is contrary to the provisions of s. 7 of the Gasworks Clauses Act, 1847, and involves a trespass on their part upon land not dedicated to public use. The defendants, on the other hand, contend that the plaintiff's complaint is based on a wrong construction of that section, and assert that they are contemplating nothing that is ultra vires. They submit, therefore, that the plaintiff has no cause of action. All the material facts are proved or admitted. It is not disputed that Goring Lane is a highway or street dedicated to public use, and, according to Lord Cairns in *Rangeley* v. *Midland Rail. Co.* (1), that involves this much at least

"a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it."

The soil of the lane is vested in the plaintiff, its control is in the hands of the East Preston Rural District Council. Dedication, however, as between the owner of the soil on the one hand and the controlling authority on the other, involves something more than the mere occupation by the public of the surface. It involves the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a road or street. How much of the subsoil is necessarily dedicated for this purpose is a matter of evidence in each case. It may be that the sub-soil is of such a nature that only a very shallow stratum is required for the maintenance of the surface as a road; on the other hand, it may be that the character of the sub-soil renders a much thicker stratum necessary. But in this case I am not called upon to determine this question of fact, because the parties are agreed that, regard being had to the nature of the sub-soil and to the class of traffic to which this road is subjected, 18 in. is the thickness of the soil which may fairly be regarded as reasonably necessary for the maintenance of this lane as a street or road.

The plaintiff does not dispute that the lane to the depth of these 18 in. is "land dedicated to public use," but this leaves open the question whether the soil at a greater depth than 18 in. from the surface is also land so dedicated. If the question is regarded as one having reference only to the relative positions of the owner of the soil and the road authority, the answer to it must obviously be in the negative. As soon as the parties are agreed that a depth of 18 in. is all that is required for the support of the road, any claim by the authority of a dedication of soil beyond the 18 in. is precluded, and, if the case fell to be determined upon the relative rights of the landowner and the road authority, my judgment must be in favour of the plaintiff.

But the real point involved is the construction of s. 7 of the Gasworks Clauses Act, 1847, and in approaching that section the terms of the section to which it is a proviso must be borne in mind, as also must be those of the whole series of sections, of which it is

A one. The sections I refer to are those numbered 6 to 12 inclusive. I need not read s. 6 in extenso, because it is conceded that what the defendants propose to do would be within the powers conferred by that section, but for the proviso in s. 7 that they are not

> "to lay down or place any pipe or other works in any land not dedicated to public use without the consent of the owners and occupiers thereof."

B Now, does that limitation on their statutory powers make it incumbent that every gas or water company—for the Waterworks Clauses Act contains a similar limitation on the powers of waterworks companies—desiring to lay their pipes under a street should ascertain the depth of soil necessary for the maintenance of the street as a street, and should be restricted in the laying of their pipes to the depth of soil so ascertained? That is what the plaintiff argues to be the true effect of s. 7. The defendants, on the C other hand, argue that the legislature was drawing a distinction between streets dedicated to public use and streets not so dedicated, and not between the upper and lower strata underlying the surface of a street dedicated to public use, and that the proviso has no reference to the quantum of soil necessary for the maintenance of this or that particular road, but operates only in the case of a road of which there has been no dedication to public use. In support of this argument counsel for the defendants relies on the fact D that in the defendant company's special Act there is a section (which I am told is a very common one) giving the company power in certain circumstances to lay pipes in a street not dedicated to public use, and he points out that, if the plaintiff is right in his construction of s. 7, the owner of a street not dedicated to public use is in a much worse position than the owner of the lower stratum of soil under a street dedicated to public use.

E That argument is not conclusive, but it is one which I cannot disregard. The matter which really weighs with me is that although the Gasworks and Waterworks Clauses Acts have been in operation now for sixty-five years past, and although there have been dozens, I think I might almost say hundreds, of cases decided wherein the construction of this series of sections has been discussed, I cannot find a single case prior to 1909 wherein anyone has even suggested the construction now sought by the plaintiff to be put F upon s. 7, and, when raised in the case before SWINFEN EADY, J. (*Marriott* v. *East Grinstead Gas and Water Co.* (2)), was almost as quickly abandoned. These sections and the corresponding ones of the Waterworks Clauses Act have been considered time and again by many judges of great eminence and have been discussed by the most learned of counsel, but from first to last tribunals and counsel alike appear to have assumed that the question of the depth of soil dedicated by the landowner for highway purposes is G one to which s. 7 has no application. That merely shows that the courts have adopted a construction of the section more consonant with good sense and reason than the one for which the plaintiff contends, and I propose to do the same. The dedication of the road to public use brings it within s. 6, and in my opinion no part of it can, for the purposes of gas and water undertakings, be properly held to be land not dedicated to public use under s. 7. The proviso in that section extends only to land of which no H part is dedicated to public use. The plaintiff is not entitled to the injunction he claims, and I must dismiss his action.

Solicitors: *Kekewich, Smith & Kaye*; *John Hands*, for *Verrall & Sons*, Worthing.

[*Reported by* W. GRIST HAWTIN, ESQ., *Barrister-at-Law.*]

ROBERTS *v.* GRAY

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), December 13, 16, 1912]

[Reported [1913] 1 K.B. 520; 82 L.J.K.B. 362; 108 L.T. 232; 29 T.L.R. 149; 57 Sol. Jo. 143]

Infant—Contract—Necessaries—Education—Profession—Instruction of professional billiards player—Executory contract.

A contract for necessaries entered into by an infant is binding on him. In this connection "necessaries" are not confined to food, or clothing, or lodging, but include education in the profession or calling to which the infant belongs. Where it is necessary to consider whether a contract by an infant is for his benefit the contract must be looked at as a whole; it will not be rendered unenforceable by the fact that it contains provisions which, standing alone, would be adverse to the infant. A contract for necessaries or for the benefit of an infant can be enforced whether it be executed or executory.

The defendant, a professional billiards player, aged nineteen years, entered into an agreement with the plaintiff, a noted billiards player, for a tour round the world together for a period of eighteen months, the plaintiff to be responsible for all expenses, and the net profits after deducting expenses to be equally divided between them. A few days after the date fixed for the commencement of the tour the defendant repudiated the agreement.

Held: the agreement was a contract for the education and instruction of the defendant in his profession of billiards player and was, therefore, a contract for necessaries, binding on the defendant for the breach of which he was liable in damages.

Clements v. *London and North Western Rail. Co.* (1), [1894] 2 Q.B. 482, applied.

Notes. Referred to: *Mackinlay* v. *Bathurst* (1919), 36 T.L.R. 31.

As to infants' contracts, see 21 HALSBURY'S LAWS (3rd Edn.) 138–149, and for cases see 28 DIGEST (Repl.) 496 et seq.

Cases referred to:

(1) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q.B. 482; 63 L.J.Q.B. 837; 70 L.T. 896; 58 J.P. 818; 42 W.R. 663; 10 T.L.R. 539; 38 Sol. Jo. 562; 9 R. 641, C.A.; 28 Digest (Repl.) 500, *174.*

(2) *Walter* v. *Everard*, [1891] 2 Q.B. 369; 60 L.J.Q.B. 738; 65 L.T. 443; 55 J.P. 693; 39 W.R. 676; 7 T.L.R. 469, C.A.; 28 Digest (Repl.) 514, *289.*

(3) *De Francesco* v. *Barnum* (1890), 45 Ch.D. 430; 60 L.J.Ch. 63; 63 L.T. 438; 39 W.R. 5; 6 T.L.R. 463; 28 Digest (Repl.) 499, *152.*

(4) *Gadd* v. *Thompson*, [1911] 1 K.B. 304; 80 L.J.K.B. 272; 103 L.T. 836; 27 T.L.R. 113; 55 Sol. Jo. 156, D.C.; 34 Digest 506, *4200.*

(5) *Wood* v. *Fenwick* (1842), 10 M. & W. 195; 11 L.J.M.C. 127; 152 E.R. 439; 34 Digest 41, *179.*

(6) *Cowern* v. *Nield*, ante p. 425; [1912] 2 K.B. 419; 81 L.J.K.B. 865; 106 L.T. 984; 28 T.L.R. 423; 56 Sol. Jo. 552, D.C.; 28 Digest (Repl.) 518, *350.*

Also referred to in argument:

Gylbert v. *Fletcher* (1629), Cro. Car. 179; 79 E.R. 757; 34 Digest 505, *4193.*

Whittingham v. *Hill* (1619), Cro. Jac. 494; 79 E.R. 421; sub nom. *Hill* v. *Whittingham*, 2 Roll. Rep. 45; sub nom. *Hill and Wittington's Case*, 2 Dyer, 104 b, n.; 28 Digest (Repl.) 519, *349.*

Holt v. *Ward Clarencieux* (1732), 2 Stra. 937; 2 Barn. K.B. 173; Fitz.-G. 275; 93 E.R. 954; 28 Digest (Repl.) 496, *135.*

Brooke v. *Gally* (1740), 2 Atk. 34; Barn. Ch. 1; 26 E.R. 417, L.C.; 28 Digest (Repl.) 490, *73.*

Harvey v. *Ashley* (1748), 3 Atk. 607; Wilm. 219, n.; cited in 2 Ves. Sen. at p. 671; 26 E.R. 1150, L.C.; 28 Digest (Repl.) 558, *739.*

Keane v. *Boycott* (1795), 2 Hy. Bl. 511; 126 E.R. 676; 28 Digest (Repl.) 496, *138*.

Bruce v. *Warwick* (1815), 6 Taunt. 118; 128 E.R. 978, Ex. Ch.; 28 Digest (Repl.) 502, *185*.

Holmes v. *Blogg* (1818), 8 Taunt. 508; 2 Moore, C.P. 552; 129 E.R. 481; 28 Digest (Repl.) 508, *211*.

Newry and Enniskillen Rail. Co. v. *Coombe* (1849), 3 Exch. 565; 5 Ry. & Can. Cas. 633; 18 L.J. Ex. 325; 12 L.T.O.S. 475; 42 Digest 623, *243*.

Ryder v. *Wombwell* (1868), L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 W.R. 167, Ex. Ch.; 28 Digest (Repl.) 510, *224*.

Peters v. *Fleming* (1840), 6 M. & W. 42; 9 L.J.Ex. 81; 28 Digest (Repl.) 511, *244*.

Martin v. *Gale* (1876), 4 Ch.D. 428; 46 L.J.Ch. 84; 36 L.T. 357; 25 W.R. 406; 28 Digest (Repl.) 517, *342*.

Earl of Buckinghamshire v. *Drury* (1762), 2 Eden, 60; 28 E.R. 818, H.L.; 28 Digest (Repl.) 521, *381*.

Re Jones, Ex parte Jones (1881), 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193; 29 W.R. 747, C.A.; 28 Digest (Repl.), 522, *387*.

Smith v. *Lucas* (1881), 18 Ch.D. 531; 45 L.T. 460; 30 W.R. 451; 28 Digest (Repl.) 553, *682*.

Leslie v. *Fitzpatrick* (1877), 3 Q.B.D. 229; 47 L.J.M.C. 22; 37 L.T. 461; 41 J.P. 822; 34 Digest 42, *184*.

Fellows v. *Wood* (1888), 59 L.T. 513; 52 J.P. 822; 4 T.L.R. 645, D.C.; 28 Digest (Repl.) 497, *140*.

De Francesco v. *Barnum* (1889), 43 Ch.D. 165; 59 L.J.Ch. 151; 6 T.L.R. 59; sub nom. *Francesco* v. *Barnum*, 62 L.T. 40; 54 J.P. 420; 38 W.R. 187; 28 Digest (Repl.) 696, *2057*.

Lovell and Christmas v. *Beauchamp*, [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587; 43 W.R. 129; 11 R. 45; sub nom. *Re Beauchamp Bros., Ex parte Beauchamp*, 10 T.L.R. 682, H.L.; 36 Digest (Repl.) 451, *220*.

Corn v. *Matthews*, [1893] 1 Q.B. 310; 62 L.J.M.C. 61; 68 L.T. 480; 57 J.P. 407; 41 W.R. 262; 9 T.L.R. 183; 37 Sol. Jo. 190; 4 R. 240, C.A.; 28 Digest (Repl.) 498, *151*.

Flower v. *London and North Western Rail. Co.*, [1894] 2 Q.B. 65; 63 L.J.Q.B. 547; 70 L.T. 829; 58 J.P. 685; 42 W.R. 519; 10 T.L.R. 427; 9 R. 494, C.A.; 28 Digest (Repl.) 499, *153*.

Stephens v. *Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 73 L.J.K.B. 739; 90 L.T. 838; 68 J.P. 437; 52 W.R. 644; 20 T.L.R. 492; 48 Sol. Jo. 474; 6 W.C.C. 48, C.A.; 28 Digest (Repl.) 698, *2085*.

Seaton v. *Seaton* (1888), 13 App. Cas. 61; 57 L.J.Ch. 661; 58 L.T. 565; 36 W.R. 865, H.L.; 28 Digest (Repl.) 716, *2278*.

Cooper v. *Cooper* (1888), 13 App. Cas. 88; 59 L.T. 1, H.L.; 28 Digest (Repl.) 553, *689*.

R. v. *Inhabitants of Laindon* (1799), 8 Term Rep. 379; 2 Const. 378; 101 E.R. 1444; 34 Digest 502, *4141*.

R. v. *Inhabitants of Chillesford*, *R.* v. *Inhabitants of Winslow* (1825), 4 B. & C. 94; 6 Dow. & Ry. K.B. 161, 168; 3 Dow. & Ry. M.C. 155, 163; 3 L.J.O.S.K.B. 148; 107 E.R. 994; 34 Digest 41, *170*.

Re Burrows, Ex parte Taylor (1856), 8 De G. M. & G. 254; 25 L.J.Bcy. 35; 26 L.T.O.S. 266; 2 Jur.N.S. 220; 4 W.R. 305; 44 E.R. 388, L.JJ.; 28 Digest (Repl.) 508, *212*.

Carter v. *Silber, Carter* v. *Hasluck*, [1892] 2 Ch. 278; 61 L.J.Ch. 401; 66 L.T. 473, C.A.; affirmed sub nom. *Edwards* v. *Carter*, [1893] A.C. 360; 63 L.J.Ch. 100; 69 L.T. 153; 58 J.P. 4; 1 R. 218, H.L.; 28 Digest (Repl.) 502, *188*.

Appeal by the defendant from a verdict and judgment at trial before Lord Alverstone, C.J., and a special jury.

On May 12, 1910, the plaintiff, John Roberts, a professional billiards player, and the defendant, Joseph George Gray, aged nineteen, also a professional billiards player, entered into an agreement by which it was agreed:

"1. The said John Roberts shall take the said Joseph George Gray in company with his father the said Harry William Gray, and the said Joseph George Gray shall go with the said John Roberts so accompanied on a tour of the world as professional billiardists on the terms and conditions hereinafter contained: (a) The term of the said tour shall be for a period of eighteen months from April 2, 1911. (b) The said John Roberts shall pay all hotel and travelling expenses, both by sea and land of himself and the said Joseph George Gray, and the like hotel and travelling expenses of his father the said Harry William Gray. In all cases the travelling shall be first class both on trains, steamers, and otherwise, and shall include sleeping berths where practicable. Such expenses shall commence from London, and at the termination of the tour shall include steamer and railway fares back to London, and the said John Roberts shall render to the said Harry William Gray on account of the said Joseph George Gray a weekly statement of all such expenses. (c) Each of them the said John Roberts and Joseph George Gray shall keep true and correct books of account and writings showing all moneys, jewels, and other valuables received by them and each of them during the tour with the dates when and places where and for what such moneys, jewels, or other valuables were received, and they shall render to each other a weekly statement showing all such receipts and expenses as aforesaid, and each party or his representative shall at all reasonable times have an access to such books and writings for the purpose of verifying the accounts to be furnished to them. (d) All receipts, earnings, emoluments, and gifts whatsoever, whether in money, jewels, or other valuables, received, earned, or given to either of them the said John Roberts and Joseph George Gray during the tour shall be pooled and equally divided between the parties at the end of each week, and for this purpose all emoluments and gifts other than money so received as aforesaid shall be valued immediately after their receipt by either of them and the money value thereof pooled and divided as aforesaid. (e) The said John Roberts shall be entitled to deduct from all moneys received by him and emoluments and gifts whose money value is to be ascertained as aforesaid all sums expended by him on account of travelling and hotel expenses of the said Joseph George Gray and Harry William Gray, and also all hotel and travelling expenses incurred by himself the said John Roberts as aforesaid. (f) It is hereby agreed and understood between the parties hereto that the total hotel and travelling expenses of the said John Roberts and Joseph George Gray shall be paid and borne by each of them equally, but that the said John Roberts shall defray the whole of the same in the first place and also that of the said Harry William Gray and reimburse himself from the said Joseph George Gray's share of profits all such sums so incurred and expended by him as aforesaid, but that in the event of such receipts, earnings, emoluments, and gifts being insufficient to satisfy such expenditure neither of them the said Joseph George Gray or Harry William Gray shall be personally liable or responsible therefor. (g) The tour to be under the sole control and management of the said John Roberts. 2. Nothing herein contained shall create or be deemed to create a partnership between the parties hereto, and the said John Roberts shall save as aforesaid be solely liable for all payments and shall be solely responsible for all losses (if any) from the date hereof until Oct. 1, 1912."

On April 20, 1911, in consequence of disputes which arose about the kind of billiard balls to be used, the defendant Gray repudiated the agreement, and this action was commenced by the plaintiff who claimed damages for breach of the contract. The defendant, in his defence, pleaded that as he was born on Mar. 28, 1891, he was an infant at the time of his signing the contract and was, therefore, not bound by it. The plaintiff did not deny that the defendant was an infant, but he contended that, as the contract was for the infant's benefit, he was bound by it. The jury found for the plaintiff, and assessed the damages at £1,500. After an argument as to the effect of the defendant's infancy, the Lord Chief Justice held that the contract was a contract of employment; that it was one under which the defendant would have received large sums of money and also the best possible instruction in the game; that his skill and

reputation would have been greatly enhanced as a result of performing the contract; and that it would have brought him in large net profits; and, therefore, that the contract was one for the defendant's benefit, and the defendant was bound by it in spite of his being an infant, and was liable for the damages awarded to the plaintiff.

J. B. Matthews for the defendant.

Tindal Atkinson, K.C., and *C. E. Dyer* for the plaintiff were not called on to argue.

COZENS-HARDY, M.R.—I see no reason to differ from the view taken by the Lord Chief Justice. We have had our attention called to a great number of cases dealing with the circumstances under which, and the extent to which, an infant may be bound by, and be incapable of repudiating, a contract made by him during infancy. Far be it from me to say there has not been some development of this law since the time when the earliest cases which have been cited were decided, but it is important to remember that as early as the time of LORD COKE it was held—Co. Litt. 172a—that an infant's contract for necessaries is binding; and it was laid down by him that that doctrine also applied not merely to bread and cheese and clothes, but to education and instruction. That has been construed by this court in *Walter* v. *Everard* (2) in a very wide sense. FRY, L.J., in that case pointed out that education must not be taken in its narrow technical sense as merely meaning education to enable a man by the work of his hands thereafter to maintain himself as an artisan, but it had a much wider meaning. It applies to education and instruction in the social state in which the infant is, and in which he may expect to find himself when he becomes an adult.

What is the effect of a contract which is entered into by an infant with reference to necessaries, including instruction and education? We have heard a forcible argument that such a contract may be good so far as the consideration has been executed, but that it cannot be enforced so far as it is executory. For that proposition I think there is no authority, and I certainly think that it is not open to this court to say that there is any such authority. I think we are bound by *Clements* v. *London and North-Western Rail. Co.* (1). There the contract was a contract of service by an infant. A term of the service was that he should become a member of a society for the employees of the London and North-Western Rail. Co., and, in consideration of certain benefits, he was not to bring any action against the company in case of accidents whether due to the company's negligence or not. The court considered the contract as a whole. It is quite idle to say that the contract must be looked at to see if there is one clause which is adverse to the infant; the court cannot consider whether one clause is not for the infant's benefit and say, if it is so, that the whole contract is void. The contract must be looked at as a whole to see whether, looking at it as a whole, it is a contract for the infant's benefit, not merely a contract for necessaries, but if it is a contract which is on the whole for the infant's benefit. What is the result? LORD ESHER said in *Clements* v. *London and North-Western Rail. Co.* (1) ([1894] 2 Q.B. at p. 490) that

> "if upon consideration of the whole agreement there is a manifest advantage to the infant, he cannot avoid it."

KAY, L.J., said (ibid. at p. 492):

> "I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract."

A. L. SMITH, L.J., quoting with approval the passage in the judgment of FRY, L.J., sitting, not in the Court of Appeal, but as a judge of the Chancery Division, in *De Francesco* v. *Barnum* (3) said (ibid. at p. 495):

> "There is another exception which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be primâ facie binding upon an infant."

A. L. SMITH, L.J., added: "I take this to be good law. Primâ facie, therefore, this contract is binding upon the plaintiff." A

If, therefore, this is a contract falling within a class to which the doctrine of necessaries applies, and if, taken as a whole, it is for the infant's benefit, I see no foundation whatever for the argument that the infant is not liable for damages in the event of his repudiating or declining to perform the contract entered into. The court has acted upon that in *Gadd* v. *Thompson* (4) to the extent of granting an injunction to restrain an infant from being guilty of a breach of a clause in a contract of service after he has left the employment. Here only damages are claimed and have been given. B

It only remains, therefore, to consider that which I think is not really a very difficult problem. What is the nature of this contract? What was the station of the parties and what is the meaning of the agreement? The agreement is one between John Roberts, who I think is, and certainly had been, the billiards champion, and Joseph George Gray, who was a young man, and is the defendant in this action. Gray was then an infant who had on the other side of the globe acquired a great reputation as a billiard player, differing in some respects from John Roberts in his special strokes, but undoubtedly a billiard player who was commencing to achieve a reputation, but had not at that time a reputation comparable to that of Roberts. It is an agreement between John Roberts, of the one part, Joseph George Gray, the infant, of the second part, and his father, of the third part. The infant is described as a billiardist, a word I never heard of before; I do not think it is very good English, but it is a word probably coined for convenience. I think it means a professional billiard player. What was the object of the contract? Plainly this. John Roberts in effect said: "I will make a tour of the world with you; you shall play with me and I will play with you; you will learn a great deal from playing in my company; I will pay all the travelling expenses and all the hotel bills and everything of that kind at first-class hotels, and for first-class steamers, and so on. I will pay not only your expenses, but also the expenses of your father, and at the end of the tour the money, including the valuable presents of jewellery which it is expected will be received, shall be pooled and divided between us." Is it possible to doubt that playing billiards in company with a noted player like John Roberts was instruction, and must be instruction of the most valuable kind for an infant billiardist who desired to make playing billiards the occupation of his life? The learned Lord Chief Justice, who, by consent of the parties, dealt with this portion of the case (which alone we have heard) without reference to the jury, held it was quite clear that this was a contract which was capable of being viewed as a contract for necessaries. He further held, the contract being one of that class, that it does not contain any single term to make it, viewed as a whole, otherwise than beneficial for the infant. That being so, he arrived at the conclusion, consistent, as it seems to me, with good law and good sense, that the contract is binding on the infant, and is binding upon him as a whole; that it is one which he cannot repudiate; and that the plaintiff is, therefore, entitled to damages. C D E F G

Is this, or is it not, a contract which comes within the general rule that an infant can bind himself by a contract for necessaries including instruction and education? I will read this passage from his judgment: H

> "Was this agreement in effect a contract for teaching instruction or employment, and was it for the benefit of the infant? In its terms, though not a contract for service, it was a contract for employment whereby in the ordinary course the infant would receive many thousand pounds."

Then he goes on to the details of the contract. I entirely agree with his construction of the contract looked at by itself. He then goes into the evidence, which satisfied him that the terms of the contract were reasonable; that the probabilities of large profits from the engagement being duly carried out by the infant were so great that it was practically certain a large sum of money would be obtained by the infant in addition to the instruction which he would obtain; and that the instruction would be for his benefit during the remainder of his life. That being so, he said that the case comes exactly and precisely within what LORD COKE said (Co. Litt. 172 A.), and what the Court of Appeal said in *Clements* v. *London and North Western Rail. Co.* (1) and he gave judgment I

for the plaintiff against the infant. I think that the judgment which he gave was perfectly right and cannot be interfered with, and that this appeal should be dismissed.

FARWELL, L.J.—I am of the same opinion. The chief point in the argument put forward on behalf of the defendant does not, in my opinion, really arise. He has sought to convince us that, assuming this contract was not a contract for necessaries it would be voidable by the infant. It is unnecessary to express my opinion on a point which KAY, L.J., dealt with in *Clements* v. *London and North Western Rail. Co.* (1). The question to what extent that rule applies, in my opinion, does not arise. In my opinion, this is clearly a contract for necessaries within the meaning which that phrase has had attached to it in the course of many centuries since LORD COKE wrote. It is in effect for board, lodging, travelling, and employment, all found at the plaintiff's expense for the infant and involved in the employment and the education which a billiard player of receptive capacity could not fail to obtain from playing continually month after month with a great player like John Roberts. Every item which goes to make up the necessaries in the sense of a labour and education contract, except the exact term to give the education, which would be necessary if it were an apprenticeship deed, is in this particular contract, as much as if, instead of finding the board and lodging on board ship and in various hotels, John Roberts had found it in a house of his own where he gave exhibitions. I cannot doubt that it is a contract for necessaries.

The next question is, is it for the benefit of the infant, because, although a contract for necessaries is, primâ facie, binding on the infant, it may be shown to contain terms so harsh as not to be binding? In my opinion, it is clearly for the benefit of the infant, and I see nothing to suggest that it is in the least harsh upon him.

The only other point which remains is: Is the contract, notwithstanding that, voidable by the infant? It appears to me that this is answered in an obiter dictum of LORD ABINGER'S in *Wood* v. *Fenwick* (5). LORD ABINGER says (10 M. & W. at p. 204):

> "There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him."

To which counsel interjects: "At all events, he may determine it at any time by notice." Then LORD ABINGER says:

> "That would be a contradiction in terms, because to say that he may contract is to say that he may bind himself by the contract. How, then, can it be determined at his election the next day?"

That is adopted by the decision of LORD ESHER and the other lords justices in *Clements* v. *London and North Western Rail. Co.* (1), and it would render the rule futile if we were to hold that, although the contract is for necessaries and although it is for the infant's benefit, he can yet repudiate it if he thinks fit. In my opinion, he cannot do so, and the judgment was quite right, and this appeal fails.

HAMILTON, L.J.—I entirely agree. The first question is whether this was a contract for necessaries, or, in the words of LORD COKE—Co. Litt. 172a—whether it was a contract for the infant's good teaching and instruction whereby he may profit himself afterwards? I think it is quite clear as a matter of law that this contract as framed was capable of being, and was rightly held to be, such a contract for necessaries. The circumstance that it is not expressed as a contract for employment, that the consideration for that which has to be done by the infant does not take the form of wages, and that he is not placed in such a relation to the plaintiff as would make him a servant, appears to me to be far from conclusive of the matter, because whether the contract is one for necessaries in this sense must depend upon its form, and there was abundance of evidence here upon which it could be found by the learned Lord Chief Justice, who was by agreement the tribunal of fact on this question as well as of the law on the point that a part and a most important part of this contract was the instruction that would be received

by the defendant from constantly playing with the plaintiff, and also in playing under the conditions of a world-wide tour—a thing which a distinguished billiard player apparently contemplates as part of his career. It seems to me to be clear, therefore, upon the first question that this contract is one for necessaries, and in so far as the antithesis formulated in *Cowern* v. *Nield* (6) by the Divisional Court is presented to us I entertain no doubt that this is not such a contract as could be called a trading contract, and is amply within the other side of the antithesis as there stated by PHILLIMORE, J., referring to contracts relating to infant persons which can be supported, such as contracts for necessaries, of which he there mentions various kinds.

If this is a contract for necessaries, is there anything about it to prevent it being binding upon the infant? For this purpose it is necessary to consider whether it contains unusual, harsh, or burdensome terms, such as would prevent it from being a contract enforceable against the infant. The Lord Chief Justice, being again a tribunal of fact and law, decided that there were no terms in this contract that would have that effect, and no reason has been suggested to us for differing from him upon this point.

There remains only one further argument, and that goes not to the nature of the contract, but to the form of the cause of action. It is suggested that because this contract was repudiated by the defendant at an early stage—though, as I gather from the judgment, not before some portion of the services contemplated by the plaintiff had been rendered—by him, and was to a large extent an executory contract so that the remedy takes the form of a claim for damages, therefore the contract is not enforceable against the infant, although, had the infant taken the benefit of the instruction he would receive he might then have been compellable to pay a quantum meruit for the services that he had received. I am unable to appreciate how it can be said that a contract which is in itself binding because it was a contract for necessaries and not qualified by unreasonable terms, can cease to be binding merely because it is still executory. To my mind, it is the character of the contract, namely, that it is a contract for necessaries in the wide sense of the term, and not the form of the remedy for its breach which the particular accidents of the case may give rise to, that must determine whether it is a contract that is binding on the infant or falls into a class which is only voidable at his option. I think there is no distinction that can be drawn of that kind because, if the contract is binding at all, it seems to me it must be binding for all such remedies as are appropriate to the breach of it, but for the benefit of the infant himself. When the terms of the contract are such as to bind the infant, it seems to me he must in common justice be bound by any form of remedy for breach of it which his unjustifiable repudiation has made it necessary for the plaintiff to seek. I agree that this appeal must be dismissed.

Solicitors: *L. Stroud*; *Letts Brothers.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

Re OSBORN AND OSBORN

[COURT OF APPEAL (Vaughan Williams and Buckley, L.JJ.), July 4, 7, 30, 1913]

[Reported [1913] 3 K.B. 862; 83 L.J.K.B. 70; 109 L.T. 505]

B *Costs—Taxation—Taxation of part of bill—Party and party costs taxed and paid—Subsequent bill for solicitor and client costs—Solicitors Act*, 1843 (6 & 7 *Vict.*, *c.* 73), *s.* 37.

The applicant brought an action in the High Court against L. & Co., and recovered against them a judgment which was upheld by the Court of Appeal. O. & O. acted as his solicitors, and their bill of costs as between party and party was paid by
C L. & Co. Subsequently O. & O. delivered to the applicant their bill as between solicitor and client, which bill included all the costs of the proceedings in the High Court and Court of Appeal and the solicitor and client items which could not be charged against L. & Co. On a summons for taxation, the applicant took the objection that the party and party costs had already been taxed and, therefore, did not form part of the bill. A summons was then taken out on the applicant's
D behalf that the bill of costs, in so far as it related to solicitor and client items, for charges and disbursements which had not been paid by L. & Co. should be taxed.

Held: a solicitor's bill against his client for costs in an action in which party and party costs are recoverable against the opposite party, ought to contain the whole bill of the fees, charges, and disbursements in reference to the business to which it relates; therefore, the bill delivered by the solicitors in the present case
E was a proper bill within the meaning of s. 37 of the Solicitors Act, 1843, and was taxable as such, and the fact that the party and party costs had already been taxed was not a sufficient ground for an order to tax only the portion of the bill relating to solicitor and client items.

Notes. The Solicitors Act, 1843, has been repealed. For the current provisions as
F to remuneration of solicitors see now the Solicitors Act, 1957, Part III.

Referred to: *Re. C. B. & M. (Tailors), Ltd.*, [1931] All E.R.Rep. 647.

As to delivery of a bill of costs, see 36 HALSBURY'S LAWS (3rd Edn.) 130 et seq., and for cases see 42 DIGEST 149 et seq. For the Solicitors Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 1100.

Cases referred to:

G (1) *Re Park, Cole* v. *Park* (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; affirmed (1889), 41 Ch.D. 336; 58 L.J.Ch. 547; 61 L.T. 173; 37 W.R. 742, C.A.; 42 Digest 159, *1596*.

(2) *Re Johnson and Weatherall* (1888), 37 Ch.D. 433; 57 L.J.Ch. 306; 58 L.T. 692; 36 W.R. 374; 4 T.L.R. 268, C.A.; varied sub nom. *Storer & Co.* v. *Johnson* (1890) 15 App. Cas. 203; 60 L.J.Ch. 31; 62 L.T. 710; 38 W.R. 756, H.L.; 43 Digest
H 163, *1655*.

(3) *Drew* v. *Clifford* (1825), 2 C. & P. 69; Ry. & M. 280; 171 E.R. 32, N.P.; 42 Digest 152, *1517*.

(4) *Waller* v. *Lacy* (1840), 3 Dowl. 563; 1 Man. & G. 54; 1 Scott, N.R. 186; 9 L.J.C.P. 217; 4 Jur. 435; 133 E.R. 245; 42 Digest 149, *1479*.

(5) *Cobbett* v. *Wood*, [1908] 2 K.B. 420; 77 L.J.K.B. 878; 99 L.T. 482; 24 T.L.R. 615;
I 52 Sol. Jo. 517, C.A.; 42 Digest 153, *1530*.

Also referred to in argument:

Scougall v. *Campbell* (1826), 3 Russ. 545; 38 E.R. 679, L.C.; 42 Digest 196, *2146*.

Re Mercantile Lighterage Co., Ltd., [1906] 1 Ch. 491; 75 L.J.Ch. 171; 94 L.T. 405; 54 W.R. 389; 22 T.L.R. 250; 50 Sol. Jo. 240; 42 Digest 153, *1529*.

Appeal from an order of CHANNELL, J., at chambers.

The applicant, Martin Buhrbanck, a German subject resident in Germany, brought an action in the High Court against Lockwood & Co., Ltd., for the return of certain moneys

paid by him to them for a consideration which had failed, or, alternatively, for damages for fraud or misrepresentation in connection with Stock Exchange transactions, and had recovered judgment against them with costs. Lockwood & Co., Ltd. appealed to the Court of Appeal, but their appeal was dismissed with costs. Throughout the proceedings Osborn & Osborn acted as solicitors for the applicant, and at the conclusion of the proceedings their bill of costs as between party and party was taxed at £1,289 11s. 6d., for which amount the taxing master gave his certificate. Lockwood & Co., Ltd. paid this amount. Subsequently, Buhrbanck requested Osborn & Osborn to deliver their bill of costs and cash account as between solicitor and client. Osborn & Osborn complied with this request and delivered their complete bill of costs as between solicitor and client to the applicant. This bill, amounting to £1,706 8s. 8d., included all the costs relating to the whole of the proceedings both in the High Court and in the Court of Appeal and to the solicitor and client items which could not be charged against Lockwood & Co., Ltd. The items contained in the party and party bill of costs which had already been taxed, amounted to £1,289 11s. 6d., and were set out in an inner column, and the solicitor and client items amounted to £416 17s. 2d. The correspondence with Buhrbanck having to be carried on in the German language, a substantial part of the solicitor and client items were payments for translations of his own and Osborn & Osborn's letters. On Mar. 28, 1913, Buhrbanck took out a summons against Osborn & Osborn for taxation of their complete bill of costs. On April 9, 1913, the master made an order for taxation. When the matter came before the taxing-master it was pointed out to him that the whole of the bill of costs would have to be taxed, and Buhrbanck then took the objection that the party and party costs had already been taxed, and, therefore, did not form part of the bill to be taxed, but the taxing-master did not take this view. On May 13, 1913, a summons was taken out on behalf of Buhrbanck

> "that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitors in so far as they relate to the solicitor and client items, and in so far as such fees, charges, and disbursements have not been allowed on taxation and paid by the defendants (Lockwood & Co., Ltd.) in the action in which the applicant was plaintiff and the said Lockwood & Co., Ltd. were defendants, be referred to the master to be taxed, and the applicant may be at liberty to discontinue further proceedings under the order of April 9, 1913."

On May 21, 1913, the master made an order dismissing the application with costs. On May 24, 1913, Buhrbanck gave notice of appeal to the judge in chambers. On June 12, 1913, CHANNELL, J., made an order dismissing the appeal with costs. On June 25, 1913, Buhrbanck gave notice of appeal to the Court of Appeal.

Schiller for the applicant.

J. B. Matthews for Osborn & Osborn.

Cur. adv. vult.

July 30, 1913. The following judgments were read.

VAUGHAN WILLIAMS, L.J.—In *Re Park, Cole* v. *Park* (1), before STIRLING, J., the learned judge is reported to have said in a case in which the statutory jurisdiction under the Solicitors' Acts did not come in question, the bills being admittedly bills that were all delivered more than a year before the testator's death, and there being no special circumstances to entitle the executor to require taxation under the provisions of those Acts (41 Ch.D. at p. 331):

> "Having heard what was said on both sides, I made inquiry as to the practice in chambers, and so far as I could discover, it seemed to be the practice for the chief clerk to look into the bill and to ascertain from his own examination, or from what was pointed out to him by the parties, whether there were any items in it which required investigation; and if he found that there were he referred the bill to the taxing master to be dealt with in the way I have mentioned—i.e., not in the same way as on a taxation under the Solicitors' Acts, which involves particular consequences as regards costs, but simply as a mode by which the claim might be

investigated, the costs being dealt with in the same way as the costs of any other claim by a creditor under the administration—i.e., allowed to the claimant, and added to his proof in the absence of any impropriety of conduct on his part. In the present case the chief clerk appears to have looked into the bill and found certain items which seemed to him to require explanation. Thereupon, without any special directions being given, it went before the taxing master, and, as I gather, he proceeded or proposed to proceed upon it as if it had been simply referred to him for taxation. To that the claimants objected, and the matter has been brought into court and argued before me."

And STIRLING, J., in this case made the following order (ibid. at p. 336):

"That it be referred to the taxing master to inquire and state whether any and which of the items so marked by the plaintiff in red ink in the four several bills of costs [describing them], and which the plaintiff, the surviving creditor of the said J. C. Park, shall dispute, are fair and proper to be allowed, and to what amount respectively. The claimants to add their taxed costs of the application to their claim, and the costs of the plaintiff to be costs in the action."

In the present case the appeal was against the decision of MASTER ARCHIBALD, given May 21, 1913, refusing to order

"that the bill of fees, charges, and disbursements, delivered to the applicant by the above-named solicitors, in so far as they relate to solicitors and client items, and in so far as such fees, charges, and disbursements have not been allowed on taxation and paid by the defendants (Lockwood & Co.) in the action in which the applicant was plaintiff and the said Lockwood & Co. were defendants, be referred to the master to be taxed, and that the said solicitors give credit for all sums of money by them received of or on account of the applicant, and refund what (if anything) they may on such taxation appear to have been overpaid, and that the master do tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and costs of the reference to be charged (if payable) according to the event of the taxation pursuant to the statute, and that upon the foregoing application being granted, the applicant may be at liberty, upon paying the said solicitors costs of the same, to discontinue any further proceedings under the order made on April 9, 1913. And further take notice that you are required to attend before the judge in chambers at the Central Office, Royal Courts of Justice, Strand, on Thursday, June 12, 1913, at 10.30 o'clock in the forenoon, on the hearing of an application by the said applicant that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitors in so far as they relate to solicitors and client items, and in so far as such fees, charges, and disbursements have not been allowed on taxation and paid by the defendants (Lockwood & Co.) in the action in which the applicant was plaintiff and the said Lockwood & Co. were defendants, be referred to the master to be taxed."

It is plain that if and in so far as this taxation was to take place under the Solicitors Act, 1843, the master did right in refusing to make the order asked for under the notice of motion which I have just read.

Re Johnson and Weatherall (2) and *Re Park, Cole* v. *Park* (1) are cases in which the taxation did not take place under the jurisdiction of the Solicitors Act, but under a special order for taxation of part of the bill. But in the present case there is no such special order for the taxation of part of a solicitor and client bill, nor do I think that there was any ground for making such special order. The only ground suggested was that there had already been a taxation of the party and party costs, and this, according to the practice certified to us by MASTER KING is not sufficient ground for an order to tax a portion of a solicitor's bill apart from the Solicitors Act, 1843.

It appears that on taxation generally it might not be necessary to tax afresh the bulk of the items, but as BUCKLEY, L.J., points out in his judgment which he has allowed me to read, an item allowed at a lower figure as between party and party may have to be allowed at a higher figure between solicitor and client, and he goes on to say:

"It does not occur to me that a party and party item could ever require to be reduced as between solicitor and client." A

I entirely agree in the conclusion of BUCKLEY, L.J., but I wish to say that I do not approve of the present practice in so far as the fee charged for taxation is concerned. It is plain that this fee is calculated on the basis that, in so far as the items included in the party and party taxation are concerned, the fee for taxation is charged twice, whereas, as a B fact, there is only one taxation of such items. The fees go to the State and not to the taxing master, but, in my judgment, there should, on taxation between solicitor and client, only be the fee charged on the items in fact taxed just as there is in a case where there is an order for taxation of part of a bill or bills of costs and the portion already taxed as between party and party is only looked at for explanation, so as to see how much has been taxed off as being too much to allow between party and party. The C result of this is that this appeal is dismissed with costs.

BUCKLEY, L.J.—In my opinion, this appeal fails. In an action in which the client was plaintiff and Lockwood & Co., Ltd., were defendants, the plaintiff recovered judgment with costs. The case was appealed and the appeal was dismissed with costs. The solicitor carried in for taxation as between party and party two bills amounting D in the aggregate to £1,679 18s. 4d. These were taxed at £1,289 11s. 6d. and that amount was paid by the defendants to the solicitor. Subsequently the solicitor delivered his bill of costs as between solicitor and client to the present applicant. The bill was in respect of the litigation above mentioned and also a further matter of the client against Glenister & Co., Ltd. That bill was made out in two columns so as to show in the first column the several items of the taxed bills amounting in the aggregate to the above E mentioned sum of £1,289 11s. 6d., and in a second column the additional items claimed by the solicitor as between solicitor and client. The aggregate amount of the bill as between solicitor and client was £1,706 8s. 8d. being the above mentioned £1,289 11s. 6d. and £416 17s. 2d. for solicitor and client charges in the Lockwood action and for the solicitor's bill in the Glenister matter. On April 9, 1913, the client obtained the common order to tax the bill. Subsequently, however, he made the application before us which F was refused by the master and refused by the judge. It is an application for an order to tax the bill so far as it relates to the solicitor and client items and so far as the bill has not been allowed on taxation and paid by Lockwood & Co., and that the applicant may be at liberty to discontinue further proceedings under the order of April 9, 1913. In my opinion, the refusal to order such a taxation was right. It is not disputed that there is jurisdiction to order taxation of part of a bill. That jurisdiction exists, not G under s. 37 of the Solicitors Act, 1843, but under the inherent jurisdiction of the court apart from the statute. It has been exercised in the case of taxation as between London agent and country solicitor of so much of the London agent's bill as related to one of the actions included in the bill in which the London firm had acted as agents for the country solicitor (*Re Johnson* and *Weatherall* (2), *Storer & Co.* v. *Johnson and Weatherall* (2)). H

The question is whether that jurisdiction ought to be exercised in this case. A solicitor's bill against his client for costs in an action in which party and party costs are recoverable against the opposite party ought to contain the whole bill of the fees, charges, and disbursements in reference to the business to which it relates and not merely a bill of the extra costs chargeable as between solicitor and client. As long ago as 1825 it was held in *Drew* v. *Clifford* (3) that it was not sufficient to include the party I and party costs in a lump sum, but that the bill must be delivered with items, and in 1840 in *Waller* v. *Lacy* (4) that the bill ought to give a history of the cause so as to enable the officer to judge of the propriety of the various items, and that the delivery of a bill containing merely the extra costs is not sufficient. The solicitor should deliver a bill of the whole costs giving his client credit for the sum received for party and party costs. Accordingly, in *Cobbett* v. *Wood* (5) it was decided in this court that a bill not containing the items allowed on taxation between party and party was not a sufficient bill within the Solicitors Act, 1843, s. 37. The bill as delivered, therefore, is, in my

opinion, a proper bill. It is contended and is no doubt the fact that as regards the items of party and party costs it will not be or may not be necessary for the taxing master to consider them again. This is not, however, necessarily the case. For instance, an item allowed at a lower figure as between party and party may have to be allowed at a higher figure as between solicitor and client. There are several items of this kind in the bill. It does not occur to me that a party and party item could ever require to be reduced as between solicitor and client. Even if the client had himself paid counsel's fees, the amount of those fees would be properly charged as between solicitor and client as forming part of the "demand" of the solicitor against the client, and credit would be given for the amount in the cash account. The client would for this purpose be treated as having paid the same on behalf of his own solicitor. But inasmuch as items might be increased, it is not true that the party and party taxation necessarily concludes, although primâ facie it does conclude, the proper sum to be allowed in the solicitor and client taxation. But beyond this the bill to be delivered under the Act of Parliament is to be a bill of the fees, charges, and disbursements for business done by the solicitor. It is that bill which is taxable under the Act of Parliament, and it is upon a review of that bill as a whole that the taxing master is to adjudicate. The substantial point between the parties is really upon the incidence of the costs of taxation, having regard to the fact that a sixth is or is not taxed off. If the £1,289 11s. 6d. is included in the bill, the client has but a small chance of taxing off more than a sixth, whereas if the £416 17s. 2d. alone is taxed, he might succeed in so doing. If there were reason to suppose that the solicitor standing in this position of advantage had inflated his solicitor and client items, knowing that he did not stand at peril as to the costs of taxation, that might be good ground for certifying specially under the proviso in s. 37 (6) of the 1843 Act. But no question of that kind is suggested here. The bill is, in my opinion, taxable under the statute in the ordinary course. I think the common order to tax originally made was right, and that that order is in fact a formidable difficulty in the client's way in obtaining any other order. But, apart from that, I think that CHANNELL, J., was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Rehder & Higgs*; *Osborn & Osborn.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

DE BEERS CONSOLIDATED MINES, LTD. *v.* BRITISH SOUTH AFRICA CO.

[House of Lords (Earl Loreburn, L.C., the Earl of Halsbury, Lord Atkinson and Lord Gorell), July 3, 4, 6, 17, December 4, 1911]

B

[Reported [1912] A.C. 52; 81 L.J. Ch. 137; 105 L.T. 683; 28 T.L.R. 114; 56 Sol. Jo. 175]

Company—Debenture—Security for loan—Grant to lender of licence to work mines—Repayment of debentures—Continuity of licence.

By an agreement made between the appellant company and the respondent company which recited that the appellant company had advanced £112,000 to the respondent company and that the respondent company contemplated an issue of £750,000 first mortgage debentures, the appellant company agreed that the loan should remain outstanding until the issue of the debentures and that they would then accept part of the debenture issue in payment and satisfaction of the loan. The appellant company also agreed to make a further loan of £100,000 by instalments when required against the issue of further first mortgage debentures. The first mortgage debentures were secured by a floating charge on the entire assets and undertaking of the respondent company. It was further provided in the agreement that in consideration of the assistance rendered and to be rendered by the appellant company to the respondent company the respondent company should grant them an exclusive licence to work certain diamondiferous grounds to which the respondent company were or might become entitled subject to the payment of royalties. The debentures had been issued and later paid off.

C D E

Held: the contract to grant the licence to work the diamondiferous land and that creating the mortgage were two entirely independent contracts since the agreement imposed on the respondent company an immediate and absolute obligation to grant the licence, but not an immediate or absolute obligation to issue or allot to the appellant company mortgage debentures, it being left optional with them at and after the time when they were bound to grant the licence whether or not they would mortgage their property to the appellant company; therefore, the grant of the licence could not have formed part of the security pledged for the payment of the mortgage debt, and on payment off of the debentures the licence remained valid and binding.

F

Decision of Court of Appeal, [1910] 2 Ch. 502, reversed.

G

Notes. Referred to: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, post p. 1046; *Jenkin* v. *Pharmaceutical Society of Great Britain*, [1921] 1 Ch. 392.

As to clogging the equity of redemption, see 6 Halsbury's Laws (3rd Edn.), 485 and ibid., vol. 27, p. 235 et seq. For cases see 10 Digest (Repl.), 805 and 35 Digest, 352 et seq.

H

Cases referred to:

(1) *Governments Stock and Other Securities Investment Co.* v. *Manila Rail Co.*, [1897] A.C. 81; 66 L.J.Ch. 102; 75 L.T. 553; 45 W.R. 353; 13 T.L.R. 109, H.L.; 10 Digest (Repl.) 782, *5084*.

(2) *Illingworth* v. *Houldsworth*, [1904] A.C. 355; 73 L.J.Ch. 739; 91 L.T. 602; 53 W.R. 113; 20 T.L.R. 633; 12 Mans. 141, H.L.; 10 Digest (Repl.) 770, *5008*.

I

(3) *Evans* v. *Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979; 79 L.J.K.B. 970; 26 T.L.R. 509; 54 Sol. Jo. 580; 18 Mans. 64, C.A.; 10 Digest (Repl.) 772, *5016*.

(4) *Jarrah Timber and Wood Paving Corpn., Ltd.* v. *Samuel*, [1902] 2 Ch. 479; 71 L.J.Ch. 688; 87 L.T. 44; 50 W.R. 601; 18 T.L.R. 674; affirmed [1903] 2 Ch. 1; 72 L.J.Ch. 262; 88 L.T. 106; 51 W.R. 439; 19 T.L.R. 236; 10 Mans. 296, C.A.; affirmed sub nom. *Samuel* v. *Jarrah Timber and Wood Paving Corpn., Ltd.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 52 W.R. 673; 20 T.L.R. 536; 11 Mans. 276, H.L.; 10 Digest (Repl.) 805, *5227*.

A Also referred to in argument:

Noakes & Co., Ltd. v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, *19.*

Browne v. *Ryan*, [1901] 2 I.R. 653; 35 Digest 352, *946 iii.*

Re Marine Mansions Co. (1867), L.R. 4 Eq. 601; 37 L.J.Ch. 113; 17 L.T. 50; 10 Digest (Repl.) 765, *4972.*

B *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318; 39 L.J. Ch. 482; 22 L.T. 424; 18 W.R. 441, L.J.; 10 Digest (Repl.) 764, *4955.*

Mellor v. *Lees* (1742), 2 Atk. 494; 26 E.R. 698, L.C.; 35 Digest 245, *55.*

Toomes v. *Conset* (1745), 3 Atk. 261; 26 E.R. 952, L.C.; 35 Digest 357, *1001.*

Vernon v. *Bethell* (1762), 2 Eden, 110; 28 E.R. 838, L.C.; 35 Digest 357, *1002.*

Talbot v. *Braddil* (1686), 1 Vern. 394; 23 E.R. 539, L.C.; 35 Digest 271, *277.*

C *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620; 79 L.J.Ch. 360; 74 J.P. 154; 26 T.L.R. 324; 35 Digest 301, *510.*

Albion Steel and Wire Co. v. *Martin* (1875), 1 Ch.D. 520; 45 L.J.Ch. 173; 33 L.T. 660; 24 W.R. 134; 9 Digest (Repl.) 519, *3427.*

Drew v. *Powel* (1803), 1 Sch. & Lef. 182.

South African Territories Co. v. *Wallington*, [1898] A.C. 309; 67 L.J.Q.B. 470; 78
D L.T. 426; 46 W.R. 545; 14 T.L.R. 298; 42 Sol. Jo. 361, H.L.; 10 Digest (Repl.) 785, *5100.*

Oxford v. *Provand* (1868), L.R. 2 P.C. 135; 5 Moo.P.C.C.N.S. 150; 16 E.R. 472, P.C.; 42 Digest 452, *232.*

Bradley v. *Carritt*, [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 51 W.R. 636; 19 T.L.R. 466; 47 Sol. Jo. 534, H.L.; 35 Digest 354, *971.*

E *Case of Monopolies, Darcy* v. *Allen* (1602), Moore, K.B. 671; 1 Web. Pat. Cas. 1; 11 Co. Rep. 84 b; Noy, 173; 72 E.R. 830; 43 Digest 8, *35.*

Ashbury Railway Carriage and Iron Co. v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 648, *4309.*

Appeal from an order of the Court of Appeal (Cozens-Hardy, M.R., Farwell and
F Kennedy, L.JJ.) ([1910] 2 Ch. 502) affirming a decision of Swinfen Eady, J., ([1910] 1 Ch. 354).

The facts appear in the opinion of Lord Atkinson.

Upjohn, K.C., Jenkins, K.C., and *J. M. W. Holmes* for the appellants.

Sir R. Finlay, K.C., Levett, K.C., W. E. Hollams and *G. H. Allen* for the respondents.

The House took time for consideration.

G

Dec. 4, 1911. The following opinions were read.

LORD ATKINSON.—This is an appeal from an order of the Court of Appeal dated July 5, 1910, affirming a judgment of Swinfen Eady, J., dated Feb. 10, 1910, in favour of the respondents, in an action in which the respondents were plaintiffs, and the appellants were defendants and dismissing the appellants' counter-claim.

H The facts of the case, so far as it is necessary to state them, are as follows. The appellants are a company registered and incorporated under the Limited Liability Laws of the colony of the Cape of Good Hope, having their head office in Kimberley, in the said colony. The respondents are a company incorporated by Royal Charter, dated Oct. 29, 1889, for the purposes mentioned in the charter. A deed of settlement was duly executed on Feb. 3, 1891, by the members of the company, and approved in pursuance
I of the provisions of this charter. A supplemental Royal Charter was granted to the respondents on June 8, 1900, and a supplemental deed of settlement in conformity therewith was duly executed by them. The charter provides (by cl. 20) that nothing in the charter shall authorise the company to set up or grant any monopoly of trade, provided that the establishment of, or the grant of concessions for, banks, railways, tramways, docks, telegraphs, waterworks, or other similar undertakings, or the establishment of any system of patent or copyright approved by the Secretary of State shall not be deemed monopolies for such purpose, and (by cl. 24, sub-cl. 5) the company is specially authorised and empowered to carry on mining and other industries, and to make

concessions of mining forestal or other rights. In the argument the appellants were for convenience called De Beers, and the respondents, the charter company. The latter company had, before 1892, acquired from native chiefs or owners, not from the Crown, large tracts of land north and south of the river Zambesi, in North and Southern Rhodesia, in South Africa, some of which lands were believed to be diamondiferous. This company was in April, 1892 indebted to De Beers in the sum of £80,500. It required more money to carry on its operations, and had in contemplation the project of issuing first mortgage debentures, to be secured by a trust deed specifically charging all its lands and mineral rights in South Africa, but neither the time nor the amount of the issue had been then fixed upon or determined. The company in this state of things entered into a contract with De Beers, dated April 20, 1892, whereby it was, amongst other things, provided: (i) That the latter should, on the execution of the agreement, and also upon the first of each succeeding calendar month of the then current year, advance to the charter company the sum of £3,500, so that the total amount of the latter company's indebtedness to De Beers should, on Dec. 1, 1892, amount to £112,000. (ii) That the charter company should repay this sum to De Beers on Jan. 1, 1893, with interest in the meantime at the rate of 6 per cent. on the amount of their original indebtedness (£80,500) from the date of the agreement, and on the subsequent advances from the dates when the same should respectively be made. (iii) That in the event of the charter company determining to issue debentures, as contemplated, De Beers should be entitled to require debentures, being part of this issue, to be issued to it, at whatever might be the rate of issue, in satisfaction of this sum of £112,000 and accrued interest thereon; and that if De Beers should so require, the charter company should grant to them exclusive licence to work all the company's diamondiferous ground in their territories south of the Zambesi on certain conditions therein specified, De Beers paying the royalties therein mentioned. (iv) That should there be no issue of debentures by the charter company, or, there being such an issue, De Beers should not desire to exercise their option to have any of the same issued to them, but should desire to obtain the exclusive right to work the above mentioned diamondiferous lands, they should be at liberty to decline to take payment of the sum of £112,000 for a period of five years, that sum should be retained by the company, bearing interest at the rate of 6 per cent. per annum, and that at the end of this period of five years, whether or not the payment of the principal sum of £112,000 be then demanded or not, De Beers should be entitled to a grant in perpetuity of the licence above mentioned. As far as the agreement is concerned, it is clear that the respondents were not bound to issue debentures; that De Beers were not bound to take any of the debentures in satisfaction of their debt; that it was entirely optional with De Beers whether or not they should claim a grant of the above-mentioned licence, at all events, until after the loan had stood out unsatisfied in whole, or in part, for a period of five years; and further, that the obtaining of the licence was in no way conditional either upon the issue of debentures by the charter company, or upon the acceptance of them by De Beers in satisfaction in whole or in part of their debt. These latter were plainly two independent transactions. The monthly advances were made by De Beers.

The charter company desired to construct, or to promote the construction of, a railway from Vryburg to Mafeking, and required for that purpose a loan of £100,000. They accordingly entered into an agreement in writing with De Beers, dated Dec. 7, 1892, and described as supplemental to the agreement of Apr. 20, 1892, described as the principal agreement. Upon the construction of this agreement the most important point in the case turns. The agreement begins by reciting (i) that De Beers will before Dec. 31, 1892 have advanced to the charter company £112,000; (ii) that in connection with the construction of this railway from Vryburg to Mafeking and its general operations, the chartered company contemplated an issue of first mortgage debentures for £750,000 to bear interest at the rate of 6 per cent. per annum, and that they had applied to De Beers to accept an issue at par of first mortgage debentures, part of this issue of £750,000 in payment and satisfaction of the sum of £112,000, and had also applied to De Beers in view of the construction of the above-mentioned railway to lend to them a further sum of £100,000, to be secured by an issue at par of first mortgage debentures, a further portion of the contemplated issue of the £750,000, to all of which De Beers had agreed.

A It then proceeds to provide that the sum of £112,000 should not be repaid as provided by the principal agreement, i.e., on Jan. 1, 1893, but should continue outstanding on loan until the first mortgage debenture issue should be made by the charter company, and should carry interest at 6 per cent. per annum until the date when interest on the first mortgage debentures commenced to run; that upon the first mortgage debenture issue being made, part of the same to the nominal value of £112,000 should be allotted B and issued to De Beers, upon which event, and the payment of all interest on this sum up to the date when the interest on the debentures has commenced to run, De Beers should give a receipt for the sum of £112,000 and all interest thereon. It further provided that the first mortgage debentures for £750,000, i.e., the whole issue, and interest thereon at the rate of 6 per cent. per annum were to be secured by a floating charge upon the entire assets and undertaking of the charter company, and a further and better charge on C certain lands therein mentioned to which the company then were or thereafter might become entitled, on the completion of the before-mentioned railway, the floating charge, however, to be so framed that the charter company should be at liberty, in the course of its business and operations for the purpose of carrying on the same, to manage, deal with, work, and turn to account by sale, lease or otherwise such assets as it might deem expedient subject to this, that the charter company was not to be at liberty to D execute any mortgage or other charge in priority to the first mortgage debentures for £750,000, and the interest thereon. It further provided that De Beers should advance the sum of £100,000 when required by the charter company in instalments at an average rate not exceeding £10,000 per month as required for the purpose of the aforesaid railway as against the issue of these debentures for £100,000. And para. 6 provided that in consideration of the assistance rendered and to be rendered by De Beers to the charter E company as appears in these two agreements, the charter company should grant to De Beers exclusive licence to work all diamondiferous grounds to which they were then or might thereafter become entitled, north or south of the Zambesi, subject to the payment of the royalties therein mentioned. It is admitted that the sum of £100,000 mentioned in this agreement was advanced as stipulated, the first instalment on July 1, 1893, and the remainder from time to time afterwards. It would appear to me that it F could neither be successfully contended that this sixth paragraph did not contain a present unconditional agreement to grant the licence to work the diamondiferous land of the charter company therein specified, irrespective of whether or not debentures were issued as contemplated; nor that from the date of the supplemental agreement the lands of the company in North and South Rhodesia did not become in equity, subject to and burdened with the rights and interests contracted by that paragraph to be vested in De Beers.

G The debenture trust deed was not executed till June 27, 1894. The charter company were of course, parties to it. It contained, amongst others, a provision to the effect that the charge created by it was a floating security, and accordingly, that the company, in the course of its business and operations, and for the purpose of carrying on the same, might sell, exchange, convey, appropriate, lease, surrender, manage, deal with, work, turn to account the property charged or any part or parts thereof, and give effect to H concessions of mining or other rights in such manner as the company might think fit, save that they should not create any mortgage or charge in priority to the security thereby constituted. A provision (para. 13) was introduced that the security thereby constituted should be enforceable in certain events, six in number, named in it. It gave to the trustees a power of sale, with a provision (para. 16) that the money, the proceeds of the sale, should in the first instance be applied towards the payment of the I arrears of interest due on the debentures, pari passu, and, secondly, to the payment of the principal due on the same, pari passu; and that on such payment being made, a memorandum thereof should be endorsed by the trustees on the debentures. The form of the debenture is given in the schedule of this deed. In this it is provided that the issue of £250,000 mortgage debentures and £500,000 debenture stock of the company should rank and carry interest, pari passu, on the interest charged, as a floating security. By one of the conditions set out upon it (para. 10) power is given to the company to pay off the debentures on giving six months' notice; and by para. 11 the principal moneys secured are only made payable on the non-payment of interest or the happening of one

of the several events named. Should the interest be regularly paid and none of these events occur, the principal moneys were to remain outstanding, no day being fixed for repayment or redemption of them. The debentures to the amount of £212,000 were issued to De Beers some time after the date of the deed. They were paid off long before this action was instituted. The charter company now contend that the agreement contained in the para. 6 of their agreement of Dec 7, 1892, to grant to De Beers an exclusive licence to work their diamondiferous ground in North and South Rhodesia, was a clog on the equity of redemption in the property and undertaking which remained in them after the issue of these mortgage debentures to De Beers and others, and was therefore void; that on the payment to De Beers of the debentures held by them, the property mortgaged was thereby redeemed; and that the charter company were entitled to have it restored to them free from the burden of this licence.

Much reliance was placed by counsel for the company in argument on the application to the agreement of Dec 7, 1892, and especially to its first paragraph of the well-known doctrine of courts of equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those which they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more, and nothing less is to be taken, in equity, to be done. So that the very first point to be considered in this case, necessarily, is the true construction of the contract of Dec. 7, 1892—the determination of what the parties to it had respectively bound themselves to do. First, it is, in my view, as I have already indicated, clear that para. 6 of that contract imposed upon the charter company an immediate and absolute obligation to grant the licence therein mentioned. And, second, I think that paras. 1, 2, and 4 of that agreement do not impose on the charter company an immediate or absolute obligation to issue or allot to De Beers £112,000 mortgage debentures in payment of the debt due to them. Their obligation fell far short of that. It amounted, in my opinion, to this, and this only. The charter company bound themselves if and when they issued or allotted these £750,000 mortgage debentures to issue and allot to De Beers in payment of this debt debentures, portion of £750,000, of the nominal amount of £112,000. It was, in my view, left optional with the charter company at, and after, the time when they were so absolutely bound to grant the licence, whether or not they would mortgage their property to De Beers in the manner proposed. If that be so, the contract to grant the licence to work the diamondiferous land and the creation of the mortgage are not two parts of one and the same transaction, but entirely independent contracts, and the grant of the licence could not, therefore, have formed, and did not form, part of the security pledged for the payment of the mortgage debt. On the contrary, the property charged by the mortgage debentures would be the undertaking—i.e., the assets of the company, burdened and incumbered with the prior obligation, superior to the mortgage security, to grant the licence; so that upon payment of the mortgage debt this licence would remain valid and binding unaffected by the redemption, because it was not so pledged. No doubt the consideration mentioned in para. 6 for the grant of the licence is "the assistance rendered and to be rendered by De Beers to the charter company as appearing in the principal agreement and that agreement." It was urged in argument, as I understood, that these words only covered the past loan of £112,000, the future loan of £100,000, and the obligation to leave the first outstanding for the stipulated time, but even if they covered in addition the contract of De Beers to take mortgage debentures when issued in payment of their past debt, the omission or refusal of the charter company to issue the debentures, even if they were bound to issue them would not invalidate the contract to grant the licence since the failure of the consideration would then only be partial. The stipulation contained in the first paragraph of the December agreement that the loan of £112,000 should continue outstanding until the first mortgage debenture issue was made, was relied upon to show that the charter company were bound to issue these debentures, else the loan might never be paid, a result which it could not be supposed that the parties ever intended. It by no means necessarily follows, however, that such a result would

be brought about, even if the issue of the debentures was optional and the charter company omitted to issue them. The contract must, I think, be held to mean that the loan should remain outstanding until the issue was in fact made, or until a reasonable time had elapsed for the making of it. If the charter company refused before the lapse of that time to make the issue, or omitted after its lapse to make it, then, in either of these events, De Beers would be free to call in the loan. I do not know if the first point was developed as fully, or pressed as strongly, in argument before the Court of Appeal as it was before your Lordships. It appears to me, however, to be a good point, fatal to the respondents' contention in reference to the debentures for the sum of £112,000, because, as I have said, in my view the obligation of the charter company was, as to the grant of the licence, present and absolute, and as to the issue of the debentures optional, and that the contracts of the parties in reference to these two matters were not different parts of one transaction, but separate agreements, each independent of the other, the former contract, therefore, forming no part of the consideration given for the mortgage.

There was much discussion on the origin and history of this equitable doctrine of the clogging of an equity of redemption, the oppressive circumstances, out of which it originally arose, the evils it was designed to remedy, and its inapplicability to such a security as is created by the mortgage debentures of a commercial company. Several authorities were cited to show what were the precise nature and incidents of the floating charge created by such instruments, including the cases *Governments Stock and other Securities Investment Co.* v. *Manilla Rail Co.* (1); *Illingworth* v. *Houldsworth* (2); *Evans* v. *Rival Granite Quarries Ltd.* (3), and special attention was directed to the description given by LORD MACNAGHTEN of this floating charge in the first-mentioned case, and by BUCKLEY, L.J., in the last-mentioned. LORD MACNAGHTEN said ([1897] A.C. at p. 86):

> "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying conditions on which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes."

And BUCKLEY, L.J., said ([1910] 2 K.B. 999):

> "A floating security is not a future security; it is a present security, which presently affects the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security."

In the present case the charge never so crystallised, and it would appear to me that such statements of the law as these, that "on payment of all that is properly payable on the security of the property charged, the whole of that property must be restored to the borrower unfettered and undiminished by anything created in favour of the lender, as part of the consideration for the loan"—that "the corollary applies to all cases where there is a right to redeem, and is incident to or part of that right"; and that the sole question is: "Is there a right to redeem?"—however applicable to ordinary mortgages of land or chattels, are scarcely applicable to a case where the mortgagee never had possession, actual or constructive, of any of the property charged, never had any estate in it vested in him, or any specific charge upon it created in his favour.

In the view which I take of the meaning of the agreement it is not necessary to decide this point. *Samuel* v. *Jarrah Timber and Wood Paving Corpn., Ltd.* (4), certainly does not rule it, for in that case, as appears from the report in the court of first instance ([1902] 2 Ch. at p. 481), mortgage debentures were not issued by the borrowing company to the lender. On the contrary, a certificate of £30,000 first mortgage redeemable

debenture stock was handed over to the mortgagee in exchange for £5,000; and the stock was subsequently transferred to the lender, a specific charge being thus created in the latter's favour on this particular stock. The alleged clog in that case was a stipulation that the lender should have an option to purchase the whole or any part of the stock at any time within twelve months at 40 per cent. This was the very kind of device to acquire the mortgaged property absolutely, against which the courts of equity set their face. I fully concur, however, with the observations of LORD MACNAGHTEN, who, after dealing fully with the origin and history of this doctrine as disclosed in the authorities, is reported to have spoken as follows ([1904] A.C. at p. 327):

> "Speaking for myself, I should not be sorry if your Lordships could see your way to modify it, so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from an impecunious landowner in the toils of a crafty moneylender."

No case was cited directly ruling the point. The *Jarrah Case* (4) is the nearest authority, but if one were free to deal with the matter on principle, and apart from authority, I should, speaking for myself, incline to the opinion that the fact (i) that no specific charge is, in the first instance, created by these mortgage debentures; (ii) that the mortgagor is free to deal, in the ordinary course of business, with the assets subject to the floating charge; (iii) that the debenture-holder has no right similar to the right of foreclosure possessed by an ordinary mortgagee, and can never recover more in money than the amount of his debenture, renders the doctrine of clog inapplicable to such transactions; but, of course, I preserve an open mind upon the subject.

The only other point argued was raised upon cl. 20 of the charter, to the effect that the grant of the exclusive right to dig and work the diamondiferous lands of the company over so vast an area as that of Northern and Southern Rhodesia was a monopoly prohibited by the following express words of the clause:

> "Nothing in this, our charter, shall be deemed to authorise the company to set up or grant any monopoly of trade,"

and was, therefore, ultra vires, and void. It is perfectly clear that the grant or licence by a proprietor of land to some person to use and exercise exclusively over that land some of his proprietary rights is not a monopoly of trade within the meaning of such a clause as this. I accordingly am of opinion that the judgment appealed against was erroneous and should be reversed, and this appeal be allowed with costs.

THE EARL OF HALSBURY.—There is no doubt that the jurisprudence of this country includes what have been called equitable doctrines, and I had intended to distinguish, so far as I could, the ordinary case of a mortgagee from that which from time to time it has been likened to, though I think only by analogy, those floating securities, debentures and so on, which are well-known commercial documents, and play a most important part in the commerce of this country. The extremely lucid, and to my mind convincing, argument which has just been delivered by LORD ATKINSON renders it totally unnecessary for me to go through the narrative which he has put before your Lordships, with the conclusions at which he has arrived, with which I entirely and heartily agree. I only wish to say—and this is the only reason why I interpose at all—that it must not be supposed that anything which is said or that the effect of this decision is in any way to affirm the proposition that debentures or floating securities of the nature of debentures are necessarily affected by this equitable doctrine which I, in common, I suppose, with all my noble and learned friends, entirely agree is part of the jurisprudence of this country now at all events. The effect of that does not necessarily involve that everything which has been by analogy called a mortgage is within the ambit of that doctrine. Against that I should utterly protest; and there is no part of the judgment which my noble and learned friend has just delivered with which I should more heartily agree than that wherein he has pointed out that which is, to my mind, a sufficient distinction. But the effect of what he has done in disentangling

the somewhat entangled arrangements which were made here is that if we were to attempt to deal with that doctrine, and to show the limitations within which that doctrine forms part of the law of England, I am afraid that it would be said, and might justly be said, that what we said was obiter, because it did not arise in the case. The effect of that is, of course, that it would be undesirable for us to give judgment on a matter which is practically not before us; and I only therefore say that I entirely and heartily concur with my noble and learned friend's judgment.

EARL LOREBURN, L.C.—I have had the advantage of reading the opinion of LORD ATKINSON, which deals fully with the facts of this case and relieves me from that task. Accordingly I will state the reasons which constrain me to differ from the order of the Court of Appeal as briefly as I can, for the difference relates only to one point.

What the plaintiffs, a chartered company, ask in this action is that two agreements made between them and the De Beers company, the defendants, shall be declared ultra vires and void in so far as they purport to confer upon De Beers an exclusive licence to work diamondiferous ground in the company's territory. The point really turns upon the effect of the agreement dated Dec. 7, 1892. There is nothing in the contention that these agreements created a monopoly contrary to the charter, and none of the learned judges has adopted it. But the Court of Appeal, affirming SWINFEN EADY, J., have decided that the provision for a diamond mining licence is invalid, because it amounts to a clog on the equity of redemption. Your Lordships are unquestionably bound by this rule of equity, and I have no intention of evading it, but I must point out, as KENNEDY, L.J., pointed out, that if it is to govern this case, then one party to an honest and, in morals as well as in business, perfectly unimpeachable contract is enabled to get rid of its obligation. That would be a deplorable consequence to flow from an equitable rule. I cannot help thinking that there is some danger lest this doctrine may be stretched beyond the necessities which give rise to it, and become an aid instead of a hindrance to unjust dealing. But I am glad to arrive at the conclusion that the present case does not fall within it at all, and for the following reason. When a mortgage is paid off, the property secured is as free and the owner must be as free to dispose of it as if there had never been a mortgage at all, and any device to prevent full redemption when the sum due is paid off will be void. Now it appears to me (I say it with all respect) that when the mortgage or charge in the present case came into being, either in law or in equity, the diamondiferous land which was included in the mortgage was already subject to this licence, and so the right to work the diamondiferous land never was included in the mortgage or charge.

The agreement of Dec. 7 in effect so far as material provided as follows. The charter company granted to De Beers an exclusive licence to work all their diamondiferous land at once and unconditionally. On the other hand De Beers were to leave their past advances to the charter company still on loan, to add to those advances, and in discharge of all their advances to accept debentures if and when the charter company should issue them. The charter company, even if bound to issue debentures, certainly was not bound to issue them at once, and, if issued, the debentures were to be then secured by a floating charge upon the entire assets and undertaking of the charter company, including, of course, the diamondiferous lands. Meanwhile the company was free to sell or lease or charge its property. It was a general agreement providing for a variety of things with which we are not concerned. In this state of things it seems to me that, nothing was included, or intended to be included in the floating charge, except the assets and undertaking, which should belong to the charter company, whensoever the debentures might be issued and the security created. If there were at that date any incumbrance upon, or any contract already affecting, such assets or undertaking, then the floating charge would be subject to such incumbrance or contract. In this case there was such a contract granting a licence to work the diamondiferous land, and when, two years or so after the licence was granted, the debentures were issued and the floating charge created, it was created subject to the licence. Paying off the debentures released the whole of the property charged. It did not indeed release the charter company from the burden of this licence, for the excellent reason that the charge was subject to the

licence. The licence was not a clog on the equity of redemption, because when the redemption took place everything which had been charged was restored to the mortgagor. I think, therefore, that this appeal should be allowed and judgment entered for the defendants. I wish to add that I agree with what LORD ATKINSON and LORD HALSBURY have said as to the point whether the doctrine under discussion applies to floating charges. I ought to add that **LORD GORELL**, who is not able to be present to-day, has come to the same conclusion as the rest of your Lordships.

Appeal allowed.

Solicitors: *Ingle, Holmes, Sons & Pott*; *Coward, Hawksley, Sons & Chance.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HATTON *v.* CAR MAINTENANCE CO., LTD.

[CHANCERY DIVISION (Sargant, J.), December 19, 1913, January 28, 1914]

[Reported [1915] 1 Ch. 621; 84 L.J.Ch. 847; 110 L.T. 765; 30 T.L.R. 275; 58 Sol. Jo. 361]

Lien—Work done—Maintenance of car—Provision of driver—Car available to owner at her pleasure.

The owner of a motor car made an agreement with a company by which the company, for a fixed sum each year, should for three years maintain the car and provide and pay a driver who was to drive the car in accordance with the owner's wishes. The car remained at the company's garage when the owner was in London, being taken out as and when the owner desired. When money due under the agreement had not been paid the company took possession of the car and claimed a lien on it for the amount owing.

Held: as all that was done by the company was for the purpose of maintaining the car in the condition in which it was sent to them and not to improve it, the company had no common law lien in respect of the amount owing to them for that service.

Per CURIAM: Even if there had been a lien originally, that lien would have been lost by virtue of the arrangement under which the owner was to be at liberty to take the car away, and did so, as and when she pleased.

Notes. Distinguished: *Albemarle Supply Co., Ltd.* v. *Hind & Co.*, [1928] All E.R.Rep. 401. Referred to: *Pennington* v. *Reliance Motor Works*, [1923] 1 K.B. 127.

As to liens, see 24 HALSBURY'S LAWS (3rd Edn.) 142 et seq., and for cases see 32 DIGEST 246 et seq.

Cases referred to in argument:

Keene v. *Thomas*, [1905] 1 K.B. 136; 74 L.J.K.B. 21; 92 L.T. 19; 53 W.R. 336; 21 T.L.R. 2; 48 Sol. Jo. 815, D.C.; 32 Digest 247, *321.*

Somes v. *British Empire Shipping Co.* (1860), 8 H.L.Cas. 338; 30 L.J.Q.B. 229; 2 L.T. 547; 6 Jur.N.S. 761; 8 W.R. 707; 11 E.R. 459, H.L.; 42 Digest 253, *390.*

Jackson v. *Cummins* (1839), 5 M. & W. 342; 8 L.J.Ex. 265; 3 J.P. 451; 3 Jur. 436; 151 E.R. 145; 32 Digest 248, *328.*

Richards v. *Symons* (1845), 8 Q.B. 90; 15 L.J.Q.B. 35; 6 L.T.O.S. 124; 10 Jur. 6; 115 E.R. 808; 2 Digest (Repl.) 339, *286.*

Judson v. *Etheridge* (1833), 1 Cr. & M. 743; 3 Tyr. 954; 2 L.J.Ex. 300; 149 E.R. 598; 32 Digest 248, *327.*

Scarfe v. *Morgan* (1838), 4 M. & W. 270; 1 Horn. & M. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest 233, *180.*

Forth v. *Simpson* (1849), 13 Q.B. 680; 18 L.J.Q.B. 263; 13 L.T.O.S. 187; 13 Jur. 1024; 116 E.R. 1423; 32 Digest 220, *51.*

Bevan v. *Waters* (1828), 3 C. & P. 520; Mood. & M. 235, N.P.; 32 Digest 221, *53.*

Coggs v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 3 Digest (Repl.) 55, *1.*

Mulliner v. *Florence* (1878), 3 Q.B.D. 484; 47 L.J.Q.B. 700; 38 L.T. 167; 42 J.P. 293; 26 W.R. 385, C.A.; 32 Digest 234, *193.*

Adjourned Motion treated as the trial of the action without pleadings.

In this case there was a motion for the appointment of a receiver of a motor car in an action in which the plaintiff claimed a declaration that the defendant company had no lien or charge on a certain motor car, the property of the plaintiff, and an order for delivery up of the said car to the plaintiff or as she should direct. A receiver was appointed on the motion, and the action was ordered to come on for speedy trial without pleadings. The whole question turned on whether a certain agreement was an agreement under which it could be said that a motor car which was the subject-matter of the agreement was improved by the persons with whom it was garaged—i.e., the defendant company—so as to give them a common law lien on the car for their charges in respect of such improvements.

Roger Turnbull for the plaintiff.

Talbot K. Crossfield for the defendant company.

SARGANT, J.—This is a very curious point that I have to decide, whether the defendant company who entered into an agreement with the plaintiff to do certain things in relation to her motor car have a lien on that car for their charges in relation to those matters.

The motor car was one that belonged to a lady and which she put under the charge of a company known as the Car Maintenance Co., Ltd. I understand she had not bought the car from that company, but had bought it elsewhere. An agreement was signed and was under seal, and by that contract which was dated July 26, 1913, it was agreed that the company should for three years well and sufficiently maintain the car, the property of the owner, and supply all petrol, lubricant, tyres, tubes and other things necessary for the proper running of the car, and repair breakdowns; then they were to provide and pay a competent, suitable, and respectable driver, who was to drive the car in accordance with the orders and directions of the owner; and they were to wash, clean, and well and sufficiently maintain the car, and the engine, and machinery, and all parts thereof, together with tyres and so on, and keep the same in good repair and fit for use. There were certain other provisions, and the owner had to make payment to the company of a fixed sum per annum for the maintenance of the car up to a total mileage of 8,000 in any year, and an additional 7d. a mile for every mile in excess of that. The owner lived occasionally in town and sometimes at Amesbury, and it appears that the car while in town was kept at the garage, but was taken out as often as the owner wanted it, and was also taken down to Amesbury whilst the owner was there for the time being. The company at one time appear to have got rather nervous as to whether they were going to be paid the amount stipulated for under the agreement. The owner was desirous of selling the car, and sent the car with the chauffeur up to town to some other motor car people for the purpose of it being sold, and at one time while the car was in town the managing director or some officer of the defendant company came across it and told the chauffeur to drive the car to the garage of the defendant company. Having got it to the garage of the company he proceeded to take off one tyre so that the car could not go out at all, and then he claimed to retain it, not only for the amount that was then due under the agreement, but apparently for everything that was to become due, or a large part of what was to become due, under the agreement until the end of the year. That second claim has now been abandoned.

The question is whether the company are entitled to a lien on the car for the amount due to them from the owner, which is about £85 under that agreement, at the rate of so much per annum. It is clear that the amount to be paid is not merely for the repair

of the car, but it is for the wages of the chauffeur and the supply of petrol and oil, and that kind of thing and therefore it is an inclusive lump sum. It was said by counsel for the defendant company that whenever an article is repaired the repairer gets a lien on the article for the amount of his charges. I do not dissent at all from that view of the law if, of course, the repairer gets the article in his shop for the purpose of repair and by that repair improves it as he would ordinarily do. But certainly I cannot find anything in the authorities which have been cited to me to show that, if what the contractor does is not to improve the article, but merely to maintain it in its former condition, he gets a lien for the amount spent upon it for that maintenance. The cases with regard to horses seem to point entirely the other way, because it is clear that a jobmaster has no lien at all for the amount of his bill in respect of feeding and keeping a horse at his stable, whereas, on the other hand, a trainer does get a lien upon a horse for the improvement which he effects to the horse in the course of training it for a race. A case was cited to me by counsel for the defendant company with regard to the extent of the lien of an innkeeper, but I do not think that has really any application to the present case. Here all that was to be done by the contractor was for the purpose of maintaining the car in the condition in which it was sent to him, and in my judgment he would have no lien, that is no common law lien, in respect of the amount owing to him for that service.

That really would be sufficient to dispose of the case, but I think I ought also to express my opinion that on the cases cited to me, even if he would have such a lien originally, that lien would be lost by virtue of the arrangement under which the owner was to be at liberty to take the car away, and did take the car away, as and when she pleased. The existence of a lien seems to me to be inconsistent with an arrangement under which the article is from time to time taken entirely out of the possession and control of the contractor, for I cannot think that the fact that the chauffeur was to be deemed to be the servant of the company was intended to have the effect or had the effect of leaving the car in the possession of the company. I think that clause was inserted for quite other reasons, which will occur to anybody who has had to do with motor cars. I accordingly make the declaration and order asked for by the plaintiff.

Solicitors: *Brooks, Jenkins & Co.*; *E. Chace Carr.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

Re ATKINSON AND HORSELL'S CONTRACT

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.) February, 21, 22, 1912]

[Reported [1912] 2 Ch. 1; 81 L.J.Ch. 588; 106 L.T. 548; 56 Sol. Jo. 324]

Sale of Land—Possessory title—Possession primâ facie evidence of right—Absolute when rights of all other persons extinguished—Condition in contract that title should be shown from specified date—Obligation of purchaser to accept possessory title beginning at later date.

Possession is primâ facie evidence of right, and it becomes absolute when the rights of all other persons are extinguished.

Where, by a contract for the sale of land, a title is to be shown as from a certain date the purchaser can be compelled to accept a possessory title beginning at a later date.

Games v. *Bonnor* (1) (1884), 54 L.J.Ch. 517, applied.

Notes. The Real Property Limitation Acts, 1833 and 1874, were repealed by the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1159), of which see s. 4 (3).

Considered: *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233. Referred to: *Re Spencer and Hauser's Contract*, [1928] All E.R.Rep. 514.

As to a statement in a contract that title is to be made in a particular way and as to possessory title, see 24 HALSBURY'S LAWS (3rd Edn.) 258, 259, and ibid., vol. 34, pp. 238, 239, 275, 276, and for cases see 40 DIGEST (Repl.) 159–164.

Cases referred to:

(1) *Games* v. *Bonnor* (1884), 54 L.J.Ch. 517; 33 W.R. 64, C.A.; 40 Digest (Repl.) 163, *1266*.

(2) *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238; 76 L.J.Ch. 235; 96 L.T. 110; 40 Digest (Repl.) 155, *1193*.

(3) *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; 40 Digest (Repl.) 164, **684*.

(4) *Tichbourne* v. *Weir* (1892), 67 L.T. 735; 8 T.L.R. 713; 4 R. 26, C.A.; 32 Digest 486, *1485*.

Also referred to in argument:

Re Marsh and Earl Granville (1883), 24 Ch.D. 11; 53 L.J.Ch. 81; 48 L.T. 947; sub nom. *Marsh* v. *Lord Granville*, 31 W.R. 845, C.A.; 40 Digest (Repl.) 82, *624*.

Hoggart v. *Scott* (1830), 1 Russ. & M. 293; Taml. 500; 9 L.J.O.S.Ch. 54; 39 E.R. 113; 40 Digest (Repl.) 268, *2238*.

Re Bryant and Barningham's Contract (1890), 44 Ch.D. 218; 59 L.J.Ch. 636; 63 L.T. 20; 38 W.R. 469, C.A.; 40 Digest (Repl.) 253, *2121*.

Appeal from a decision of SWINFEN EADY, J., on a vendor and purchaser summons.

By a contract in writing dated Feb. 28, 1911, Annie Rose Atkinson agreed to sell and Charles Horsell agreed to purchase for £3,000 freehold land at Chertsey. The deposit paid was £300, and the purchase was to be completed on May 1, 1911. The title was to commence with a general devise of the Almners Estate contained in the will of George Carthrow, and the purchaser was to assume the seisin or ownership of the testator, and that the property passed by the devise. By that will George Carthrow devised the property to his son James Carthrow for life, with remainder to James' first and other sons in tail, with remainder to James' daughters as tenants in common in tail, and in default of such issue to the use of George Carthrow's own right heirs. George Carthrow died on Feb. 26, 1842, and his son James died on June 2, 1874, without issue. James Carthrow was the eldest living son and heir-at-law of George Carthrow at the time of the latter's death in 1842. Consequently, on James' death without issue, the remainder in fee under the will of George Carthrow vested in James Carthrow. James Carthrow left a will, dated April 6, 1871, whereby he devised all his real and personal estate to his wife Mary Ann Frances Carthrow. She survived him and proved the will on

June 25, 1874. On the death of James Carthrow the land in question passed to Mary Ann Frances Carthrow in fee. The present vendor did not, however, derive title under that devise. On the death of James Carthrow the contention was put forward that the property passed to the person who would have been the right heir of George Carthrow if he had died when James Carthrow died. In other words, that the right heir of George Carthrow was to be ascertained with reference to the date of James Carthrow's death instead of at the date of George Carthrow's own death. At the date of the death of James Carthrow, his next brother, William Carthrow, was dead, leaving a daughter Ann, who married first Sir Robert Colquhoun, and, on his death, married in 1871 William Adair Atkinson. In 1874 Mrs. Atkinson claimed to be entitled to the property as heiress of George Carthrow, and, although she was not so entitled, she demanded the title deeds from James Carthrow's widow and devisee and obtained them, and it was alleged that she entered into possession of the property, and she and those claiming title under her had been in possession ever since. In 1884 she obtained out of court by an order made in the chambers of BACON, V.C., some railway money representing proceeds of land held under the same title taken by the London and South-Western Railway Co. The present vendor was a daughter of Lady Colquhoun, and claimed through a settlement made by her mother. The purchaser sent in the following requisition:

> "If the pedigree is correct, James Carthrow himself appears to have been the testator's heir-at-law, and, upon failure of his own issue in his own lifetime, he appears to have become tenant for life with remainder to himself in fee. The property therefore passed under the will of James Carthrow, and since his death the occupiers appear to have been trespassers. The present title appears to be wholly bad."

To which the vendors replied:

> "George Carthrow made a will, and the question of intestacy does not arise, as the will dealt with the property agreed to be sold."

The purchaser took out a summons, under the Vendor and Purchaser Act, 1874, asking for a declaration that a good title had not been shown and for the return of the deposit. The summons was adjourned into court, and SWINFEN EADY, J., decided that the title could be forced upon the purchaser. The purchaser appealed.

E. C. Macnaghten, K.C., and *A. Guest Mathews*, for the purchaser.
Micklem, K.C., and *Dighton Pollock*, for the vendor.

COZENS-HARDY, M.R.—This is an appeal from the decision of SWINFEN EADY, J., who held, on a summons taken out under the Vendor and Purchaser Act, 1874, asking for a declaration that a good title has been shown subject only to the production of a declaration, that the purchaser is not so entitled.

The death of the testator took place in 1842, and the property passed to a tenant for life. Then it went to the heir-at-law. In 1874 there was a question as to who was entitled as heir-at-law. The parties took the view that Lady Colquhoun was entitled, and not the person, who it is now admitted—and I should be surprised if any doubt arose on it—was the true heir and entitled to the property. Correspondence took place. Lady Colquhoun claimed the property, and we have letters which show that the deeds were handed over in 1874 to Lady Colquhoun, and from that time downwards she, subject to a statutory declaration, if it is really wanted (but I should have thought there was sufficient proof to satisfy any reasonable person without it), and the persons claiming through her down to the present vendor, have not only had the title deeds but have been in possession and have received the rents and profits of the estate. It is also shown by the abstract that the person who was the true owner in 1874 was a person not under disability, and that, therefore, there was no person who could in any way interfere with or challenge the title of Lady Colquhoun and the persons claiming under her.

We have had a great deal of discussion as to the effect of the Real Property Limitation

Act, 1833. My present view is that the phrase "statutory conveyance" and so on, is a loose metaphorical term, and that the true view is that whenever you find a person in possession of property that possession is primâ facie evidence of ownership in fee, and that primâ facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s. 34 of the Act of 1833. That explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives. But that, of course, does not dispose of the present case. There is a point behind that, and a point which deserves consideration. The property was sold under conditions, and this is not a case of any attempt on the part of the vendor at sharp practice, or to deceive anybody. Everything is perfectly bonâ fide here, the conditions of sale state the title to all the lots, and they commence with a general devise. The abstract which was delivered began with the will, and it went on and treated in good faith, as the parties had done, Lady Colquhoun as the heiress-at-law, and traced the title down from Lady Colquhoun to the present vendor. It is said that, although it be true, as it was admitted to be true, that the vendor has a good title to this property, it is not one which the purchaser bargained for, or was entitled to require, because one particular of the title depends not upon written documents per se, but upon written documents prior to that and subsequent to that, and upon the fact of possession for the statutory period in the deed.

I ask myself this: Supposing the abstract had been the identical abstract which has been here delivered, and that it contained a statement that Lady Colquhoun has been in uninterrupted possession since 1874, would that or would it not have been a title which could be enforced under this contract? It seems to me that it was. The title begins as stipulated. Every document which is contained in the abstract does relate to the land in question. It shows facts which establish that the person who was then ousted was an absolute owner, and not under any disability, and that, therefore, there is nobody who can challenge the title of the vendor. I ask myself: Is there any ground for holding that you must necessarily presuppose a title going through a mass of documents without any intervening application of the Statute of Limitations. I know of no authority to justify such a contention. I think that it would have a startling effect, and it would be inconsistent with *Games* v. *Bonnor* (1), which is a very strong case, but one which I think has a very great bearing upon the matters in question. That is a case where the vendor said that he was the mortgagee in possession under a mortgage dated June 9. That was the root of title, with completion some day in 1881. It appeared that at the date of the contract, and at the date named for completion, he had not a good title. Having regard to the prior state of the title it was discovered—I care not whether it was disclosed by reason of the recitals in the deed or otherwise—after the date fixed for completion that the statutory period had run in his favour. In an action brought after that date the difficulty was pointed out by the conveyancing counsel, who said that in his opinion a good title could not be made under the mortgage, but might be made under the Statute of Limitations. The court thought that was a title which the purchaser was bound to accept, because the vendor had shown that at the date when the action was commenced he was in a position by reason of, and in virtue of, the Statute of Limitations to convey a good title, which he had, to the whole property.

Any other view would, I think, be very extraordinary. Let me assume an open contract. The vendor has been in possession, say, for twenty years. I think that it is true that he would have to show an absolute title for forty years—that is to say, to show deeds and documents beginning before the period when he entered into possession. If the vendor can do that—as in the present case she can by reason of possession under the deeds and documents—I do not see any reason why the vendor should not be able to enforce specific performance, although in one sense of the word that which is the root of title—namely, a document at least forty years old, will not have been one of the documents through which, and by virtue of which, the vendor claims to be entitled to the property. The vendor has satisfied the obligations to show that a good title exists, and can say: "I show an abstract extending back forty years," that abstract being

important as showing dealings with the property, and negativing the right of anybody to defeat the operation of the statute. In my opinion the decision of SWINFEN EADY, J., in the present case was perfectly right. I think also that his decision on the same point very nearly in *Re Baker and Selmon's Contract* (2), was also perfectly right. That was a case where the trustee said that he was selling under a trust for sale. The fact was that there was no trust for sale. He was not in a position as trustee for sale to make a title. But he was in a position to make a title with the concurrence of the beneficiaries who had prior to the contract of sale authorised him to sell. That was a contract which the purchaser was bound to take, and was a very different one. It involved an investigation of the title which would have been unnecessary if there had been a trust for sale, and here it involved questions of duty, and many matters of that kind, and involved a different abstract from that required under the abstract of sale. I think that the present is a case, therefore, in which there is no foundation for saying that the purchaser was entitled to assume that the title should begin in 1838, and go through a chain of deeds and documents. It is sufficient if, in fact, the vendor produced an abstract beginning at that date, and, having regard to the Statute of Limitations, she is in a position to say that she has a good title and that she has shown it from 1838. I think, therefore, that this appeal should be dismissed.

One word only about a point which disposes of the case at an earlier period. Counsel for the purchaser argued in opening the appeal, and mainly relied on, the question of repudiation. He says that the purchaser repudiated on April 26, 1911, and was entitled to do that, because a good title had not been shown. I think that the answer to that is very short and simple. The purchaser takes out a summons and asks for requisitions, and does not raise the point in the form of summons or in the affidavit that the purchase was well repudiated before taking out the summons, and that the purchaser is content to rely on that repudiation apart from anything else. On that ground I think that that objection is not open to him.

FLETCHER MOULTON, L.J.—Rescission is a volitional act of the party who is not guilty of a breach of the contract. He is taking advantage of a breach that is complete on the part of the other party to the contract to exercise the right which the law recognises he possesses to terminate the contract. So soon as a party to a contract indicates that he will not perform the contract, the other party has a right if he chooses, but not unless he chooses, to say, that the contract is at an end. In the present case, assuming that the vendor had said that the purchaser shall take the title that she has shown on her abstract and none other, and the purchaser had said then he rescinds, in my opinion, he would have been right, because the vendor had failed to make a title. But the purchaser did not say so, and in taking out this summons he, in my opinion, came to the court to say whether or not the vendor had fulfilled her contract. He was, therefore, asking the court to decide as between him and his vendor whether such was the case, and entirely concludes the contention that he had taken upon himself the responsibility of realising that it was a total breach, and determining to take advantage of it and raising common law rights of rescission.

I am, therefore, of opinion that the only question before us is whether or not the vendor has so fulfilled her contract of sale that we must compel the purchaser to complete it. That being so, I ask myself what is the contract? The conditions of sale are clear and binding on the parties if there is a condition as to title. However severe it be on one side, however lax it be on the other, if it is one of the conditions of the contract, the vendor must comply with it and the purchaser cannot complain. And in considering whether or not the vendor is ready to perform her contract, we must take the measure of her obligation as fixed by the condition. It may be that she can give a perfectly good title to the purchaser. But if she has undertaken to give a title of a particular type, and the good title which she offers is not of that type, the purchaser cannot be compelled to accept it, because it is not that which contractually the vendor has undertaken to give. A conveyancer experienced in the law may say that it is as valuable and as sound a title. But the purchaser has a right to say that he does not take anybody's advice; that he contracted for one type of title, and no court can make him take

A one which does not comply with the contract. That is where I put a different interpretation on the decision in *Games* v. *Bonnor* (1) from that placed upon it by the Master of the Rolls.

In *Games* v. *Bonnor* (1) the root of the title was to be a certain mortgage deed. The mortgagee took possession under that deed, and he sold as such mortgagee. It turned out that the root of the title beyond the mortgage deed was bad in law. But under the B mortgage deed the mortgagee had taken possession, and had acquired by the time the court came to decide the point, a perfectly good title under the Statute of Limitations, and the court required the purchaser to accept it. In my opinion, both parties there realised that the root of the title was the mortgage deed, and the only question was whether under that a title could be made. The court, in my opinion, did not attempt to decide that a person must take a possessory title if it is a good one, whatever be the C condition as to the title, but that under those circumstances the person claiming under the mortgage was able to give a good title, and that was given. If the court were to put the interpretation on *Games* v. *Bonnor* (1), suggested by the vendor here, it would mean that whatever was the condition as to the title, provided the vendor could give a good possessory title, the court could force it on the purchaser. The court could not do that without violating not only the principles of real contract law, but violating the principles D of contract. The courts do not make principles of contract. They accept them and enforce them. In my opinion, if the parties have stipulated as to the nature of the title to be shown it is just as much as if they stipulated White Acre should be part of the property that was sold. The law has only to enforce those contracts.

Taking it, then, that the title must be proved according to the condition, I turn to the condition itself. I think that counsel for the vendor made admissions which, to my E mind, decide the case. There is not the slightest doubt here that the vendor acted with perfect good faith. She believed that she had a title deduced from George Carthrow, and the condition stated that she should give a title deduced from him. That means coming from a date like 1842. It turned out that that title led to the property belonging to the wife of James Carthrow in 1874, and that the supposed descent to Lady Colquhoun as the real root of the title which is now offered to the purchaser was wrongful. She F took the property by a claim, the badness of which was recognised at the time. It was not her property, and, therefore, the sole title by which it is held is a possessory title dating from 1874 when Lady Colquhoun took possession of it. I asked counsel for the vendor whether, if the vendor had known of the facts, she would have allowed this condition to appear in the conditions of sale, knowing the title which alone could be proved by the vendor, and he said frankly "No," because it would not be honest to do G so. What does that mean? It means that an intending purchaser reading this, and relying on the honesty of the party who was making it, would not understand by this that the title which was about to be given to him was a possessory title, which now is being forced on the purchaser. That being so, it appears to me conclusive that that title is not in accordance with the condition. If the description of this title could not honestly be made by a person who knew the facts in the language of the condition of H sale it means, to my mind, that that condition tells the public that they are going, if they become purchasers, to receive a title other than that which is now sought to be forced upon them. If that be so, it appears to me we ought to say that the purchaser cannot be forced to accept that title.

It is said, and said with perfect truth, that there is no question of bad faith here. I agree, but if with the knowledge of the truth it would not have been bad faith, it seems I to me it is necessarily a misrepresentation whether you knew it or not, only in the one case it is an innocent and in the other case it is a guilty misrepresentation. And when you are coming to consider the question of specific performance it appears to me that an innocent misrepresentation carries with it the same consequences as a guilty one. I cannot say that the court would not to some extent consider with greater severity the question of an intentional one. But still, if it was a misrepresentation, then I think we ought not to force upon the purchaser this title, because he did not get that title which he was entitled to assume was going to be given to him with the property.

It is said that a good title is a good title. It may be so. But there may be prejudices

both in the purchaser and in the market against mere possessory titles. I do not think that we have to consider whether it is reasonable that a person should object to a possessory title before the Real Property Limitation Act, 1874. It seems to me the question is whether he is bound to accept it by reason of his contract. That being so, I do not think that it is very important to examine closely the contrast between the two titles. As to the language, "The title to all the lots shall commence with a general devise. . . ." I think that that points to a title derived by the documents and not to a possessory title. But it is suggested by counsel for the vendor that there is a technical performance of this condition although he admits nobody would understand its meaning, because he says that no honest man could have used this language as describing the title which he says technically satisfies it. He says that there is a recital that Lady Colquhoun was the heiress-at-law of George Carthrow. All I can say is that if you look at the date it is a recital which could not be relied on by anyone, and has never been relied on, because it says quite plainly that she is the heiress-at-law of a person as to whom the deed contradicts her being the heiress. It is just as insensate as if it had been said that Lady Colquhoun was the eldest son of her father, and, therefore, succeeded to the estates. It is absolutely inconsistent with the rest of the deed. I do not think that this saying that all recitals are to be accepted would include a thing which in itself is absolutely contradicted by the deed, so that any court construing that deed would recognise that that recital did bind the parties, because it could not bind the parties, and they would recognise it as a mistake, just as much as if it was a mistake in spelling or in the use of a word. Therefore, in my opinion, this does not technically comply with the condition.

I want for one moment to trace the consequence of a decision that a title of this type can be forced on the purchaser. It practically means that, however far back the root of the title is said to be, the vendor may force upon the purchaser a title with any number of interruptions filled up by possessory title. And so much so that no purchaser would be able to protect himself in future without finding that there is in the conditions of sale a negative sentence saying that no possessory title would be relied upon. I cannot believe that a decision like that is in conformity with what honest and capable conveyancers would feel themselves bound to do in drawing conditions of sales, and I regret very much that the court should come to a decision which, to my mind, will make conditions of sale of this kind deceive persons who are not skilled lawyers and expose them to the necessity of accepting titles which could not be honestly described in the language of the condition. For these reasons I am of opinion that, although the question of rescission is not before us at all, the title to the estate which the vendors are now prepared to give is not one which satisfies the contractual obligations which they took upon themselves by the conditions of sale, and that, whether it is a good title or not, it is not one that can be forced on the purchaser. I am, therefore, of opinion that this appeal ought to be allowed.

I would add that I entirely agree with the explanation given by the Master of the Rolls of the operation of the Statute of Limitations. I think that it was both accurate and extremely happily expressed. Possession is primâ facie evidence of right, and that becomes absolute when the rights of all other people are extinguished. That is what the statute does. The metaphor in *Scott* v. *Nixon* (3) used by LORD ST. LEONARDS of its being analogous to a conveyance is a very dangerous metaphor. The danger of that metaphor was pointed out in *Tichborne* v. *Weir* (4). I think that the true explanation is that which was given by the Master of the Rolls in the present case.

BUCKLEY, L.J.—In my opinion, this appeal fails.

On the question of the purchaser's notice of April 26 the members of the court are of one mind, and I do not wish to add anything on that point. Upon the main point I agree with the judgment which has been delivered by the Master of the Rolls, and I will state my reasons in my own words, and they shall be few. I start with this, that the vendor has shown a good title, and the purchaser admits that she has shown a good title. But the purchaser's contention is that, having regard to the condition of sale, he was entitled to have a title of a certain sort shown to him, and that the vendor has not shown him a title of that sort; she has shown him a good title of another sort. To

describe the sort of title which the purchaser says that he ought to have had, it may be stated thus: Under the conditions of sale the title was to commence with a will of 1838, and the purchaser says that the vendor could only compel him to take a title in which that will of 1838 was a relevant and necessary factor and showed that by devolution there was vested in the vendor the title which in 1838 was vested in the owner. An abstract of title was delivered which traced the title down to 1874, and then traced it onwards through Lady Colquhoun, who in 1874 was treated as being, though she was not in fact, entitled as heiress-at-law of George Carthrow. In point of fact, the person who became entitled as heir-at-law was his son James Carthrow, and the property had passed under James Carthrow's will to James Carthrow's widow, and Lady Colquhoun had nothing to do with it. The abstract then went on to trace the title as if Lady Colquhoun was—as everybody at that date thought she was, and as the court in 1884 in point of fact treated her as being—entitled, and traced the title as if it were one of devolution from the will of 1838 straight onwards. The fact was that that was not so. In 1874, if you had traced the title by devolution, you ought to have followed it from the widow of James Carthrow. But this difficulty having been pointed out, it was obvious, and it was known (in the first place the vendor did not agree to it) to everybody afterwards, that there was this difficulty. Thereupon the vendor said that that did not make any difference. Lady Colquhoun went into possession and got all the deeds in 1874—that is, thirty-eight years ago. So the vendor said: "I have a perfectly good title, and a perfectly good possessory title," to which the purchaser replied: "I am not bound to take the possessory title; you must, under these conditions, show me a title derived by devolution from the testator in 1838."

Is that so? To my mind, it is certainly not so. I do not think that there was any contract at all that the purchaser should have a title of that kind. I will try it by two tests. The first test I propose to apply is this. Suppose that the abstract had traced the title to 1874, and then had stated that Lady Colquhoun was not the heiress-at-law, but from that time onwards to 1911 that she had been in possession. If the abstract had been in that form could the purchaser have been compelled to take the title? I should say unquestionably, because in that case the will of 1838 would not have been a document material in tracing the title by devolution, but that abstract would have shown a perfectly good title, and the purchaser would, I conceive, have been bound to take it. The second test which I will put is that of an open contract. Supposing there had been a perfectly open contract under which the vendor was bound to show a forty years' title, and he had only got a fifteen years' title, would he have had to show a title from a previous date? If the purchaser had said that he would not take that title, and the vendor had replied that she had a good possessory title, could the purchaser have said that he would not take it, because the deeds forty years ago have nothing to do with the title which the vendor was showing? Certainly the purchaser could have been compelled to take that title.

But there is another consideration, and that I think is this. It is the fact that the deeds prior to the date of the possessory title, or when adverse possession commenced, are irrelevant. They are relevant. They would be relevant in various ways. They may be relevant to show that at the date when the adverse possession first commenced there was not a person under disability still surviving who could defeat the title. They may be material under certain circumstances to show what was the estate of which adverse possession was taken, as, for instance, that by statute there was some right against the land which would bind everybody into whose hands it might come. Early documents may be material. It does not at all follow because the root of title is specified as being of a date prior to that at which the title by adverse possession commences that those deeds are necessarily irrelevant. On principle it seems to me that the vendor, as showing a perfectly good title, is entitled to say to the purchaser that he must take that title; that she has done that which she contracted with him that she would do; that the title began in 1838, and she had shown all the material facts from that time to the present. That is what is meant by the root of the title. It is not meant that a deed or will is the root of the title, and that that deed or will is an essential factor in establishing the title which is ultimately to be accepted.

Apart from principle, it seems to me that the matter is really concluded by *Games* v. *Bonnor* (1), not because there are not certain distinctions to be found between that case and the present case—I think there are—but because it seems to me that *Games* v. *Bonnor* (1) certainly affirmed the principle which I have been seeking to enunciate. It seems to me that that case necessarily involves that where as between two contracting parties a title is to be shown as from a certain date the purchaser can be compelled to take a possessory title commencing at a later date. In other words, though you cannot in a contract of this kind get away from the proposition that the title to be shown is of a particular quality and character, there is nothing in this contract by which the purchaser is entitled to say that it is to be inferred that the contract is that he is not to have a possessory title, but is to have some other title—namely, a title commencing with the root of the title and devolving and working out by devolution to a particular point. On these grounds it seems to me that the decision of the learned judge in the court below was quite right, and that this appeal ought to be dismissed.

Solicitors: *Donald S. Ball*; *Beaumont, Son & Rigden*, for *Paine, Brettell & Porter*, Chertsey.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re CHERRY'S TRUSTS. ROBINSON *v.* WESLEYAN METHODIST CHAPEL PURPOSES TRUSTEES

[Chancery Division (Sargant, J.), October 23, 1913]

[Reported [1914] 1 Ch. 83; 83 L.J.Ch. 142; 110 L.T. 16; 30 T.L.R. 30; 58 Sol. Jo. 48]

Trustee—Corporate body—Religious or charitable trust—Capacity of corporation to act—Interference with powers of Official Trustees of Charitable Funds—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 2 (5), *s.* 4 (3)—*Public Trustee Rules*, 1912 (*S.R. & O.*, 1912, *No.* 348), *r.* 30.

By s. 2 (5) of the Public Trustee Act, 1906, the Public Trustee "shall not accept any trust exclusively for religious or charitable purposes." By s. 4 (1) "the Public Trustee may . . . be appointed to be custodian" of certain trusts. By s. 4 (3): "The provisions of this section shall apply in like manner as to the Public Trustee to any . . . body corporate entitled by rules made under this Act to act as custodian trustee."

The provision in s. 2 (5) prohibiting the Public Trustee from accepting any trust exclusively for religious or charitable purposes does not prevent a body corporate empowered to undertake trusts under r. 30 of the Public Trustee Rules, 1912, from acting as custodian trustee of a religious or charitable trust under s. 4 (3) of the Act. The prohibition in s. 2 (5) was inserted in the Act because of the special position of the Public Trustee, and that prohibition is not to be applied to a body corporate coming within s. 4 (3) by reason of the provision in s. 4 (3) that the provisions of s. 4 should apply to a body corporate "in like manner as to the Public Trustee."

The appointment of a body corporate to be custodian trustee under s. 4 (3) does not abridge or affect the powers and duties of the Official Trustees of Charitable Funds under the Charitable Trusts Act, 1853, s. 51. If at any future time the court thought it desirable that the trust fund should be vested in the Official Trustees it would be just as competent to the court to make a vesting order after the appointment of a body corporate as custodian trustee as it would be before that appointment.

Notes. As to the Public Trustee and other corporations as trustees, see 4 HALSBURY'S LAWS (3rd Edn.) 363–367, and for cases see 8 DIGEST (Repl.) 488, 489, and 43 DIGEST 1033–1036. For Public Trustee Act, 1906, see 26 HALSBURY'S STATUTES (2nd Edn.) 28.

Case referred to in argument:

Re Coates to Parsons (1886), 34 Ch.D. 370; 56 L.J.Ch. 242; 56 L.T. 16; 35 W.R. 375; 3 T.L.R. 173; 8 Digest (Repl.) 490, *2028*.

Adjourned Summons to determine the questions (inter alia) whether a corporation might properly be appointed and have power to act as custodian trustee of real, leasehold or personal estate devised or bequeathed upon charitable trusts or for charitable purposes, and also whether the appointment in question in this case was valid.

By the deed poll dated Oct. 4, 1866, under the hands and seals of W. A. G. Osborn, J. Bedford, J. Fernley, W. McArthur, and W. Newburn, and enrolled in Chancery on Dec. 14, 1866 (hereinafter called "the principal deed"), it was declared that W. A. G. Osborn, J. Bedford, J. Fernley, W. McArthur, and W. Newburn, and all and every other the trustees and trustee for the time being acting in the execution of the trusts of the principal deed should stand possessed of all donations and bequests which should from time to time thereafter be made to them for the benefit of any of the funds which then were or thereafter might be constituted by or under the authority or with the consent of the Wesleyan Methodist Conference for the purpose of promoting the acquisition and erection of or the relief of or generally for the benefit of or in connection with chapels, land, buildings, and hereditaments settled or to be settled upon the trusts therein mentioned or other like trusts, and of all donations and bequests which should from time to time thereafter be made to them for the benefit of or in connection with some particular property settled upon such or the like trusts as aforesaid upon trust as to all such donations and bequests as to or upon which any trust, charge, or obligation had been or should be created or imposed by the donors or testators thereof respectively to pay and apply such donations and bequests according and subject as aforesaid, and also as to such donations and bequests as to or in respect of which no trust, charge, or obligation had been or should be created or imposed by the donors or testators thereof respectively upon trust to appropriate, pay, and apply the same to or for the benefit of such one or more of the funds thereinbefore mentioned and thereby contemplated as the said conference should from time to time direct. At the date of the deed poll next hereinafter mentioned, H. J. Pope, John Hornabrook, M. Hartley, J. Lees Barker, W. Middlebrook, and Thomas Cole were the then present duly constituted trustees of the principal deed.

By a deed poll, dated Oct. 7, 1910, under the hands and seals of H. J. Pope, J. Hornabrook, M. Hartley, J. Lees Barker, W. Middlebrook, and Thomas Cole, and enrolled in the central office of the Supreme Court on Oct. 12, 1910, it was declared that H. J. Pope, J. Hornabrook, M. Hartley, J. Lees Barker, W. Middlebrook, and Thomas Cole, and all and every other the trustees and trustee for the time being acting in the execution of the trusts of the principal deed or of this deed should stand seised and possessed of all real leasehold and personal estate which should from time to time thereafter be given, devised, or bequeathed or lawfully assured or transferred to them upon or for any trusts, intents, or purposes connected with the church or society of the people called Methodists and associated with the Wesleyan Methodist Conference or any of its synods, circuits, missions, or other connectional or local organisations, whether immediately connected with chapels or not, upon the trusts and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations thereinafter declared and contained of and concerning the same, that was to say (among other things), in regard to any real leasehold or personal estate of which the trustees should be duly appointed custodian trustees upon and subject to the regulations prescribed by s. 4 of the Public Trustee Act, 1906, and the authorised rules under such Act or the statutory regulations and authorised rules for the time being in force respecting custodian trustees.

In pursuance of the provisions of the Charitable Trustees Incorporation Act, 1872, on July 4, 1911, the Charity Commissioners granted a certificate of incorporation of the trustees of the charity for Wesleyan Methodist chapel purposes comprised in the principal deed and the deed poll of Oct. 7, 1910, by the name of "The Trustees for Wesleyan

Methodist Chapel Purposes (Registered)" subject to the conditions and directions therein mentioned. One Stephen Cherry, late of Cellarhead Road, Stoke-upon-Trent, duly made his will, dated April 29, 1908, and thereby, after appointing John Wills, George Hocknell, and Edward John Fairer executors and trustees thereof, gave and bequeathed free of legacy duty the legacy following, namely: To the trustees for the time being of the Wesleyan Methodist Chapel situate at Bampton Grange in the parish of Bampton in the county of Westmorland, the sum of £50 to be by them invested and the income thereof devoted to the keeping in repair of the chapel. Stephen Cherry died on Oct. 28, 1910, without having revoked or altered his will, which was duly proved by the executors therein named on Dec. 14, 1909, in the Lichfield District Probate Registry. The plaintiffs other than the Rev. Seth Swithenbank (hereinafter called "the managing trustees") were the present trustees of the Wesleyan Methodist Chapel situate at Bampton Grange aforesaid, and the legacy of £50 has been duly paid to them by the executors of the will of Stephen Cherry. The chapel is vested in the managing trustees upon the trusts of the model deed for Wesleyan Methodist Chapels. By an indenture dated Jan. 30, 1913, and made between the managing trustees, of the first part, the Rev. Seth Swithenbank (the superintending teacher of the circuit), of the second part, and the defendants, the Trustees for Wesleyan Methodist Chapel Purposes (Registered), of the third part, the managing trustees appointed the defendants, the Trustees for Wesleyan Methodist Chapel Purposes (Registered) to be custodian trustees of the sum of £70 7s. 1d. consolidated two and a half per cent perpetual guaranteed preferential stock of the Midland Railway Co. which then represented the legacy of £50, and of any future investment thereof or fund representing the same upon and for the trusts and purposes affecting the same by virtue of the will of Stephen Cherry. Since the execution of the indenture the sum of £70 7s. 1d. stock had been duly transferred to the Trustees for Wesleyan Methodist Chapel Purposes (Registered). Clause 44 of the model trust deed of July 3, 1832 provided for the appointment of new trustees.

By the Public Trustee Act, 1906:

"Section 2 (1). Subject to and in accordance with the provisions of this Act and rules made thereunder, the Public Trustee may, if he thinks fit—(a) act in the administration of estates of small value; (b) act as custodian trustee; (c) act as an ordinary trustee; (d) be appointed to be a judicial trustee; (e) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870. . . . (4) The Public Trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent. (5) The Public Trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the official trustees of charity lands or official trustees of charitable funds.

"Section 4 (1). Subject to rules under this Act the Public Trustee may, if he consents to act as such, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust—(a) by order of the court made on the application of any person on whose application the court may order the appointment of a new trustee; or (b) by the testator, settlor, or other creator of any trust; or (c) by the person having power to appoint new trustees. . . . (3) The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee."

By r. 30 of the Public Trustee Rules, 1912:

"Any incorporated banking or insurance or guarantee or trust company or other body corporate for the time being empowered (by the Act of Parliament, charter,

memorandum of association, deed of settlement, or other instrument constituting or defining its powers) to undertake trusts shall be entitled to act as custodian trustee, but for so long a time only as such body corporate shall not, by any prospectus, circular, advertisement, or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund of the United Kingdom in respect of any act or omission of such body corporate when so acting."

Difficulties arose owing to the fact that the Charity Commissioners raised questions (a) whether the defendants the Trustees for Wesleyan Methodist Chapel Purposes (Registered) could validly be appointed custodian trustees of property held upon charitable or religious trusts in any case, and (b) whether the appointment purported to be made by the indenture of Jan. 30, 1913 was valid. The parties desired to obtain a decision of the court for their guidance in the present and future cases, and this application was accordingly made.

Owen Thompson for the *managing trustees.*
Sheldon for the defendant corporation.
Austen-Cartmell for the Attorney-General.

SARGANT, J.—This application raises two questions—one of great public importance, the other only concerning the parties to the actual application. The summons relates to a small charitable legacy of £50 only, but the considerations which determine my decision will necessarily apply to much larger funds. The question is whether a certain body of trustees who have been incorporated and are empowered to act and are acting for the purpose of holding funds belonging to the Wesleyan Methodist Connexion can be appointed custodian trustees under the Public Trustee Act, 1906.

The body in question has its origin in the following deeds and documents: There is first a deed of Oct. 4, 1866 by which a body of individual trustees was constituted for the purpose of holding trust funds that might be given for the benefit of the Wesleyan Methodist body, or of any particular chapel or trust in connection with that body and then there was an extension deed of Oct. 7, 1910 extending the objects and powers of the former deed. Each deed was duly enrolled in Chancery or in the Central Office, and by a certificate or order of the Charity Commissioners, made by virtue of the Charitable Trustees Incorporation Act, 1872, the trustees of those deeds were incorporated as a body of trustees with perpetual succession and seal in accordance with the provisions of the Act. As a matter of fact nothing is said in the document of incorporation as to custodian trustees, but I do not think that affects my judgment in one way or the other. The particular fund in question has arisen in the following way: Under a deed, which was in accordance with the model deed of July 3, 1832, for the grant of Wesleyan Methodist chapels, a certain Wesleyan Methodist chapel, which is situate in Bampton Grange, in Westmorland, was assured to trustees upon the trusts of the model deed; and by his will, dated April 29, 1908, the testator, Stephen Cherry, who died in 1910, bequeathed a sum of £50 free of legacy duty to the trustees for the time being of the Wesleyan Methodist chapel situate at Bampton Grange to be by them invested and the income thereof devoted to keeping the chapel in repair. That legacy is now invested in a small amount of guaranteed preferential stock of the Midland Railway Co., and by a deed of Jan. 30, 1913, and made between the trustees of that chapel of the first part, the Rev. Seth Swithenbank, who was the superintendent preacher of the circuit, and was the person whose approval was to be given to the appointment—and it is not suggested that he was not the proper person to authorise what was done—of the second part, and the body of the trustees incorporated under the order of the Charity Commissioners which I have already mentioned of the third part, the trustees purported in exercise of the powers vested in them by the Trustee Act, 1893, and by the Trustees Appointment Act, 1890, and by the Public Trustee Act, 1906, and of any other powers them enabling to appoint this incorporated body of trustees to be custodian trustee of this particular sum of preferential stock.

The question now raised before me on this summons, issued under the certificate of the

Charity Commissioners, is whether that appointment of this incorporated body as custodian trustee is a good appointment. One general objection of great importance has been made to the appointment. It is said that a certain disqualification, which is imposed upon the Public Trustee by s. 2 (5) of the Public Trustee Act, 1906, preventing him from acting as a trustee of a trust exclusively for religious or charitable purposes, applies equally to any incorporated body which may be appointed as custodian trustee under s. 4 (5) of the same Act. In order to deal with this objection it is necessary to refer to some parts of s. 2, and also to some parts of s. 4 of the Act.

By s. 2 of the Act power is given for the Public Trustee to act in the matter of trusts, and, among other things, to act [s. 2 (1) (c)] as a custodian trustee—a phrase which, I am told, is a completely new one and is first used in this Act.

By s. 4 (1) power is given to the Public Trustee to be appointed as custodian trustee of any trust, and, if and when he is appointed custodian trustee, his position in consequence of that appointment is defined by some subsequent sub-sections of that section. In this respect sub-s. (3) is of importance. [His Lordship read the sub-section.] Looking at s. 4 alone it is plain that any body corporate can act as custodian trustee with the like consequences and in the like manner as would ensue if the Public Trustee were appointed as custodian trustee, and in the section itself there is no limitation whatever of the trusts in respect of which either the Public Trustee or any incorporated body may be appointed as custodian trustee. But it is said that those words "the provisions of this section shall apply in like manner as to the Public Trustee to any . . . body corporate" bring in, not only as against the Public Trustee, but as against a banking or other company or body corporate the disqualifications or prohibitions contained in sub-ss. (4) and (5) of s. 2. The question is whether on the true construction of s. 2 (4) and (5) the prohibitions or restrictions are personal to the Public Trustee, and, therefore, not to be applied to any other corporation which may be appointed in his stead under s. 4. It was contended by counsel for the Attorney-General that the trusts under s. 4 were necessarily limited to trusts not excluded by sub-ss. (4) and (5) of s. 2, and that, therefore, the trusts with regard to which a body corporate could be appointed were as closely limited as the trusts with regard to which the Public Trustee might be appointed.

In my opinion, that is not the right way of reading ss. 2 and 4 as a matter of construction. In my opinion, s. 4 must be read as applying primâ facie to all trusts, and then on that footing sub-ss. (4) and (5) of s. 2 must be applied for the purpose of excluding certain defined trusts. I have to determine whether sub-ss. (4) and (5) of s. 2, which do not in terms apply to s. 4, are to be brought into s. 4 by virtue of any analogy or any considerations of public policy. I do not myself see any reason why they should be. Looking at sub-s. (5) of s. 2 it seems to me to be clear that that provision is made because of the special position of the Public Trustee. The Public Trustee is a public corporation. He is made a corporation sole by the Act [s. 1 (2).] In certain cases of mistake or breach of trust by him a right is given to the cestui que trust to resort to public funds, and it was obviously important to provide that the Public Trustee should not undertake trusts involving certain risks. I asked counsel for the Attorney-General whether he could suggest any reason why a banking company willing to act as custodian trustee under s. 4 (5) should not be able to act in respect of a trust under a deed of arrangement for the benefit of creditors or in the administration of an estate that is believed to be insolvent, and I did not get from him any satisfactory answer. In my judgment, the language of s. 4 and the general considerations derived from the object of the Act are quite sufficient to lead to the conclusion that the restrictions contained in s. 2 are a personal disqualification only intended to be imposed upon the Public Trustee himself. I think that those considerations apply to the first words of sub-s. (5) of s. 2. I can well see very good reasons why a public corporation, like the Public Trustee should not be mixed up in trusts which were exclusively for religious or charitable purposes.

In my opinion, therefore, no valid ground has been suggested for holding that the disqualifications imposed on the Public Trustee by sub-ss. (4) and (5) of s. 2 apply to a body corporate, but it was further suggested that the later words of sub-s. (5) might have the effect, because it was urged that under the Charitable Trusts Acts the Official

Trustees of Charitable Funds were practically constituted custodian trustees of charitable funds, and that the effect of appointing companies to be custodian trustees in the case of funds held for religious or charitable purposes would be to withdraw from the ambit of the authority of the official trustees funds which might otherwise have been within their jurisdiction or invested in their names. With regard to that point it is material to observe that under s. 51 of the Charitable Trusts Act, 1853, the official trustees only take such charitable funds as are transferred to them by the trustees. It is only when people come in voluntarily and desire to get the aid of the official trustees that the official trustees are appointed. Of course under other sections the court may in certain instances declare that trust funds shall vest in the official trustees. In the present case the persons who have possession of these funds are not desirous of appointing the official trustees to hold them, so that there is no question of the official trustees dealing with the funds at present. Further, it was conceded by counsel for the plaintiff trustees and not in any way disputed by counsel for the Attorney-General, that if at any time hereinafter the court should think it desirable that this fund should be vested in the official trustees, it would be just as competent to the court to make an order vesting the funds in the official trustees and to appoint them custodian trustees after as well as before the appointment of the defendant corporation as custodian trustee. It seems to me, therefore, that there is no sufficient reason for saying that the appointment of the defendant corporation as a custodian trustee will in any way abridge or affect the powers and duties of the Official Trustees of Charitable Funds. The only difference will be that the custody of the fund will be in this permanent corporate body instead of in the individual trustees, and incidentally that in this respect there will not in future be as strong a motive for voluntarily transferring the funds to the Official Trustees of Charitable Funds. On the general point of construction, therefore, I decide that a body of this kind incorporated in this way is empowered under s. 4 of the Public Trustee Act, 1906, to be appointed a custodian trustee of any trust, and that the prohibitions contained in sub-ss. (4) and (5) of s. 2 apply only to the Public Trustee, and do not apply to the companies or other body corporate referred to in sub-s. (3) of s. 4 of the Act.

Two other minor points have been taken. It is said that the managing trustees are not the proper persons to make this appointment, and that the charity fund must necessarily from time to time belong to the persons who are the trustees for the time being of the chapel. But the persons who are making the appointment have the power of appointing new trustees of the chapel, and, in my opinion, have the power of appointing new trustees of this legacy whether that is the mere consequence of the appointment of new trustees of the chapel or whether it ought to be in terms a separate appointment. That being so, they appear to me to fall within the very words of s. 4 (1) (c), of the Public Trustee Act, 1906. They are the persons having the power to appoint new trustees. It was conceded that it was not necessary in order that persons should have the power to appoint a custodian trustee that an occasion should have arisen on which it was possible to appoint a new trustee—that is to say, it is not necessary that there should be a vacancy in the office of trustees. That was not contended by counsel for the Attorney-General, and as at present advised I think that it could not have been successfully contended. I think it is only necessary to find out who are the persons in whom the power of appointing new trustees is vested if an occasion arises, and then it follows that they are the persons who have the power of appointing the custodian trustee under the Public Trustee Act, 1906.

Another point was made which may be of a little more general importance—namely, that the corporate body which it is desired to appoint, or which has in terms been appointed in this instance, is not within r. 30 of the Public Trustee Rules, 1912, which provides:

> "Any incorporated banking or insurance or guarantee or trust company or other body corporate for the time being empowered (by the Act of Parliament, charter, memorandum of association, deed of settlement, or other instrument constituting it or defining its powers) to undertake trusts shall be entitled to act as custodian trustee. . . ."

The main objection taken—because counsel for the Attorney-General withdrew an objection he took towards the close of the argument founded on the fact that this body could only undertake a certain limited class of trusts—was founded on the alleged impossibility of pointing out the instrument within the meaning of that rule under which this body had the power to undertake trusts. I do not myself feel that difficulty at all. The trustees under the two documents to which I have already referred had arranged that they and the individual successors whom they might have chosen to succeed them should undertake the trusts, and then the Charity Commissioners, exercising the jurisdiction conferred on them under the Charitable Trustees Incorporation Act, 1872, constituted those persons a body corporate. To my mind, the two deeds of trust and the order of the Charity Commissioners constituting that body as a body corporate formed together an instrument or instruments—of course the singular includes the plural—under which that body corporate was entitled to undertake trusts. In my opinion, therefore, that objection also fails.

The result is that the questions raised by the originating summons ought to be answered by declaring that the defendants, the corporation in question, may properly be appointed and have power to act as custodian trustee of real, lease-hold, or personal estate devised or bequeathed upon charitable trusts or for charitable purposes within the scope of the deeds of Oct. 4, 1866 and Oct. 7, 1910, and of the order of July 4, 1911; and, further, that the appointment which has in fact been made is an effective appointment.

Solicitors: *Rawle, Johnstone & Co.*, for *Cooper & Sons*, of Manchester; *Treasury Solicitor.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

ELLIS *v.* ALLEN

[Chancery Division (Sargant, J.), December 16, 17, 1913]

[Reported [1914] 1 Ch. 904; 83 L.J.Ch. 590; 110 L.T. 479]

Practice—Admission—Admission by letter—Admission "either on the pleadings or otherwise"—R.S.C. Ord. 32, *r.* 6.

The words "where admissions of fact have been made either on the pleadings or otherwise" in R.S.C. Ord. 32, r. 6, are not confined in their operation to admissions made on the pleadings or otherwise under the rules of Ord. 32, but are of general application and justify the making of an immediate order when an admission is made by letter of facts which show that the defendant has no defence to the action.

Notes. As to admission of facts, see 30 Halsbury's Laws (3rd Edn.) 397 et seq., and for cases see Digest (Pleading) 214 et seq.

Cases referred to:

(1) *Landergan* v. *Feast* (1886), 55 L.T. 42; 54 W.R. 691, C.A.; Digest (Pleading) 216, *1811.*

(2) *Barrow* v. *Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 35 Digest 89, *5.*

Also referred to in argument:

Re Beeny, Ffrench v. *Sproston*, [1894] 1 Ch. 499; 53 L.J.Ch. 312; 70 L.T. 160; 42 W.R. 377; 38 Sol. Jo. 235; Digest (Pleading) 217, *1826.*

Mackellar v. *Hornsey* (1901), 49 W.R. 301; 45 Sol. Jo. 294; Digest (Pleading) 87, *735.*

Eastern Telegraph Co., Ltd. v. *Dent*, [1899] 1 Q.B. 835; 68 L.J.Q.B. 564; 80 L.T. 459; 15 T.L.R. 296; 43 Sol. Jo. 366, C.A.; 35 Digest 90, *6*.
Greville v. *Parker*, [1910] A.C. 335; 79 L.J.P.C. 86; 102 L.T. 380; 26 T.L.R. 375, P.C.; 31 Digest (Repl.) 72, *2282*.

Summons for directions.

This was a summons for directions by the plaintiffs in this action calling on the defendants to show cause why an order for directions should not be made that the defendant Allen "having admitted that he has committed a breach of the covenant contained in" a lease dated Aug. 23, 1910, by which the plaintiffs demised a piece of land to him and a house thereon for a term of seven years from Sept. 29, 1910, at a yearly rent of £400

> "against the assignment, transfer, underletting, or parting with possession of the premises thereby demised or any part thereof without the previous consent in writing of the lessors"

declaring

> "that the term of years created by the said lease has ceased and determined, and that the plaintiffs are entitled as against the said defendant to re-enter on the said premises."

C. E. Allen was lessee of the plaintiffs, under a lease dated Aug. 23, 1910, of a house and ground for a term of seven years from 1910. Allen had covenanted that he would not assign, transfer, underlet, or part with the possession of the said premises or any part thereof without the previous consent in writing of the lessors, such consent not to be unreasonably or vexatiously withheld in the case of a responsible and respectable person. The lease also contained a proviso that in the event of any breach or non-performance of any of the covenants and agreements on the part of the lessee therein-before contained the lessors might re-enter on the said demised premises. On Aug. 27, 1913, Allen entered into a written agreement with one Johnston to let the demised premises with the furniture therein to Johnston for a term of fifty-two weeks less one day from Sept. 1, 1913, to Aug. 29, 1914, at a yearly rent of £1,725, and Johnston went into possession under this agreement. The consent of the lessors had not been obtained to this letting. The lessors accordingly on Sept. 23, 1913, issued a writ against Allen and Johnston claiming (inter alia): (i) a declaration that the term of years created by the lease to Allen had ceased and determined; (ii) possession of the premises demised for the said term; (iii) mesne profits till judgment as against the defendant Allen. And also against such defendant only damages for breach of his covenant in his lease to yield up the premises in repair. Allen's solicitors after the writ had been served wrote a letter to the plaintiffs' solicitors, dated Oct. 1, 1913, in which they said:

> "We must express the greatest surprise at the contents of your letter of yesterday's date. The position appears to be this: Our client took up the lease of this property rather over three years ago, and at once laid out nearly £3,000 on improvements, a list of the most important of which we enclose. He has recently let the property, furnished, to a tenant who is a respectable and responsible person, whom your clients would have been bound to accept if their consent had been applied for. Our client's omission to apply for your clients' consent was purely a mistake. The letting was arranged hurriedly, and both he and his agents did not consider that a licence was required in the case of a short letting of the property furnished, and, as you are aware, such lettings are often accepted in this form of covenant. Our client regrets the omission, is quite willing to pay the costs your clients have incurred, and also to pay for a short deed of waiver. Are we to understand that your clients, notwithstanding these facts, still claim to forfeit our client's lease, to cause him to lose all the money he has expended on the property, and subject him to an action for damages at the hands of his under-tenant in a case where the breach of covenant was entirely accidental and has caused your clients no damage whatever beyond the expenses they have incurred, and which we have offered to pay? It is necessary we should write to you fully so that, should your clients adhere to the

position they have taken up, we may be able to prove to the court, on an application for relief, that our client was willing to do everything reasonable to remedy the breach of covenant."

The plaintiffs after receiving this letter took out a summons for directions under R.S.C. Ord. 32. The material rules of that order to be construed were:

"Rule 1. Any party to a cause or matter may give notice, by his pleadings, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Rule 4. Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Rule 6. Any party may at any stage of a cause or matter, where admissions of fact have been made either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give judgment, as the court or judge may think just."

Mark L. Romer, K.C., and *Rolt* for the plaintiffs.
H. C. Bischoff for the defendant Allen.
F. Dodd, for the defendant Johnston, took no part in the argument.

SARGANT, J.—This is an application in an action brought by the plaintiffs against Allen, the lessee of a certain property, and Johnston, the sub-tenant, to recover from them possession of the demised premises. By Ord. 32, r. 6, it is provided that any party may

"at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties,"

and that on such application such order may be made or judgment given "as the court or judge may think just." The action is founded on a breach of covenant by the defendant Allen not to "assign, transfer, underlet, or part with the possession" of the demised premises

"without the previous consent in writing of the lessors, such consent not to be unreasonably or vexatiously withheld in the case of a responsible and respectable person."

No doubt the defendant Allen has let the property to Johnston without having applied to the plaintiffs for their consent, and the day after they had entered an appearance for Allen in the action his solicitors wrote a letter to the plaintiffs' solicitors. [His Lordship read the letter, and continued:] That letter was relied on by plaintiffs as an admission by the defendant Allen that there has been a subletting of the property by him contrary to his covenant in the lease.

A Counsel for the defendant Allen, who urged every point that could be urged, based his argument mainly on two points. In the first place, he contended the words "either on the pleadings or otherwise" in r. 6 meant either on the pleadings or otherwise under this order. The cases cited do not cover this point. In two of them the order was not necessarily made under r. 6. In *Landergan* v. *Feast* (1) the Court of Appeal apparently thought that the point was a nice one, which might some day have to be decided. This B is the first case in which the point has arisen for actual decision. I should be unduly narrowing the meaning of the rule if I did not hold that the admission in this case was within it. The object of the rule was to enable a party to obtain speedy judgment where the other has made a plain admission entitling the former to succeed.

I do not think that r. 6 should be confined as suggested, but in my judgment it applies where there is a clear admission on the face of which it is impossible for the party C making it to succeed. The second argument put forward by counsel is that the letter is not an admission which shows that there can be no defence to the action, and he says that, accepting the letter as containing certain admissions by his client, that is not inconsistent with the client having a defence on the equitable ground of mistake or inadvertence. He cited *Barrow* v. *Isaacs & Son* (2), where the court, refusing to grant relief, seemed to think that relief might in some cases be granted on the ground of D unilateral mistake. I asked counsel to point to any facts in the present case which would give the court jurisdiction to grant his client relief, but he declined to show his hand, and could not cite any case where relief had been given on the ground of forgetfulness of a covenant or the omission to notice its exact wording. The non-production of such a case is eloquent. In granting relief non-payment of rent was at first the only ground. Then the jurisdiction was extended to cases of breach of covenant to insure E against fire; subsequently it was extended by s. 14 of the Conveyancing Act, 1881, to other cases, but not to such a case as this.

I cannot conceive any circumstances which the defendant Allen could rely on as a defence to the action, having regard to the admissions made by the letter, and I hold that the plaintiff is entitled to judgment against him under r. 6. I sympathise with the defendant, but can see no ground for helping him.

F Solicitors: *R. S. Taylor, Son & Humbert*; *Laytons*; *Sidney James*.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law*.]

A

GENN *v.* WINKEL

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton and Buckley, L.JJ.), June 14, 17, 1912]

[Reported 107 L.T. 434; 28 T.L.R. 483; 56 Sol. Jo. 612; 17 Com. Cas 323]

B

Sale of Goods—Passing of property—Sale or return—"Adopting transaction"—Goods delivered by bailee to third person on sale or return—Loss by third person—Liability of bailee to owner—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 18, *r.* 4.

The bailee of goods with which he has been entrusted on terms of sale or return may entrust the goods to a third person on similar terms without thereby "adopting the transaction" with the owner of the goods so that the property in the goods passes to him (the bailee) under s. 18, r. 4, of the Sale of Goods Act, 1893, but if, owing to the loss of the goods by the third person, he is unable to return the goods to their owner within the time fixed by the contract between him and the owner, or, if no time is so fixed, within a reasonable time (e.g., a time customary in the particular trade), the property in the goods then passes to him under s. 18, r. 4, and he is responsible to the owner for their loss.

C

D

Notes. Considered: *Kempler* v. *Bravingtons* (1925) 133 L.T. 680; Referred to: *Lake* v. *Simmons*, [1927] All E.R.Rep. 49.

As to delivery of goods on sale or return, see 34 HALSBURY'S LAWS (3rd Edn.) 71–73, and for cases see 39 DIGEST 507–512. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

E

Case referred to:

(1) *Kirkham* v. *Attenborough*, *Kirkham* v. *Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, *1252*.

Also referred to in argument:

F

Weiner v. *Smith*, *Weiner* v. *Gill*, [1906] 2 K.B. 574; 75 L.J.K.B. 916; 95 L.T. 438; 22 T.L.R. 699; 50 Sol. Jo. 632; 11 Com. Cas. 240, C.A.; 39 Digest 509, *1263*.

Re Florence, *Ex parte Wingfield* (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 246, C.A.; 39 Digest 510, *1268*.

Moss v. *Sweet* (1851), 16 Q.B. 493; 20 L.J.Q.B. 167; 16 L.T.O.S. 341; 15 Jur. 536; 117 E.R. 968; 39 Digest 511, *1276*.

G

Ray v. *Barker* (1879), 4 Ex.D. 279; 48 L.J.Q.B. 569; 41 L.T. 265; 27 W.R. 745, C.A.; 39 Digest 511, *1277*.

Elphic v. *Barnes* (1880), 5 C.P.D. 321; 49 L.J.Q.B. 698; 44 J.P. 651; 29 W.R. 139; 39 Digest 512, *1300*.

Appeal by the defendant from a decision of SCRUTTON, J., in an action tried by him without a jury.

H

The plaintiff, a diamond merchant, sued the defendant, a diamond broker, for the balance of the price of diamonds which he (the plaintiff) had delivered to the defendant, on sale or return on Jan. 4, 1910. On the same day the defendant entrusted the diamonds on sale or return to a third person named Gutwirth. On Jan. 6 the diamonds were handed by Gutwirth on the same terms to a fourth person, who lost them. The plaintiff sued the underwriters on his own and on Gutwirth's policies, and the action was settled by a payment of £105 in respect of the diamonds and £30 for costs. The plaintiff then sued for the balance of the price of the diamonds, and SCRUTTON, J., gave him judgment for the amount claimed. The defendant appealed.

I

By the Sale of Goods Act, 1893, s. 18:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer . . . Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:

A —(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

B *Pollock, K.C.*, and *P. B. Morle* for the defendant.

Rawlinson, K.C., and *R. J. White* for the plaintiff.

VAUGHAN WILLIAMS, L.J.—In the course of his judgment in *Kirkham* v. *Attenborough* (1) which was a case in which a person who had received goods on sale or return pledged them, LORD ESHER, M.R., said ([1897] 1 Q.B. at p. 203):

C "We have, then, to see what is the position of the person who has received the goods. To determine this it is necessary to consider the principles adopted by the courts and now unhappily, as I think, codified in the [Sale of Goods Act, 1893], the language of which is unfortunately chosen."

I have to construe that code with reference to the facts of the present case and then D to apply it.

The section of the Act which governs the present transaction is s. 18, r. 4. In my judgment, the defendant has done an act adopting the transaction. The position of a person receiving goods on sale or return, I think, is that, if there is a time fixed for the return of the goods which has not expired, or, if not, so long as a reasonable time for the return of the goods has not expired, his liability is only that of a bailee, so that no E action lies against him except for negligence. It is, however, otherwise where there is a fixed time and it has expired. In the present case there was no time fixed. The defendant, who had received the goods on sale or return, transferred them on the same terms to another agent, who in his turn passed them on to a third person. Under those circumstances the defendant is responsible for the conduct of those who subsequently obtained possession of the goods through his act. He chose to deliver them on F sale or return to another agent, who dealt with them by handing them to a third person. There is no evidence as to the terms upon which he handed the goods to the third party or what the position of the third party was. It is said that the goods were lost. Everyone agrees that the goods disappeared and could not be returned to the plaintiff and that that resulted from an act of the defendant, who had handed them to another agent, who then passed them on to a third person.

G The plaintiff then called upon the defendant to return the goods. The defendant took up the position that he could not return them because he could not obtain them from the third person. The question, therefore, is whether the loss of the goods has resulted from an act of the defendant. In my opinion, it has, and I think it was entirely due to the defendant's act that he could not return the goods. That being so, the defendant comes clearly within the principles laid down by LORD ESHER, M.R., and H LOPES, L.J., in *Kirkham* v. *Attenborough* (1). I do not read those judgments as limiting the liability of persons who take goods on sale or return to cases where there was an intention on their part to adopt the transfer of the goods. It was quite sufficient here that the defendant knowingly transferred the goods to another agent, who then transferred them to a third person, and when the defendant was called upon to return them he became liable because he did not in fact return them. A reasonable time had elapsed; I the defendant said he could not return the goods, and he explained it by saying simply that he was not in a position to return them. Primâ facie the defendant is liable because he could not return the goods. He has given no explanation and no reasonable excuse for his inability to return the goods. I am, therefore, of opinion that the judgment of SCRUTTON, J., must be affirmed, and that this appeal fails.

FLETCHER MOULTON, L.J.—I am of the same opinion. I think that this case might be decided very shortly against the defendant on the grounds that VAUGHAN WILLIAMS, L.J., has stated towards the end of his judgment. The goods were received

on sale or return and the defendant has not returned them, and he has given no adequate excuse for not returning them. The facts have been gone into to some extent, and, therefore, I should not content myself with putting it so briefly as that, and I would indicate two ways in which the facts may be looked at, both of which lead to exactly the same conclusion, and in both of which I make the same hypothesis as to what was proved by the defendant under the head of "excuse." A

The first line of defence is that the defendant was a mere bailee. He delivered the goods to a third person, who delivered them to a fourth party, who lost them without any fault on his (the defendant's) part, and, therefore, it is said he is not liable. I will assume, without deciding it, that the person to whom the goods were delivered on sale or return is a mere bailee. But if a bailee chooses to avail himself of the powers of the contract by which he is bailee to intrust the goods to other persons on contractual terms so that he parts with the possession of the goods and can only have a right to get possession again under the terms of the contract he has made with these other persons, he is responsible if he does not get them back. He could no longer plead that he merely held them as bailee and had not been guilty of negligence. He has made a contract by which the goods are delivered to third persons with whom his bailor has nothing to do and who may not have known his bailor, and he can no longer say, "I am not liable unless I personally have been negligent." If he cannot get them back under his contract with the third person so as to be able to hand them back to his bailor he is liable. I think there is not the faintest evidence as to how the goods were lost, whether it was due to carelessness or not, but I do not think it is important. I think that the defendant can no longer defend himself merely on the ground of being a bailee after he has chosen to hand the goods on to other persons. B C D

I will now take the second line of defence by which the defendant assumes that he has proved that he delivered the goods on sale or return to another agent who then delivered them to a fourth party on the same terms. That is an assumption very much in favour of the defendant, because there is no evidence that he delivered them to the third person on any terms which entitled him to demand them back at all; but I will assume in his favour that all these contracts were on sale or return. I am not prepared to decide that if a person receives goods on sale or return and immediately hands them on to someone else on the same terms that is in law an act adopting the transaction. The contract of sale or return appears to me clearly to be a contract whereby the person to whom the goods are delivered acquires a right to hold them for a reasonable time, during which he can make up his mind to keep the goods, in which case it becomes a sale on credit, and he is liable to pay the price, or he can return the goods. Under those circumstances a person who receives goods on sale or return and at once passes them on to someone else under a like contract is entitled to demand them from that third person just as soon as the original owner of the goods has the right to demand them from him, and, therefore, I do not see that he has lessened or impeded his power of returning the goods when the owner of the goods has a right to demand them back, but I am clear that, if he allows a period to elapse before he hands them to a third person on sale or return, he has done an act which limits and impedes his power of returning the goods as soon as the owner of the goods demands them. For instance, if fourteen days be a reasonable time in such a contract in this particular trade, and if he waits seven days before entrusting the goods to a third person on sale or return, that third person has a right to keep them as against him for fourteen days, whereas the original owner of the goods has a right to the return of them within seven days from that date, and I think that that is clearly an act inconsistent with anything but his having adopted the transaction. Therefore, I think that in that case it would be taken that the purchase was made. E F G H I

Here the defendant handed the goods to a third party at once and that was not necessarily an adoption of the transaction. The third party waited two days and handed them on, I will suppose, on the same terms to a fourth person. That was, in my opinion, an adoption by the third party of the purchase from the defendant, and, therefore, the defendant must be taken to have sold these goods to the third person on credit. Having thus sold the goods on credit, it is quite clear that that act was inconsistent with not adopting the transaction within the meaning of s. 18 of the Sale of Goods Act, 1893.

Therefore, under those circumstances it seems to me that the defendant adopted the transaction and that the plaintiff is entitled to sue him for the value of the goods. However you look at the facts the defendant is liable to the plaintiff, and the decision of SCRUTTON, J., was right and the appeal must be dismissed.

BUCKLEY, L.J.—If A. delivers goods to B. on sale or return and B. having received them immediately delivers them to C. on sale or return, the reasonable time in the one case must, I think, be co-extensive with that in the other case, and if that reasonable time elapses and C. brings back the goods to B. and B. takes them back to A., everybody is acting within his rights, and it appears to me that the property never passes. That is not the point for decision in this case, and those are not the facts here, but that is a first step towards explaining the reason why I arrive at my conclusion. If under like circumstances A. delivers goods to B. and B. delivers them to C., in each case on sale or return, and the reasonable time be, let us say, fourteen days, and C. after four days sells the goods or elects to buy the goods, the result will be, I think, that the property will have passed, because C. will have done an act which renders it impossible for B. to return the goods to A.

This is the reason why that is so. The contract under which B. received the goods was a contract under which it was competent to him to offer to sell the goods. That is the very purpose for which he was to have them. If he sold them he bound himself to buy them. In the first case which I took he does nothing more than offer to sell them. B. had offered to sell to C., but C. had never bought, and, therefore, B. had simply done something authorised by the power which A. had given him, and he was entitled to say: "Although I offered my goods under that power nothing has resulted, and, therefore, I am entitled to return them to you." In the second case which I put he has also done something under the power which A. had given him. He has offered to sell them to C., and C. has bought them. The result would be that the transaction had resulted, not in a mere offer, but in a contract, and in that case, an act had been done adopting the transaction. If that is right, the moment at which the property passes is not the moment at which B. offers the goods to C. on sale or return, that moment being the same moment at which B. has received the goods, but it is the moment at which under that offer made by B. to C., C. does something, with the result that B.'s offer has resulted in a contract, and if it has resulted in a contract then the property has passed.

On Jan. 4 the plaintiff handed the goods to the defendant on sale or return. His counsel has said that he was entitled during a reasonable time to demand the return of them at any moment. It is not necessary to decide that, and I am passing it by. Having got the goods, the defendant forthwith handed them to a third person on sale or return. It appears to me that is exactly the first case I put. The two reasonable times are co-extensive, and the act which the defendant did in handing the goods to a third person comes within s. 18 of the Sale of Goods Act, 1893, and, therefore, causes the property to pass. On Jan. 6 the third person handed the goods to a fourth person on sale or return. Two days had then elapsed of that reasonable time as between the defendant and the third person, and the third person's only authority then was to offer the goods to a fourth person on sale or return in what would have been a reasonable time, less two days. Let me expound that proposition a little in this way. Let us suppose that the reasonable time as between the defendant and the third person was fourteen days, and that thirteen of those days had run out, and the third person had then been minded to offer the goods to a fourth person on sale or return, he could then only offer them for one day, and he would have been bound to stipulate as between himself and the fourth person that he should have not the whole of what was regarded as the reasonable time in that trade in reference to those goods with no conditions attached, but that he should have one day and no more. If the third person offered these goods to a fourth person for fourteen days, he would be doing an act inconsistent with the sale or return bargain as between the plaintiff and the third person who was buying under the Sale of Goods Act. In the present case after two days of the reasonable time had elapsed the third person offered the goods to a fourth person for a longer time than he was authorised to offer them by two days, having regard to his relation with

the defendant. That, I think, was an act by which the defendant must be deemed to be so dealing with the goods as to make it impossible for him to return them to the plaintiff. The result was that the third person then was buying, and if he was the buyer the defendant was the seller, and if the defendant sold to the third person, the property passed as between the plaintiff and the defendant. What subsequently happened was that the third person handed the goods to a fourth person, who lost them. I agree that the fact that he lost them is immaterial, and also when he lost them. The question is: To whom did the goods belong at the moment when this happened? It seems to me that on Jan. 6, when the third person had parted with the goods to a fourth person, upon terms inconsistent with his obligation towards the defendant, the third person was buying, and, therefore, the defendant was buying, so that at that moment—namely, on Jan. 6—the property passed from the plaintiff to the defendant. The result is that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Julius A. White*; *John J. Hands.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

GEORGE *v.* DAVIES

[King's Bench Division (Bray and Lord Coleridge, JJ.), April 26, 1911]

[Reported [1911] 2 K.B. 445; 80 L.J.K.B. 924; 104 L.T. 648; 27 T.L.R. 415; 55 Sol. Jo. 481]

Custom—Contract—Domestic servant—Determination of contract at end of first month by notice given during first fortnight—Judicial notice.

The plaintiff, a domestic servant, entered the service of the defendant on Nov. 3, 1910. On Nov. 17 she gave notice to leave at the end of the first month of her service, and accordingly left on Dec. 3. The defendant declined to pay her wages for the month during which she had been in his service, and the plaintiff brought an action in the county court claiming the amount due. A custom was set up on her behalf that in a contract of domestic service either party was entitled in the absence of special terms as to notice to put an end to the contract at the end of the first month by notice given at or before the expiration of the first fortnight. No evidence was given of such a custom, but the judge said that he had taken judicial notice of it before, and that he would do so on this occasion.

Held: where a custom is continually being put forward and proved by evidence in the courts a time comes when a judge is entitled to say that he no longer requires it to be proved and that he will take judicial notice of it; in the present case the county court judge was entitled to take judicial notice of the custom; and, therefore, the plaintiff was entitled to judgment for the amount claimed.

Per **Curiam**: At the expiration of the first month one month's wages had become due to the plaintiff. She had a vested right to be paid those wages and was entitled to sue for them, even assuming she had broken her contract by leaving without proper notice.

Moult v. *Halliday* (1), [1898] 1 Q.B. 125, distinguished.

Notes. As to judicial notice of custom, see 15 Halsbury's Laws (3rd Edn.) 334; and for cases see 17 Digest (Repl.) 36. As to termination of contract of service on notice, see 25 Halsbury's Laws (3rd Edn.) 489 et seq.; and for cases see 34 Digest 66–67.

A Cases referred to:

(1) *Moult* v. *Halliday*, [1898] 1 Q.B. 125; 67 L.J.Q.B. 451; 77 L.T. 294; 62 J.P. 8; 46 W.R. 318; 14 T.L.R. 109; 42 Sol. Jo. 117, D.C.; 17 Digest (Repl.) 18, *205*.

(2) *Cutter* v. *Powell* (1795), 6 Term. Rep. 320; 101 E.R. 573; 34 Digest 88, *649*.

B Also referred to in argument:

Re Matthews, Ex parte Powell (1875), 1 Ch.D. 501; 45 L.J.Bcy. 100; 34 L.T. 224; 24 W.R. 378, C.A.; 17 Digest (Repl.) 36, *432*.

Appeal from the decision of His Honour JUDGE BACON, sitting at Bloomsbury County Court.

C The plaintiff, a domestic servant, sued the defendant to recover the sum of £1 18s. 4d., being the amount of one month's wages alleged to be due to her. She entered the defendant's service on Nov. 3, 1910, at the yearly wage of £23, payable monthly. No agreement was made between the parties as to notice, and on Nov. 17 the plaintiff gave notice that she would leave the defendant's service on Dec. 3. She accordingly left upon that date, and upon the defendant refusing to pay her D wages for the months during which she had been in his service upon the ground that she had broken her contract by leaving without giving a month's notice she brought an action to recover the sum due. It was alleged at the trial on the plaintiff's behalf that a custom existed by which either party to a contract for domestic service was entitled in the absence of special terms as to notice to determine the contract at the end of the first month by notice given at or before the E expiration of the first fortnight of the service. No evidence was given in support of this custom, but the learned judge said that he had taken judicial notice of it upon previous occasions, and that he would do so in the present instance. He therefore gave judgment for the plaintiff for the amount claimed. The defendant appealed.

F *Lort Williams* for the defendant.
The plaintiff did not appear.

BRAY, J.—The action was brought in the county court by the plaintiff against her master to recover one month's wages. [HIS LORDSHIP stated the facts and continued:] The learned judge, who has been a county court judge for many years and who must have tried a number of cases of this kind, said that in other G cases he had taken judicial notice of such a custom and would do so in this instance. I cannot say that he was wrong in so doing. A time must come when a county court judge, having had the question of the existence of this custom before him in other cases, may say that he will take judicial notice of it and will not require it to be proved by evidence, and apparently the learned judge in this case is prepared H to do so. In *Moult* v. *Halliday* (1), which was cited to us in argument, evidence was called in support of this custom, but the learned judge there came to the conclusion that upon the evidence before him the custom was not proved, and gave judgment for the defendant. An appeal was brought from that decision upon the ground that the learned judge was bound to take judicial notice of the custom. The Divisional Court held that the question of whether the custom was proved was I a question of fact and dismissed the appeal. That case was decided over thirteen years ago, and, as I have said, where this custom is continually being put forward and proved by evidence a time must come when a judge may say that he no longer requires it to be proved and that he will take judicial notice of it. I cannot therefore say here that the learned judge was wrong in taking judicial notice of it.

One other point was argued on behalf of the defendant. It is said that if a domestic servant breaks her contract by leaving without giving proper notice, she forfeits the wages which have accrued due to her. I cannot agree with this contention. At the expiration of the first month one month's wages had become due to her. She

had a vested right to be paid those wages and was entitled to sue for them, and that notwithstanding the fact that she subsequently committed a breach of contract by leaving without proper notice. In such circumstances her master might maintain a cross-action for damages for breach of contract, but no such claim has been brought before us. We are only asked to set aside the judgment for the plaintiff, but for the reasons I have given I think this appeal must be dismissed.

LORD COLERIDGE, J.—I am of the same opinion. In this case the learned judge, having had many of these cases before him, considered that he had the right to take judicial notice of this custom, and a time must come when judges are entitled to do so. As my brother has pointed out, the case of *Moult* v. *Halliday* (1), to which we were referred, is a different case from the present. In that case for some reason or another, although evidence was given as to this custom by which in a contract of domestic service notice may be given during the first fortnight to terminate the contract at the end of the month, the judge disregarded that evidence, and on the appeal all that the judges of the Divisional Court said was that he was not bound to accept the evidence as to custom which had been given before him. In the present case the learned judge was, in my opinion, entitled to take judicial notice of the custom.

On the question of whether the plaintiff was entitled to recover a month's wages there is a very old authority in *Cutter* v. *Powell* (2). It was held in that case, so long ago as 1795, that if a sailor hired for a voyage took a promissory note from his employers for a certain sum, provided he proceeded, continued, and did his duty on board for the voyage, and before the arrival of the ship he died, no wages could be claimed even for the period which he had served either on the contract or on a quantum meruit. But LAWRENCE, J., in his judgment distinguished that case from the hiring of an ordinary servant. He said (6 Term. Rep. at p. 326):

> "With regard to the common case of an hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year."

That is on the footing that the hiring of a servant is for a year certain. In the case before us the wages were payable monthly and plaintiff had served for a month, and, even if it is said that she broke her contract by leaving without giving one month's notice, that, in my opinion, does not hinder her from suing for the wages which were actually earned by her. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Maddison, Stirling, Humm & Davies.*

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

Re LUPTON. Ex parte OFFICIAL RECEIVER

[Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 3, 1911]

B [Reported [1912] 1 K.B. 107; 81 L.J.K.B. 177; 105 L.T. 726; 28 T.L.R. 45; 56 Sol. Jo. 205; 19 Mans. 26]

Bankruptcy—Property available for distribution—Civil servant—"Compensation granted by Treasury" on retirement—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52) *s.* 53 (2)—*Superannuation Act*, 1909 (9 *Edw.* 7, *c.* 10) *s.* 1 (2).

C A lump sum granted under s. 1 (2) of the Superannuation Act, 1909, by way of additional allowance to a civil servant on his retirement from the civil service **held** to be "compensation granted by the Treasury" within the meaning of s. 53 (2) of the Bankruptcy Act, 1883, so that it did not automatically vest in the trustee in bankruptcy of a civil servant who was an undischarged bankrupt as property of the bankrupt divisible among his creditors, but had D to be dealt with in accordance with the provisions of s. 53 (2).

Notes. Section 53 (2) of the Bankruptcy Act, 1883, is re-enacted in s. 51 (2) of the Bankruptcy Act, 1914, and s. 44 of the Act of 1883 is re-enacted in s. 38 of the Act of 1914. Section 1 (2) of the Superannuation Act, 1909 (other than the proviso thereto which was repealed by s. 37 of the Superannuation Act, 1949) is still E in force as amended by s. 4 of the Superannuation Act, 1935, and with certain other amendments as to the amount of the additional allowance which may be granted. See the note to s. 1 of the Act of 1909 in 17 Halsbury's Statutes (2nd Edn.) 854, 855.

Referred to: *Nixon* v. *A.-G.*, [1930] All E.R.Rep. 487.

As to the appropriation of a bankrupt's salary or income, see 2 Halsbury's Laws F (3rd Edn.) 456, 457; and for cases see 5 Digest (Repl.) 994 et seq. For the Bankruptcy Act, 1914, s. 38 and s. 51 (2), see 2 Halsbury's Statutes (2nd Edn.) 373 and 387. For the Superannuation Act, 1909, s. 1 (2), see 17 Halsbury's Statutes (2nd Edn.) 854.

Case referred to in argument:

Re Huggins, Ex parte Huggins (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; G 30 W.R. 878, C.A.; 5 Digest (Repl.) 995, *8023*.

Appeal from an order of Phillimore, J.

The debtor, a civil servant in the employ of the post office, was adjudicated bankrupt in 1889, and had not received his discharge. On Mar. 31, 1911, the bankrupt being fifty-eight years of age, retired from the Civil Service, and under the pro- H visions of s. 1 of the Superannuation Act, 1909 (which he adopted) was awarded a pension of £105 per annum, and a lump sum of £312 4s. as an "additional allowance." The official receiver gave notice to the Treasury claiming the £312 4s. as property of the bankrupt divisable among his creditors within s. 44 of the Bankruptcy Act, 1883, and it was retained by the Treasury pending the decision of the court.

I Phillimore, J., held that the sum was a gift, and passed to the trustee in bankruptcy.

The bankrupt appealed. He contended that the sum was "compensation granted by the Treasury" within s. 53 (2) of the Bankruptcy Act, 1883, and therefore the trustee in bankruptcy was not entitled to the whole sum but must apply to the court for an order for payment in accordance with s. 53 (2).

Tindale Davis for the appellant.

The Solicitor-General (*Sir John Simon, K.C.*) and *Hansell* for the official receiver.

COZENS-HARDY, M.R.—This appeal raises an important question under s. 53 of the Bankruptcy Act, 1883, and I have come to the conclusion that the judgment of PHILLIMORE, J., on this very difficult point is wrong.

The question arises in consequence of something which happened under the Superannuation Act, 1909, but I think possibly the best way of approaching the question is to deal first with s. 53 of the Bankruptcy Act, 1883. That section clearly contemplates persons engaged in the Civil Service of the Crown; that is expressly stated in sub.-s. (1). I think that subsection primarily contemplates the case of a continuing officer in the Civil Service. In sub.-s. (2) the language is somewhat different. It deals, I think, primarily with the case of a person who is no longer engaged in the Civil Service. The subsection provides:

> "Where a bankrupt is in the receipt of a salary or income other than as aforesaid [that is other than his salary as a Civil Servant] or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the court may direct."

On the passing of the Bankruptcy Act what were the powers of the Treasury, and in what circumstances would compensation be granted by the Treasury to a retired civil servant? For that purpose, of course, we must look at the statutes then in force. The first to which our attention has been called, and I think it is the first of the Acts that are now in force, is the Superannuation Act, 1834. I think it is impossible to read that Act without seeing that, although the Treasury were empowered to grant compensation to a civil servant who had lost his post by reason of the abolition of the office, or by reason of some re-arrangement of the office, which necessitated his retirement, although that was one case in which the Treasury was authorised to grant compensation, yet the Treasury was authorised to grant compensation quite apart from the loss or extinction of the office, but simply in consideration of past services. For that purpose, I think reference to ss. 18 and 30 may be regarded as conclusive. Section 18 is in two parts. It provides:

> "No compensation for any office abolished. . . . shall be charged upon the incidents or any other fund of any public department; and . . . no such compensation [that is, the compensation for loss or for any office abolished] nor any allowance or compensation in the nature of superannuation or retired allowance or reward to any such person in respect of his having held any public office or employment, or having been engaged in any public service, shall be granted"

except under certain conditions. So that s. 18 plainly draws a distinction between the two cases. The Treasury may grant a compensation for loss of office and it may grant it as a reward for past services. And then, s. 30, which is still in force, provides:

> "provided always, and be it further enacted, that nothing in this Act contained shall extend, or be construed to extend, to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act."

If immediately after the passing of the Bankruptcy Act, 1883, the Treasury had granted a lump sum to a retired civil servant for past services, would that, or would that not, have come within the express language of s. 53 sub-s. (2) of that Act? Would that have been, a "compensation" granted by the Treasury? In my opinion it is impossible for us to say that it would not have been.

I now come to the Superannuation Act, 1909, under which the present question arises. Section 1 (1) provides that, with regard to persons entering the Civil Service after the date of the Act, in calculating the amount of retiring allowance

instead of one-sixtieth of the annual salary and emoluments shall be read one-eightieth, which was, of course, a diminution of the amount of pension or retiring allowance that they would get. Then sub.-s. (2) says:

> "The Treasury may grant by way of additional allowance to any such civil servant who retires after having served for not less than two years, in addition to the superannuation allowance (if any) to which he may become entitled or the gratuity (if any) which may be granted to him under section 6 of the Superannuation Act, 1859, a lump sum equal to one-thirtieth of the annual salary and emoluments of his office multiplied by the number of completed years he has served, so, however, that the additional allowance shall in no case exceed one and a half times the amount of such salary and emoluments."

That section applies only to what I may call new civil servants, civil servants who entered the Civil Service after the passing of the Act; but there is a provision in s. 3 under which, subject to compliance with certain regulations, the existing civil servants may apply to the Treasury to be allowed to come in on the footing of new civil servants.

As a question of construction of s. 1 (2), I think it is plain that there is a difference between the right to the one-eightieth—that is something which he is said to be entitled to—and the lump sum which the Treasury may grant. I think it is impossible to say that a civil servant has the same claim to the lump sum as he has to the one-eightieth. I treat this case as a case in which there is no distinction for the purposes before us between a new civil servant and an old civil servant who has complied with the regulations and has obtained from the Treasury a grant of a lump sum. That is the case at present before us. The bankrupt was made bankrupt some time ago, and has not obtained his discharge. He applied under section 3 for a lump sum, and a lump sum was granted him, and the question that arises is, is that lump sum simply property of the bankrupt vesting in the trustee available solely for his creditors in the first instance or is it "compensation" granted by the Treasury within the meaning of s. 53 (2) of the Bankruptcy Act, 1883? In my opinion it is "compensation granted by the Treasury" within s. 53 just as the compensation granted by the Treasury under the Act of 1834 would have fallen within it. But counsel for the Treasury says we must look simply at s. 6 of the Superannuation Act, 1909, and the only reference to compensation to be found in that Act is the particular case of compensation on the abolition or re-arrangement of the office. That seems to be a fallacy. That is the only particular instance of compensation which is to be found in the Act of 1909, but s. 8 provides that this Act is to be "read as one" with the Superannuation Act, 1834, and the several intervening Acts. I think, therefore, that a case which plainly falls within the Act of 1834 is just as much compensation as the particular case of compensation which is found in s. 6 of the Act of 1909.

In my opinion, therefore, the decision of PHILLIMORE, J., on this very difficult point is not sound. In his judgment he said the lump sum was a gift. Of course, in the sense that the Treasury are under no obligation to give it, I quite agree with that. Then he said it was not a gift subject to any conditions; it was not a periodical gift; it was, in fact, as much a gift as if an individual had made a gift of money to the bankrupt. With great respect to the learned judge I am unable to follow that. It seems to me that this is "compensation granted by the Treasury," and falls within the express language of s. 53 of the Bankruptcy Act, 1883, and therefore, although it is undoubtedly "property" of the bankrupt within s. 44; it is property which has to be dealt with having regard to the provisions of s. 53.

FLETCHER MOULTON, L.J.—I am of the same opinion, and agree fully with the judgment which has just been delivered. I do not think it is capable of doubt that there is a distinction between sub-s. (1) and sub-s. (2) of s. 1 of the Super-

annuation Act, 1909. Whereas the civil servant is entitled to the one, the other is given generally if the Treasury think fit to give it—they cannot be compelled to give it.

With regard to the main question. I agree with the Master of the Rolls that we must start with the Bankruptcy Act, 1883, s. 53 (2), and see what is the fair meaning of the word "compensation" in that Act. All civil servants hold their position during the pleasure of the Crown, and usually when they reach the age of sixty-five the Crown exercises its rights and ceases to avail itself of their services, but in certain cases of distinctive services they are kept on beyond the ordinary age, and when they go then certain allowances are made, sometimes by way of annual payments, and sometimes by way of a lump sum. In sub-s. (2) of s. 53 of the Bankruptcy Act, 1883, we find the words "salary, income, half-pay, pension, or "compensation." I think that points to compensation including lump sums paid to civil servants by the Treasury and annual payments. That is not contested by the Solicitor-General, whose argument at one time, I confess, made a very great impression on my mind. His argument is that "compensation" is used strictly in a technical sense in all these Acts, and that it means compensation, not when a man is taken away from his office, but when his office is taken away from him—when, for instance, owing to some re-arrangement or other purpose his office is suppressed. He has called our attention to passages in the earlier Acts which clearly show that "compensation" was used as denoting a sum paid to persons who were deprived of their office in this way. The first thing I have to remark upon that is this—and the Solicitor-General accepted it—that if you were to take it in the strict sense it would make it perfectly clear that the compensation which is protected, to a certain extent, by s. 53 (2) of the Bankruptcy Act might be a lump sum. But I have come to the conclusion that although "compensation" is always used in respect of payments to persons who have been deprived of their office in that way it is also used in a broader sense, and s. 18 of the Act of 1834, to which the Master of the Rolls has called attention, puts that beyond doubt. If, therefore, an Act which was passed before the Bankruptcy Act used the word in that broad sense, I feel myself free to interpret it in a broader sense than that which was pressed upon us on behalf of the Treasury, and I have come to the conclusion that it fairly covers all payments made in respect of the cessation of employment, whether those are in the shape of annual payments or whether they are in the shape of lump sums. For these reasons I think that this lump sum is the "property" of the bankrupt, and is subject to the provisions of s. 53 of the Bankruptcy Act, 1883.

FARWELL, L.J.—I am of the same opinion, and I am glad to be so because I think it would have been very unfortunate if we had had to hold that the word "compensation" has the strict meaning suggested by the Solicitor-General, so that a man whose office has been abolished because, presumably, it was useless, and who may or may not have done good service is protected, but that a man who has done exceedingly good service in a continuing office and gets compensation for past services is not protected. I can hardly believe that if that consequence had been apparent to the draftsman of the Act he should have allowed any such suggestion of ambiguity to appear, but I entirely agree, taking all these Acts together, the word "compensation" is used as equivalent to allowance for past service; and I agree that in construing the Bankruptcy Act, 1883, by the light of the other Acts as they then stood, there can be no sort of question that it was intended that compensation should include allowance for past service. It is not, perhaps, immaterial to observe that the payment which under sub-s. (2) of s. 1 of the Superannuation Act, 1909, the Treasury may grant, if it thinks fit, is by way of additional allowance, and the allowance to which it is added, although it is quite true by a lump sum and not an annual payment, stands on the same footing

or might reasonably be said to stand on the same footing. For these reasons I am glad to be able to agree with my brethern.

Appeal allowed.

Solicitor: *Lumley & Lumley*; *Solicitor to the Board of Trade.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES

[HOUSE OF LORDS (Lord Loreburn, L.C., Lord Atkinson, Lord Shaw and Lord Robson), May 30, July 17, 1911]

[Reported [1911] A.C. 641; 80 L.J.K.B. 1318; 105 L.T. 450; 75 J.P. 505; 27 T.L.R. 550; 55 Sol. Jo. 667]

Master and Servant—Dispute—Summary proceedings—Set-off of claims of employer and workman—"Claims" not confined to those put forward in the proceedings, but including all claims found by the court to be subsisting—Employers' claim for damages set off against wages due to workman although no claim for wages made by workman—Employers and Workmen Act, 1875 (38 *& 39 Vict., c.* 90), *s.* 3 (1), *s.* 4.

By s. 3 of the Employers and Workmen Act, 1875: "In any proceeding before a county court in relation to any dispute between an employer and a workman . . . the court may . . . (1) . . . adjust and set off the one against the other all such claims on the part either of the employer or of the workman . . . as the court may find to be subsisting, whether such claims are . . . for wages, damages, or otherwise." By s. 4 of the Act a court of summary jurisdiction may exercise all or any of the powers by the Act conferred on a county court.

The word "claims" in s. 3 (1) means claims which the county court or court of summary jurisdiction finds the employer or workman has a right to make irrespective of whether such claims are put forward by either party in the proceedings before the court. Where, therefore, employers claimed damages for breach of contract against a workman, **held** that the court of summary jurisdiction was entitled to set off the claim for damages against the wages due and owing to the workman although the workman made no claim for wages in the proceedings.

Notes. Referred to: *Sagar* v. *H. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.

As to summary jurisdiction under the Employers and Workmen Act, 1875, see 25 HALSBURY'S LAWS (3rd Edn.) 524 et seq.; and for cases see 34 DIGEST 110 et seq. For the Employers and Workmen Act, 1875, s. 3 and s. 4, see 9 HALSBURY'S STATUTES (2nd Edn.) 23 and 24.

Cases referred to in argument:

Re Land Credit Co. of Ireland, Markwell's Case (1872), 21 W.R. 135; 23 Digest (Repl.) 331, *3985*.

Clemson v. *Hubbard* (1876), 1 Ex.D. 179; 45 L.J.M.C. 69; 33 L.T. 816; 40 J.P. 725; 24 W.R. 312, D.C.; 34 Digest 114, *853*.

Appeal from a decision of the Court of Appeal (VAUGHAN WILLIAMS and FARWELL, L.JJ., FLETCHER MOULTON, L.J., dissenting), reported [1910] 2 K.B. 445, affirming

a judgment of the Divisional Court (LORD ALVERSTONE, C.J., and RIDLEY, J., DARLING, J., dissenting), reported [1910] 1 K.B. 386, upon a Special Case.

The appellant, Keates, was a collier in the employment of the respondents. On April 30, 1909, in breach of his contract of employment, he wrongfully absented himself from his work in the colliery. On May 18, 1909, a summons was preferred by the respondents against him under the Employers and Workmen Act, 1875, by which the respondents claimed damages for breach of contract by the appellant, and also that the wages earned by and due to the appellant from the respondents be ascertained, and that the respective claims for damages and wages be adjusted and set off by the court. There was no dispute as to the amount of the wages, but no claim for wages was made by the appellant. The summons was heard before the stipendiary magistrate for Pontypridd on Aug. 5 and 19, 1909, who found the appellant indebted to the respondent for 11s. 3d. damages for breach of contract, and also found that £1 15s. 8d. was due from the respondents to the appellant as wages earned by the appellant. Acting under s. 3 (1) of the Employers and Workmen Act, 1875, the magistrate directed the 11s. 3d. to be set off against the sum of £1 15s. 8d., leaving only £1 4s. 5d. to be paid to the appellant for wages. The appellant submitted that as no claim for wages had been made, the court was not entitled under s. 3 (1) of the Act of 1875 to set off the respondents' claim for damages against the wages due to the appellant.

Bailhache, K.C., J. Sankey, K.C., and *Clive Lawrence* for the appellant.

Danckwerts, K.C., and *Trevor Lewis* for the respondents.

Their Lordships took time for consideration.

July 17, 1911. **LORD ATKINSON.**—The question for decision in this case turns upon the construction of s. 3 (1) of the Employers and Workmen Act, 1875, and resolves itself into this: Do the words of that subsection mean that the claims which the court may adjust and set off are claims which the employer or workman has a right to make, though he has in fact omitted to put them forward in the proceedings arising out of the dispute mentioned in the section, or are the words to be confined to claims which have in fact been put forward in those proceedings by the person who has this right to make them?

In the construction of a statute it is, of course, at all times, and under all circumstances, permissible to have regard to the state of things existing at the time when the statute was passed, and to the evils which, as appears from its provisions, it was designed to remedy; and I think that nothing could be more unsafe or more misleading than to allow oneself to be deterred from putting upon a statute the particular construction which the consideration of these things would lead one to adopt, by the apprehension of the prejudicial effect which it might have on rights and privileges conferred by subsequent legislation, unthought of at the time when the particular statute was passed. It is necessary then to ask oneself what were the respective rights and liabilities of employer and employed in the year 1875, and what the jurisdiction and power conferred on county courts to set off the respective claims of litigants who might come before them. The doctrine of common employment was then well established and in full operation. The Workmen's Compensation Act had not been passed. The employer who paid the wages which he owed, who did not dismiss illegally, and was not guilty of personal negligence in the selection of the fellow servant of the complaining workman, or of the machine, with which that workman had to work, could not well be sued either in tort or contract; and the workman on his side would seldom, if ever, be sued save for damages for breach of his contract of service by leaving his employment without adequate notice, or for damages for negligence in discharge of the duties which his contract of employment imposed. Claims such as these were likely to be comparatively small in amount, and would be fully met by the sum of £50, the highest amount which the county court could award.

By the combined operation of s. 76 of the County Courts Act in force in 1875 (9 & 10 Vict., c. 95) and s. 88 and three following sections of the Judicature Act,

1873, it is clear that the county court had ample jurisdiction to set off claims such as are in this case dealt with, if put forward in a litigation before it. But the Employers and Workmen Act, 1875, was passed, as set forth on the face of it, to enlarge the powers of the county courts, not to leave them as they were, and it has enlarged them in a most remarkable way. The court may now under this section (s. 3) give relief which not only was never claimed by either of the parties litigant, but is directly in conflict with the relief claimed, and setting at naught the rights which they respectively insist upon. For instance, if an employer should sue his workman for damages for breach of contract by refusing to do the work which he had contracted to do, and the workman insisted that the work which he refused to do was not work which under his contract he was bound to do, each party thus insisting on the contract between them, each standing, as it were, on the "letter of his bond," the county court judge could, in defiance of this insistence, dissolve the contract, apportion the wages earned under it and award damages, presumably for its breach, or for its termination, as the case might be, to either of the parties litigant, not one of which things was claimed by anyone concerned. Again, instead of awarding damages he might, under sub-s. (3) of s. 3, take security from the party in default for the due performance of so much of his contract as remained unperformed, if the defaulter consented to that course. It is obvious that this peculiar quasi-parental jurisdiction was conferred in the interest of industrial peace, and should not be hampered by rules of pleading. Section 3 confers jurisdiction in addition to that already possessed by the county courts—for what end? In order, in the words of the statute, to

> "adjust and set off the one against the other all such claims on the part either of the employer or the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting. . . ."

It is conceded that these claims may have no connection whatever with the particular matter in dispute between the employer and the workman. The claim may be a claim for wages, which the employer admits to be due. It need not be a contested claim, but, according to the argument for the appellant, the party sued can oust the operation of this remedial statute, and leave things in precisely the same position as if it never had been passed, simply by omitting to give the notice required by s. 76 of 9 & 10 Vict., c. 95, though there be no danger of surprise. In my view the consideration of s. 3 (1) should be approached from an entirely different point of view from that suggested by the appellant.

I think that the object of the statute being, as, in my opinion, it obviously is, to promote industrial peace, and, with that end, in the case of any dispute between employer and workman coming before the county court, to secure the adjustment of all claims for debt or damages, wages, or other liability subsisting between them, whether connected with this dispute or not, one's attention ought to be directed to seeing whether there is any provision of the statute so clear and imperative as to prohibit the exercise of the benevolent jurisdiction conferred by it in such a case as the present. I think that the words "claims" which the court "may find to be subsisting" are adequate, though not happily chosen to indicate claims which the court may find that either party has the right to make, whether they have in fact put them forward in the litigation or not, and, therefore, that the magistrate had in this case power to make the decree or order which he made, and that the judgment of the Court of Appeal is therefore right and should be affirmed. It was urged in argument that if the county court, or a court of summary jurisdiction, has the jurisdiction exercised in this case, the employer might make a claim before either of these tribunals for a small sum, and that under such circumstances the tribunal whose jurisdiction he invoked would have power to adjudicate upon a claim of the workman, under the Workmen's Compensation Act, for compensation in respect of an injury sustained by him. I wish to say emphatically that I express no opinion upon that point. It does not arise in this case. The latter statute does not affect the claims adjudicated upon here. If unfortunate results of this kind,

which must have been unforeseen in 1875, follow, it is a matter to be set right by the legislature. But whether they do follow or not affords, in my view, no justification for construing the Act of 1875 otherwise than as it should be construed if this later statute had never been passed.

LORD SHAW.—I agree.

LORD ROBSON.—This case turns on the effect to be given to the word "claims" in s. 3 of the Employers and Workmen Act, 1875. The section confers on a county court the power in any proceeding before it in relation to any dispute between an employer and a workman, arising out of their relation as such, to

> "adjust and set off the one against the other all such claims on the part either of the employer or of the workman arising out of or incidental to the relation between them as the court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise."

Section 4 provides that this comprehensive power may also be exercised by a court of summary jurisdiction, and it has been so exercised in the present case. The magistrate has found the workman indebted to the employer in a sum of 11s. 3d. for damages for breach of contract. Acting under the above section, he has also, on the invitation of the employer, inquired whether there are any claims on the part of the workman against the employer incidental to the relation between them, and he has found one such claim to be subsisting—namely, for a sum of £1 15s. 8d. earned and due in respect of wages. He has, therefore, directed the 11s. 3d. to be set off against the larger sum, leaving only £1 4s. 5d. to be paid by the employer.

The workman contends that the jurisdiction to do this only arises where the claim, which the magistrate assumes thus to adjust and settle by means of set-off, is a claim made before him by the party entitled to make it, and not merely, as in this case, a claim of which he has been informed judicially, and as to the existence and correctness of which he has satisfied himself judicially. The answer to this contention is to be found in the plain words of the section, which are in complete accord with the object of the statute taken as a whole. It is a statute dealing with industrial disputes, and it seeks to provide certain courts with a means of checking or composing such disputes so far as they are concerned with small pecuniary claims. In the subsection following the one just quoted, the Act goes so far as to empower the magistrate to rescind wholly any contract between the employer and the workman, if, having regard to all the circumstances of the case, he thinks it just so to do,

> "upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as [the court] thinks just."

This is a very unusual power, and it shows that the county court judge or magistrate is being entrusted with a jurisdiction and discretion outside the limits of ordinary litigation. It opens a wide field of inquiry beyond the particular claim which one of the parties has brought before him. He is able under this second subsection to exercise a power similar to, but stronger than, that which the appellant says is so novel and extreme that the legislature cannot be taken to have intended it under sub-s. (1). Thus, if he thought it expedient to rescind the contract between the parties, the claim or right to wages due would be one of "the circumstances of the case," and, as such, would be subject to the magistrate's discretionary powers in reference to apportionment and payment. It seems to me that some such power is necessary to give effect to either subsection. Subsection (1) aims at settling disputes by the adjustment of all subsisting claims, and sub-s. (2) aims at the same object by the summary termination of contracts which it may have become irksome, or dangerous, to enforce. The scope of the statute being thus wide, there seems to be no ground on which sub-s. (1) can be properly read in

A a more restricted sense than its literal wording imports. In directing the magistrate to adjust all the claims between the parties which the court "finds to be subsisting," the Legislature can scarcely be taken to have intended that the magistrate might find a claim for wages to be in fact subsisting between the parties, and yet be unable to deal with it in settling the whole account because the workman had not thought it necessary to sue for it.

B But the appellant contends that the mere right to have the wages paid is not a claim at all. This appears to be only another way of saying that it is not a claim preferred before the magistrate. The workman has worked in order to get his wages, and, although he does not think it necessary to bring an action for them, it is quite well understood between his employer and himself that he wants his wages, that he is entitled to them, and that he means to have them. If he refrains C from formal or explicit demand, it is only because, in such circumstances, it is so well understood and implied that it does not need to be made explicit. I think that this constitutes a "claim" within the meaning of this subsection. It has been pointed out that if the magistrates acted up to the full extent of the jurisdiction given to them by this statute it might have the most inconvenient consequences. When the statute was passed the claims between employer and workman D were, for the most part, simple in character and small in amount. Since then they have become numerous, complicated, and substantial, and are no longer such as can be conveniently or properly disposed of by a magistrate acting under this subsection. But most of them are confined to special tribunals, and I doubt if the mischief suggested would be serious in extent. The jurisdiction, however, of the magistrate is discretionary, and it is difficult to think that he would be so E unreasonable as to exercise it in some of the extreme and inappropriate cases which have been suggested. In any event we have no power to construe this statute otherwise than according to its plain intent, and I think that this appeal fails.

EARL LOREBURN.—I agree.

Appeal dismissed.

F Solicitors: *Smith, Rundell & Dods*, for *Morgan, Bruce, Nicholas & James*, Pontypridd; *Bell, Brodrick & Gray*, for *C. & W. Kenshole*, Aberdare.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL (AT THE RELATION OF TAMWORTH CORPORATION AND OTHERS) *v.* BIRMINGHAM, TAME AND REA DRAINAGE BOARD

[CHANCERY DIVISION (Kekewich, J.), October 25, 28, 29, 30, 31, November 1, 5, 6, 21, 1907]

[Reported [1908] 2 Ch. 551; 77 L.J.Ch. 836; 98 L.T. 310; 72 J.P. 20; 24 T.L.R. 126]

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), November 19, 1909]

[Reported [1910] 1 Ch. 48; 79 L.J.Ch. 137; 101 L.T. 796; 74 J.P. 57; 26 T.L.R. 93; 54 Sol. Jo. 198; 8 L.G.R. 110]

[HOUSE OF LORDS (Earl Loreburn, L.C., Lord Atkinson, Lord Gorell and Lord Robson), June 26, 27, July 3, December 15, 1911, July 26, 1912]

[Reported [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; 11 L.G.R. 194]

Water—Pollution—River—Effluent from sewage works—Standard of purification needed—Prevention of deterioration of river water—Quality of water before introduction of effluent to be considered—Construction to be adopted of Public Health Acts—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 17.

By s. 17 of the Public Health Act, 1875 [now replaced by s. 30 of the Public Health Act, 1936: see 19 HALSBURY'S STATUTES (2nd Edn.) 335]: "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage of filthy water into any natural stream or watercourse . . . until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse . . ."

Held by the Court of Appeal (agreeing with KEKEWICH, J.): under s. 17 it was not incumbent on a local authority to purify their effluent absolutely to the standard of a naturally pure stream; the section was intended to prevent deterioration of the water in the stream or watercourse; and, in considering whether or not there had been such deterioration, the actual quality of the water in the stream or watercourse before the introduction of the effluent must be taken into account.

Per KEKEWICH, J.: On the proper construction of the section the legislature must be taken to have intended that at no one point in the stream shall offending liquid be conveyed into it, and that the offence at one point cannot be avoided or excused by careful observance of the prohibition elsewhere. Therefore, in the present case the plaintiff must establish that at some point or points the defendants have conveyed into the river T. sewage or filthy water which has deteriorated the quality of the water at that point.

Per FLETCHER MOULTON, L.J.: The difficulty of dealing with sewage is very great. . . . It is consequently incumbent on the courts to see that they do not make the remedies which are in their hands for compelling public authorities to do their duty in this respect too onerous, but that they interpret very carefully the legislative provisions as to purity.

Court of Appeal—Jurisdiction—Injunction—Power to discharge—Facts changed since injunction granted—Reference to expert to inquire and report.

On an appeal against an order for a perpetual injunction, where, though the injunction was rightly granted by the judge in the court below on the materials then before him, the facts have changed between that hearing and the hearing of the appeal (e.g., if the defendants have taken steps to terminate the illegal

action alleged against them), the Court of Appeal can (EARL LOREBURN, L.C., dubitante) refer the matter to an expert (e.g., in the case of the alleged pollution of a river); can, if they think fit, adopt his report wholly or partially; and can make an order discharging the injunction and accepting in its place an undertaking by the defendants, or making such other order as the judge below could have made if he had had before him the materials placed before the Court of Appeal.

Injunction—Attorney-General—Grant to—Restraint of illegality by public authority—Discretion of court whether or not to grant.

When the Attorney-General comes to the court to complain that a public authority is exceeding its powers and acting in breach of a statute he is not entitled, on proving his case, to an injunction as of right. The court has a discretion whether or not to grant an injunction.

Notes. Considered: *A.-G.* (*at the relation of Manchester Corpn.*) v. *Harris*, [1960] 3 All E.R. 207. Referred to: *A.-G.* v. *Kerr and Ball* (1914), 79 J.P. 51; *Metropolitan Water Board* v. *Dick, Kerr & Co., Ltd.*, [1916–17] All E.R.Rep. 122; *Robinson* v. *R.*, [1921] 3 K.B. 183; *George Legge & Son, Ltd.* v. *Wenlock Corpn.*, [1938] 1 All E.R. 37; *A.-G.* v. *Ripon Cathedral* (*Dean and Chapter*), [1945] 1 All E.R. 479.

As to pollution of rivers, &c, see 33 HALSBURY'S LAWS (2nd Edn.) 612 et seq.; as to the jurisdiction of the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 439–445, 468–473; and as to injunctions, see ibid., vol. 21, pp. 403, 404, 436–439. For cases see 44 DIGEST 37 et seq.; 16 DIGEST (Repl.) 208 et seq., 538–541; 28 DIGEST (Repl.) 888, 889, 909 et seq.

Cases referred to:

(1) *A.-G.* v. *Cockermouth Local Board* (1874), L.R. 18 Eq. 172; 30 L.T. 590; 38 J.P. 660; 22 W.R. 619; sub nom. *Workington Local Board* v. *Cockermouth Local Board*, *A.-G.* v. *Cockermouth Local Board*, 44 L.J.Ch. 118; 44 Digest 46, *323*.

(2) *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 20 T.L.R. 489; 2 L.G.R. 826; 16 Digest (Repl.) 538, *3790*.

(3) *A.-G.* v. *London and North Western Rail. Co.*, [1900] 1 Q.B. 78; 69 L.J.Q.B. 26; 81 L.T. 649; 63 J.P. 772; 16 T.L.R. 30, C.A.; 16 Digest (Repl.) 542, *3829*.

(4) *Imperial Gas Light and Coke Co.* (*Directors, etc.*) v. *Broadbent* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 28 Digest (Repl.) 768, *211*.

(5) *L.C.C.* v. *A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 50 W.R. 497; 18 T.L.R. 298, H.L.; 16 Digest (Repl.) 537, *3775*.

(6) *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 30 W.R. 916; 16 Digest (Repl.) 542, *3828*.

(7) *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 42 Digest 696, *1111*.

(8) *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; 38 L.J.Ch. 265; 19 L.T. 708; 33 J.P. 196; 17 W.R. 240, L.C. & L.J.; 28 Digest (Repl.) 737, *4*.

Also referred to in argument:

A.-G. v. *Great Eastern Rail. Co.* (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; 27 W.R. 759, C.A.; affirmed (1880), 5 Ch. App. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 16 Digest (Repl.) 541, *3824*.

St. Mary, Islington, Vestry v. *Hornsey U.D.C.*, [1900] 1 Ch. 695; 69 L.J.Ch. 324; 82 L.T. 580; 48 W.R. 401; 16 T.L.R. 286; 44 Sol. Jo. 327, C.A.; 41 Digest 31, *233*.

Badische Anilin Und Soda Fabrik v. *Levinstein* (1883), 24 Ch.D. 156; 52 L.J.Ch. 704; 48 L.T. 822; 31 W.R. 913; 2 R.P.C. 73; on appeal (1884), 29 Ch.D. 366; 53 L.T. 750, C.A.; on appeal (1887), 12 App. Cas. 710; 57 L.T. 853, H.L.; 28 Digest (Repl.) 889, *1179*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal.

The action was brought by the Attorney-General at the relation of the corporation of the borough of Tamworth and the Tamworth Rural District Council against the Birmingham, Tame and Rea District Drainage Board for an injunction to restrain the defendants from discharging sewage or filthy water from their sewage farm into the river Tame until such sewage or filthy water had been freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in that river in contravention of s. 17 of the Public Health Act, 1875. The defendants constructed a sewage farm, known as the Birmingham Sewage Farm, and sewage was conveyed to the farm to be purified. From time to time they made further additions, so that their sewage farm consisted of about 3,000 acres. The farm was situated on the banks of the river Tame, commencing just below the city of Birmingham and extending thence some five miles down the valley of the river. The effluent from the farm was discharged into the river at various points by artificial channels. It appeared that the defendants were able to purify satisfactorily a little more than the daily dry-weather flow through the farm, which was about 22,000,000 gallons, but that they could not deal properly with any excess, which in times of heavy rain was very considerable, and which they were compelled to discharge into the river partly purified by means of lagoons. The defendants made continuous efforts to deal with this excess by means of bacteria beds, still tanks, distributing plant, steam ploughs, and the like. The defendants alleged, by their defence, delivered in July, 1899, that it was impossible, with the then existing works, so thoroughly to treat the sewage as to render the effluent from the works absolutely clear; that when the additional works in course of construction were completed they would be able to deal with the sewage in a satisfactory manner; and that, from various sources, the river was greatly polluted before it reached the sewage farm of the defendants. By an amended defence, delivered in June, 1907, the defendants alleged that they now properly purified all sewage coming into their works in ordinary times, but that in flood time it was impossible to purify it completely; that the new works were intended to deal with floods, and would to a great extent purify any amount of sewage; and that the river where it left the defendants' lands, and after receiving the effluent, was purer than where it entered the defendants' works. Evidence was given that the river Tame was a small and sluggish stream with a normal flow of about 17,000,000 gallons daily. The river Rea, which flowed into the Tame near the upper or Birmingham end of the sewage farm, had a normal flow of about a quarter of the Tame. Those rivers, before they reached the sewage farm, passed through a thickly populated area, and when they arrived at the farm were in a polluted condition.

In November, 1907, the action came on for trial before KEKEWICH, J., who, in the course of his judgment, said that s. 17 of the Act of 1875 did not provide that no excrementitious or other foul or noxious matter might be conveyed into a stream, for it was not said that none such should be conveyed into any natural stream or watercourse, but only that there should not be conveyed into it such as would affect or deteriorate the purity and quality of the water. HIS LORDSHIP continued: It seems to me that, on the grammatical and reasonable interpretation of the language, what the legislature intended to prohibit was the deterioration—that is, the making worse the purity and quality of the stream or watercourse, and that no one can be said to have offended against the prohibition if as a matter of fact there has been no such deterioration. But what is to be deteriorated? The purity and quality of the water in the stream or watercourse into which the sewage or filthy water is conveyed, or water of an arbitrary standard of purity and quality,

A determined, not by the actual facts of each case, but laid down by some rule, irrespective of these facts. Again, it seems to me that according to the grammatical and reasonable construction of the language, the purity and quality must be those of the water in the stream or watercourse into which the sewage or filthy water is conveyed, and it is impossible to conclude that there has been an offence against the prohibition unless that special purity and quality has been shown to be B deteriorated.

Then the legislature speaks of the stream or watercourse and of the water in such stream or watercourse as a whole, and it is contended on behalf of the defendants that in judging the effect of their operations one must regard the whole, and that, if, regarded as a whole, the water in the stream or watercourse has not been deteriorated, no offence has been or can be established. But the stream may be C many miles in length, and owing to a variety of natural or adventitious circumstances the purity and quality may vary so as to be entirely different at different points. And the body exercising the power of drainage into the stream may convey sewage or filthy water into it at different points, and if the stream is to be regarded as a whole they may reasonably ask for judgment on all their operations as a whole, and say they have committed no offence against the Act because the D operations thus united have produced no deterioration notwithstanding that at some one or more point or points such deterioration is distinctly produced. I entertain, however, no doubt that on the proper construction of the section the legislature mut be taken to have intended that at no one point in the stream shall offending liquid be conveyed into it, and that the offence at one point cannot be avoided or excused by careful observance of the prohibition elsewhere. This is E my own view of the construction of the section, but it agrees with that expressed by Sir George Jessel in *A.-G.* v. *Cockermouth Local Board* (1). The plaintiff, on whom the burden of proof lies, has, therefore, to establish that at some point or points the defendants have conveyed into the river Tame sewage or filthy water which has affected or deteriorated, that is, as I understand it, has affected so as to deteriorate, the purity and quality of the water in the river at that point.

F In order to solve this question of fact one must know two things. First, what was the purity and quality of the water at the selected point before the sewage or filthy water was conveyed into it; and, secondly, what was the character of such sewage or filthy water. These things once known with reasonable precision, there ought not to be any great difficulty in deciding whether what is conveyed into the river makes it worse than it was before. I cannot adopt the view that the purity G and quality of the river ought to be judged by any standard other than one of fact. I cannot think that I ought to regard the river as being any different from what it really is. If it is suggested that the river must be presupposed to be of the character which may be found in an ordinary agricultural district, perhaps transparent and pleasant to the eye, capable of sustaining fish-life, and even drinkable by cattle and useful for domestic purposes though not drinkable by man, the H answer is, first, that there is no ascertained standard of the purity and quality of such rivers, and, secondly, that there is no reason for accepting such a standard if ascertained rather than that of a hill-stream, far less amenable to pollution, or, on the other hand, the standard of streams in a manufacturing district, where the pollution is likely to be far greater. You must, in my judgment, inquire what is in fact the purity and quality of the particular stream, and then further inquire I whether it has in fact been deteriorated. . . . I have no doubt, and indeed it has been conclusively proved, that the defendants have done their best to discharge the duty imposed on them by the legislature, and that to this end they have employed not only money without stint but to the best of their ability, and so far as circumstances have hitherto permitted, all the means which the resources of modern science have placed at their disposal. Nevertheless, what I have to consider is not what they have attempted to do or the manner in which they have done it, but a bare question of fact whether in the result they have succeeded in their attempt or whether, notwithstanding all they have done, they now convey into the

river Tame sewage or filthy water not freed from all excrementitious or other foul or noxious matter such as will affect or deteriorate the purity and quality of the water in that river. Their defence, which I hold to be a good defence in law, is that the Tame is a river the purity and quality of the water in which is of low standard, and that they do not by what they convey into the river affect or deteriorate that purity and quality. [His Lordship reviewed the evidence.] I find that, as a matter of fact, the defendants convey into the river Tame water not freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such river.

What then is my duty? The defendants appeal to me not to grant an injunction. They allege, and the evidence fully supports that allegation, that they have been persistently struggling against great difficulties, and that they have met with a large measure of success, that there is no reason to believe that they will not persistently struggle, and that there is every reason to believe that success in the future will be greater than it has been in the past. . . . To this appeal I am not at liberty to accede. As I understand the law, the Attorney-General, coming to complain that a public body is exceeding its powers or committing some offence against a statute, is entitled as a matter of right on proving his case to the only relief which the court can grant—namely, an injunction in one form or another. Convenience, which sometimes assists the court in other cases to avoid granting an injunction, while making a declaration of right, is not, in my judgment, applicable to such a case as the present where the Attorney-General is plaintiff. Nor am I disposed to suspend the operation of the injunction. That method of procedure ought, I think, to be limited to cases where it is desired to submit the question to a higher court or where certain works are proposed to be done to get rid of the cause of complaint as, for instance, abating a nuisance. I do not think that the remedies which the defendants propose to adopt are sufficiently certain or can be perfected within a sufficiently definite time to make that procedure applicable here. On the other hand, I think that the defendants deserve gentle treatment. Consideration of the whole position is a matter for the discretion of the Attorney-General, and it would be impertinent of me to say more. But I will venture to add this. An injunction cannot be enforced by any process without an order of the court, and the court would be extremely reluctant to allow process to issue unless and until the defendants have had a reasonable time for remedying the present state of affairs, and have neglected to use the opportunity thus afforded to the best advantage. Judgment must go for an injunction as asked—that is, following the exact terms of s. 17 of the Public Health Act, 1875, and the defendants must pay the costs.

The defendants appealed to the Court of Appeal who discharged the injunction granted by Kekewich, J.

COZENS-HARDY, M.R., in giving judgment, said: This is undoubtedly a case of great importance, not merely to the particular locality, but, I think, to all public bodies and public boards throughout the country. The Birmingham, Tame and Rea District Drainage Board have statutory powers to deal with the sewage of Birmingham and a large tract of land, including several very important towns. They have constructed sewage works. But those sewage works did not fully carry out the intentions of those who had constructed them; and it is plain that, whatever be the true meaning and effect of s. 17 of the Public Health Act, 1875, the defendants were guilty of a breach of that section. The action was tried before Kekewich, J., and he decided—and I see no reason whatever to doubt the accuracy of his decision—that there was then a breach of s. 17. He granted an injunction in the terms of that section, and made the defendants pay the costs of the action.

Before I deal with the rest of the case there is one part of the judgment of Kekewich, J., to which I am not prepared to give assent. He said (supra):

> "As I understand the law, the Attorney-General, coming to complain that a public body is exceeding its powers or committing some offence against the

A statute, is entitled as a matter of right, on proving his case, to the only relief which the court can grant—namely, an injunction in one form or another."

I am not prepared to assent to that proposition. I think that the view which was taken by FARWELL, J., in *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (2) ([1904] 2 Ch. at p. 42), and the view which was adopted by VAUGHAN WILLIAMS, L.J., in B *A.-G.* v. *London and North Western Rail. Co.* (3) ([1900] 1 Q.B. at p. 87), is the more accurate one, and that it is not the law for the Attorney-General as a matter of right to say: "Under all circumstances, if I prove a breach of a statute, the court is bound to grant an injunction, whether it be an injunction against continuing to do something, or whether it be in form a mandatory injunction."

Then it comes for us to consider what has happened since. The defendants C appealed against the order of KEKEWICH, J., and it was an appeal which undoubtedly was in form very peculiar. In substance it proceeded upon the footing that the court is not really in a position to say that KEKEWICH, J., was wrong in granting the perpetual injunction he did, but that it is satisfied by evidence that since the judgment, at an enormous expenditure of money, the defendants had so altered the situation that there is now no breach of s. 17. The evidence was most con- D flicting. We took the view that this is a case in which the court must have the assistance of an expert of the highest qualifications who will see what is being done, attended at least once by representatives on each side, and will give us the benefit of his assistance. We named Sir William Ramsay, of whose qualifications it would be impertinent of me to say a word, and he was requested "to inquire and report to the court whether the sewage effluents from the defendants' works which E enter the river Tame are before entering the said river entirely or to any or what extent freed from all excrementitious matter or other foul or noxious matters such as will affect or deteriorate the 'purity' of the water in such river (i) at the points of entry or (ii) within a distance of 600 yards therefrom." Sir William Ramsay has been good enough to furnish us with a most elaborate and careful report. I do not propose to go through it. Suffice it to say that he has analysed with the F greatest care a large number of specimens of the water taken at the various points—the river before the effluents enter; where the effluents enter the river; and 600 yards further down; and the conclusion at which he arrives in his report I will repeat in his own words:

> "To sum up: My opinion is that the river is not made fouler by the entry of the Birmingham effluent. To adopt the terms of reference: The sewage G effluents from the defendants' works which enter the river Tame are before entering the said river to such an extent freed from all excrementitious matter and other foul or noxious matters that they do not affect or deteriorate the 'purity' of the water in such river (i) at the points of entry, or (ii) within a distance of 600 yards therefrom."

If the construction of s. 17 of the Public Health Act, 1875, is that which KEKEWICH, H J., thought it was, and which for the reasons I shall give in a minute I think it is, that is a clear and explicit finding that there is now at this moment nothing done by the defendants in contravention of that section. It is quite true that that report is not a thing which is absolutely binding upon us. It is open to criticism by counsel, but to imagine that we should not have regard to a report by a man of such eminence as Sir William Ramsay in a case in which, apart from that report, the I evidence is absolutely contradictory, is, I think, impossible. I, therefore, have no hesitation in saying, whatever the subsequent decision may be, that I accept as the fact those findings which Sir William Ramsay has made in the two sentences which I have read.

Is that sufficient? By s. 17 of the Act of 1875:

> "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until

such sewage or filthy water is freed from all excrementitious, or other foul or noxious, matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake."

Is that an absolute prohibition against conveying any sewage or filthy water into any natural stream, or is it only a prohibition against conveying sewage or filthy water in such a manner as prejudicially to affect or deteriorate? I will read what KEKEWICH, J., said upon that point. After reading the words of the section, he said:

"This, again, necessarily implies that excrementitious or other foul or noxious matter may be conveyed, for it is not said that none such shall be conveyed into any natural stream or watercourse, but only that there shall not be conveyed into it such as would affect or deteriorate the purity and quality of the water. It seems to me that, on the grammatical and reasonable interpretation of the language, what the legislature intended to prohibit was the deterioration, that is, the making worse the purity and quality of the stream or watercourse, and that no one can be said to have offended against the prohibition if as a matter of fact there has been no such deterioration."

It seems to me almost absurd to say that a man can be guilty of a statutory offence under this section if he has improved the water of the river by that which he casts into it. I think, therefore, that the question which we submitted to Sir William Ramsay was the proper question to submit in a case like this, and that it is not true to say that there has been a statutory offence if the defendants have put into the river some water which does contain a certain amount of filth, although it is so much better than the rest of the water which was in the river before that upon the whole it improves the character of the water. In other words, it cannot be said to "deteriorate the purity and quality of the water." On the contrary, it benefits it; and we must read the word "affect" in the sense of "prejudicially affect or deteriorate the purity and quality of the water."

That being so, what ought we to do in this case? I cannot fail to regard this fact, that the defendants in this case are a public body discharging a most important function, who have certainly not spared money. We were told that upwards of £500,000 had been spent over the work. They have done what they could. Not only have they done what they could, but actually, instead of damnifying, they have benefited the river Tame. Under those circumstances is it right to say that this public body should go on discharging their duties with a sword over their heads in the shape of a perpetual injunction? I think not. It may be that in the order which we propose to make we are going further than has been done in any previous case which is reported. But I think that the order which I propose and suggest will, while removing this sword over the heads of the defendants, and while enabling them to discharge their duties without the prejudice created by such an injunction, at the same time impose upon them such obligations as the statute directs should be imposed upon them, and will give to the defendants all such rights as they ought to have. I think that the order which we ought to make should be in this form, subject to any words which counsel may suggest after judgment has been delivered: "It appearing that the state of things existing at the date of the judgment has since been changed by means of the permanent works constructed by the defendants, so that there is no longer any breach of the statutory provisions contained in s. 17 of the Public Health Act, 1875, and the defendants undertaking to use their best endeavours to prevent in future any breach of such provisions, discharge the injunction." That will be the substantive part of the order. Then there will be liberty to apply to the court below. The defendants must pay the costs of the appeal.

FLETCHER MOULTON, L.J.—I am of the same opinion, and I agree that this case raises a very important point for local authorities and for the public generally. The difficulty of dealing with sewage, now that our towns have grown so large, is

very great. And seeing that sewage is now pretty well all water-borne, and that it must, therefore, go down natural channels to the sea, the terms and restrictions which have been put by the legislature upon the discharge of sewage into these natural streams become a question of great importance. It is consequently incumbent on the courts to see that they do not make the remedies, which are in their hands for compelling these bodies to do their duty in this respect, too onerous, but that they interpret very carefully the legislative provisions as to purity. Otherwise this task would be made quite impossible to perform. I think that s. 17 of the Public Health Act, 1875, evidences that the legislature has felt the great difficulty of the task, and it has taken a standard for performance which is, on the one hand, sufficient to protect the public, but, on the other hand, is a practical one leaving the task of the local authorities a possible one.

Before I deal with the words of the section, I want to deal with the question of what is "excrementitious or other foul or noxious matter." We all know that excrementitious matter, being of organic origin, is liable to change, and, as Sir William Ramsay has put it, if we are to take excrementitious matter to mean unchanged fæces or urine, then the defendants do not offend, because in their effluent there is none such. But to give it that meaning would, in my opinion, be to make the section not sufficiently stringent to protect the public, because these organic bodies rapidly undergo change—chiefly in the way of oxidation—which makes them approach more and more definite chemical bodies of a stable character, such as are generally met with in what is called "inorganic chemistry." Therefore, what is present is more or less completely oxidised or burnt-up excrementitious matter. If we were to say, therefore, that the statute meant that everything that had an excrementitious origin remained still excrementitious matter, no matter what changes supervened, it would be perfectly impossible to purify water that had once been used for conveying sewage, because the processes of purification do not remove the nitrogen and the oxygen and the carbon which existed in the excrementitious matter that was originally put into it. They only change their combinations, and that which was put into the water must remain there and would remain there for all time. Therefore, you cannot say that because there is matter that is derived from excrement there is any "excrementitious matter." That would be a ludicrous interpretation of the section. The legislature, therefore, realised that that which is put into the water remains in some form there except as to some very minute portion which may become volatile with free ammonia. But even that would remain in the water in small traces. And, seeing that it must remain there, the legislature must have some practical definition of the duty of local authorities in dealing with sewage which cannot be based on the idea that you take out that which is put in. It must be sufficient that that is so altered by subsequent chemical change that it becomes harmless from the point of view of the public and does no damage to them.

The test that has been taken is an excellent one. The legislature have said that you may not discharge into a stream that which makes it worse. The consequence is that if by carefully applying that test to the upper waters of a stream it appears that the stream becomes more and more pure, then those that discharge into the lower waters of that stream must modify their methods, so that they do not interfere with that improvement. Nobody may make worse a stream by discharging water into it that has received excrementitious matter. The language of s. 17 of the Act seems to me not to possess any ambiguity. What you must not discharge into the stream is water that conveys that which will make the stream worse. That being the meaning of the section, it seems to me that after the report of Sir William Ramsay—which, knowing well his eminence, I accept absolutely—we must come to the conclusion that the defendants no longer offend against that section. I am satisfied that at last the admitted zeal of the defendants, in their desire to perform their statutory duties, has led them, thanks to improvements in modern science, to a successful way of doing it, and that, therefore, the offence against this section of the Act has ceased. That being so, I think that it is not

right for this court to leave under the stigma of an injunction a public body that is conscious of its duties and is doing its best to perform its duties, and one which has for years been striving to do them perfectly, as is found by the learned judge in the court below. I think that it is not right for us to do that when we are satisfied that that public body has at last succeeded, and is using means which will in the future be successful, because it took it a very long time to enable it to perform the gigantic task imposed upon it. I thoroughly agree, whether it be novel or not, that it is the duty of the court, in a case like the present, to make such an order as that which the Master of the Rolls has just read.

FARWELL, L.J., concurring, said that he read s. 17 of the Act of 1875 as meaning that what was done should not affect such purity and quality as the stream had, not absolute purity that the stream was to be assumed to have.

The other point on which he was desired to say something was the question which KEKEWICH, J., had disposed of, where he came to the conclusion that he had no discretion and was bound to grant an injunction because the Attorney-General asked for it. HIS LORDSHIP continued: In my opinion, that is a misconception. An injunction is only the form of remedy, or one of the forms of remedy, which the court grants in aid of a legal right. The right is to intervene and to call the attention of the court to a breach of a statute. In a case of that nature there is no remedy in damages possible. But there is a remedy by declaration, and there is the remedy by suspending the injunction and by giving liberty to apply after the declaration without granting an injunction. The right to an injunction is certainly not absolute. Probably that was put more compendiously by LORD KINGSDOWN in *Imperial Gas Light and Coke Co. (Directors, etc.)* v. *Broadbent* (4) when he said (7 H.L.Cas. at p. 612):

> "The rule I take to be clearly this: If a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

The exception there, of course, means that it is in the power of the court to say whether it will grant an injunction or whether it will not. One bears in mind, as SIR GEORGE JESSEL said in *A.-G.* v. *Cockermouth Local Board* (1) (L.R. 18 Eq. at p. 176), that

> "there is no difference between an ex-officio information and an information at the relation of a private individual. In both cases the Sovereign, as parens patriæ, sues by the Attorney-General."

It would be rather startling to be told at this time of day that it would be sufficient for the Attorney-General simply to institute proceedings alleging a breach of a statute, and that there is an end of it. It is for us to say, acting on behalf of His Majesty, whether that is the proper remedy. I should also add that I do not think that there is any authority, so far as I am aware, which justifies the conclusion to which KEKEWICH, J., came.

As the Master of the Rolls has referred to a case that came before me, I would point out that what I said in *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (2) ([1904] 2 Ch. at p. 42) was only obiter. In that case the Attorney-General intervened at the relation of a public authority complaining of a breach of a building line, and the defendants declined to do anything at all. The question was argued before me whether the Attorney-General could be guilty of laches, and I said that I did not think that it was necessary for me to express any opinion on the conflicting authorities as to whether the Attorney-General could have laches attributed to him. But I also said this, to which I adhere:

> "It is not sufficient for the Attorney-General simply to come to the court and say 'I call attention to the fact that there has been a breach of this statute,

and it follows as a matter of course that the mandatory injunction which I ask for must be granted.' "

I adhere to that, and I would leave out the word "mandatory," because I think that applies to a mandatory injunction or to a negative injunction. I think that must be so. I observe that LORD HALSBURY, in *L.C.C.* v. *A.-G.* (5), when he is stating that the court has no jurisdiction to restrain the Attorney-General from giving his fiat, says this ([1902] A.C. at p. 168):

> "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not."

Of course, that is perfectly accurate. It is for the Attorney-General to determine whether he shall commence litigation. But it is for the court to determine what the result of that litigation shall be. I think that is well put by FRY, J., in *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (6), where he says (21 Ch.D. at p. 755):

> "The question is whether, under such circumstances, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public. In my judgment he is entitled to do so, and the court is bound to attend to his interference."

That is to say, the court cannot say that the Attorney-General ought never to have instituted the proceedings; the court must listen to his application and then adjudicate as to whether there should be an injunction granted or not. On that point the learned judge's injunction was based, in my opinion, on a misapprehension.

HIS LORDSHIP, in conclusion, said that he entirely agreed with the order proposed by the learned Master of the Rolls.

The plaintiff appealed to the House of Lords.

Astbury, K.C., Macmorran, K.C., and *J. Henderson* for the appellant.

Sir Robert Finlay, K.C., P. O. Lawrence, K.C., and *T. T. Methold* for the respondents.

Their Lordships took time for consideration.

Dec. 15, 1911. The following opinions were read.

EARL LOREBURN, L.C.—I have had the opportunity of considering in print the opinion given by LORD GORELL, and I am quite prepared to agree with the form of order proposed by him. My own view is that what happened when the Birmingham Drainage Board obtained time precluded them from asking that the injunction granted by KEKEWICH, J., should be dissolved; and I am not at all satisfied that such a question as that referred to Sir William Ramsay ought have been referred, especially as the present appellant objected to that way of dealing with the case. If a trial as to the condition of the river was proper before these improvements were made, I cannot see why one of the parties should be practically compelled to leave it in the hands of an eminent scientist to determine the condition of the river after the improvements were made. But upon these points I defer to the opinion of the Court of Appeal, supported as it is by the concurrence of your Lordships. I am content to concur with your Lordships in the order proposed. It will settle the point at the moment in debate—viz., the sufficiency of the condition of the river at the date of Sir William Ramsay's report and will impose upon the Birmingham Drainage Board the duty of keeping it in the condition required by the statute. It will also leave to the relators the right of applying to the court if this duty is not

discharged, without the need of a new action. I could not have agreed to substitute, as the order of the Court of Appeal does substitute, for an injunction to obey a statute an undertaking by the respondents merely to do their best to obey. A court of law has no power to grant a dispensation from obedience to an Act of Parliament. If the respondents are not prepared to give the undertaking required, then I consider that the appeal should be allowed, and an injunction continued.

LORD ATKINSON.—I, too, have had the advantage of reading the opinion of LORD GORELL. I concur in it and approve the form of order which he suggests should be made, as well as the course to be adopted in case it is not accepted by the parties.

LORD GORELL.—This appeal is from two orders of the Court of Appeal dated June 22, 1909, and Nov. 19, 1909, respectively. The first was an order that it should be referred to Sir William Ramsay to inquire and report as to the condition of the sewage effluents from the respondents' works which enter the river Tame; and the second discharged a perpetual injunction granted by KEKEWICH, J., restraining the respondents from conveying sewage or filthy water into the river Tame until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in the said river.

The respondents are a statutory board for the purpose of treating the sewage of various boroughs, urban and rural sanitary districts, including Birmingham. Their district comprises a drainage area of nearly 100 square miles, and contains a population of about 950,000 persons, and they have established and laid out at Saltley, and in the Tame Valley, sewage disposal works and irrigation lands, and for these purposes have utilised a large acreage of land. Their sewage farm extends for more than six miles along the river Tame, and they own the land on each side of the river for a considerable distance. The borough of Tamworth is about twelve miles down the river from the land of the respondents, and the land under the jurisdiction of the said borough or of the Tamworth Rural District Council does not come higher up the river than a point between five and six miles below the eastern boundary of the sewage farm. As I understand the facts, the river Tame, before it reaches the boundary of the respondents' sewage farm, flows through populous manufacturing districts and is polluted with sewage and manufacturing refuse, and shortly after it reaches the respondents' sewage works it is joined by the river Rea, a river which flows through the city of Birmingham, and for a considerable distance, immediately before joining the Tame, through populous manufacturing districts, and is also polluted before it gets to the respondents' works. It does not seem to have been alleged by the appellant that the respondents have created a nuisance either by their works or by the discharge of the effluent from such works into the river Tame, though they in fact discharge the effluent from their works into the Tame.

The action was brought on June 13, 1899, in order to obtain an injunction to restrain the respondents from making or using any sewer, drain, or outfall in or about their sewage farm for the purpose of conveying and from conveying sewage or filthy water into the river Tame until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in the said river. It was alleged that the respondents were acting in breach of s. 17 of the Public Health Act, 1875, which is as follows:

> "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake."

In July, 1899, the appellant moved for an interlocutory injunction in the terms claimed by the statement of claim, but the court declined to grant an injunction upon the respondents' undertaking until the trial or further order to exercise their statutory powers with regard to their sewage farm under the supervision of an engineer agreed upon by the parties. The engineer made a report, and by an order dated Nov. 24, 1899, made upon another motion by the appellant, the respondents undertook that they would carry out the recommendations contained in the report under his direction with all reasonable dispatch, and thereupon the court ordered that the trial of the said action should stand over until the Easter Sittings, 1900. In May, 1900, the appellant again moved for an injunction, and by an order of that date, the respondents admitting that at the date of the issue of the writ the appellant had a good cause of action for the relief claimed, and again undertaking to carry out the recommendations contained in the report under the engineer's direction and with all reasonable dispatch, it was ordered that the trial of the action stand over until after the second motion day in Michaelmas Sittings, 1900. The respondents appear to have proceeded to construct and carry out the works recommended in the report, and expended large sums in so doing, but, finding that the works were not sufficiently effective, they decided on advice to treat the sewage in septic tanks and then to pass the effluent through bacteria percolation beds, and they commenced the construction of such septic tanks and bacteria beds. It seems that the alterations and other works necessary to adapt the respondents' works so as to enable the sewage to be treated according to the new system involved practically the entire remodelling of such works and necessarily a long time to develop while their fresh works were being proceeded with.

The appellant brought the action to trial on Nov. 21, 1907, and the injunction was granted by Kekewich, J. He decided against a contention of the appellants that under s. 17 of the Public Health Act, 1875, it was incumbent upon the respondents to purify their effluent absolutely to the standard of a naturally pure stream, and that it was immaterial that the river Tame was already highly polluted, holding that the legislature intended only to prohibit the deterioration—that is, the making worse the purity and quality of the stream or watercourse—and that no one could be said to have offended against the prohibition if, as a matter of fact, there had been no such deterioration. He further decided that he was bound by law to grant an injunction. The grounds upon which he so acted are stated by him in his judgment. He had already stated that the respondents had done their best to discharge the duty imposed upon them, and to this end had employed not only money without stint, but, to the best of their ability and so far as circumstances had permitted, all the means which the resources of modern science had placed at their disposal, but although he stated that they had met with a large measure of success, that there was no reason to believe that they would not persistently struggle, and that there was every reason to believe that success in the future would be greater than in the past, he declined to act on an appeal by the respondents for further reasonable time to do what remained to be done to prevent the commission of an offence, and granted an injunction. He seems to have thought that, as there was a breach of duty at the time, the injunction was a matter of right to the Attorney-General, and that the case was not one for a declaration of right only, or for the suspension of an injunction. He further did not think that the remedies which the respondents proposed to adopt were sufficiently certain, or could be perfected within a sufficiently definite time to make that procedure applicable, but he added that the court would be extremely reluctant to allow process to issue unless and until the respondents had had a reasonable time for remedying the present state of affairs, and had neglected to use the opportunity thus afforded to the best advantage. At the time when this judgment was given, the respondents had already made progress towards carrying out their proposed new works, and on Mar. 14, 1908, they appealed against the judgment of Kekewich, J. The Court of Appeal in July, 1908, when the appeal first came on, directed that the matter should stand over in order that the works might be prosecuted and

affidavits brought before the court showing what the respondents had been doing to purify the effluent from their works since the trial of the action, and the appeal accordingly stood over for nearly a year, and the works were proceeded with.

At the hearing of the appeal on June 11, 1909, affidavits were put in showing what the respondents had done, and that they had adopted the most scientific method, but the appellant in affidavits filed by him disputed the result of what had been accomplished by these methods, and the court decided to refer the questions set out in the order they made for inquiry and report to Sir William Ramsay, and made the first of the orders appealed against in the following terms:

> "This court does order that it be referred to Sir William Ramsay, K.C.B., F.R.S., to inquire and report to the court whether the sewage effluents from the defendants' works, which enter the river Tame, are, before entering the said river, entirely or to any and what extent freed from all excrementitious matter or other foul or noxious matters such as will affect or deteriorate the purity of the water in such river (i) at the points of entry, or (ii) within a distance of 600 yards therefrom. And it is ordered that the said Sir William Ramsay on his first visit be attended by the engineers on either side. And it is ordered that this appeal do stand over till the Michaelmas Sittings, 1909."

Sir William Ramsay accordingly held his inquiry and made his report dated Oct. 20, 1909, which he concludes as follows:

> "To sum up, my opinion is that the river is not made fouler by the entry of the Birmingham effluent. To adopt the terms of reference, the sewage effluents from the defendants' works which enter the river Tame are to such an extent freed from excrementitious matter and other foul or noxious matters that they do not affect or deteriorate the purity of the water in such river (i) at the points of entry or (ii) within a distance of 600 yards therefrom."

In November, 1909, the appeal again came before the Court of Appeal, and the court, after hearing the parties and reading the report of Sir William Ramsay, made the second of the orders appealed against, by which, after reciting as follows:

> "And it appearing that the state of things existing at the date of the said judgment has since been changed by means of the permanent works constructed by the defendants, so that there is no longer any breach of the statutory provisions contained in s. 17 of the Public Health Act, 1875, and the defendants, by their counsel, undertaking to use their best endeavours to prevent in future any breach of such statutory provisions,"

the court ordered that the said judgment of Nov. 21, 1907, so far as the same granted an injunction, be discharged, and that the defendants pay to the relators their costs occasioned by the appeal.

This appeal was then brought to your Lordships' House. The first point made by the appellant was that the Court of Appeal had no jurisdiction to dissolve the injunction. It is not necessary to consider what would have been the position if, the injunction having been granted, an application were made to the Court of Appeal to dissolve it, for, the order of KEKEWICH, J., having been made in November, 1907, the application to the Court of Appeal in March, 1908, was by way of appeal from his order, and sought to have it reversed and the action dismissed. The appellant asserted, however, that on the appeal the Court of Appeal could not interfere with the order if it were rightly made at the time. The respondents admitted that the order was rightly made at the time when it was made, though there was a question as to what was to be done with regard to storm water; but their point was that since the order they had completed the construction of fresh works, and that there was no longer any breach by them of the provisions of the Act, and no necessity or reason for the injunction continuing. They maintained that the hearing before the Court of Appeal was a re-hearing upon which fresh evidence could be given, and that the court should determine the matter as at the time of the re-hearing.

Under the Judicature Acts and rules the hearing of an appeal from the judgment of a judge is by way of re-hearing, and the court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the court may think fit: see R.S.C., Ord. 58, rr. 1 and 4. The court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought: see Ord. 58, r. 4. It seems clear, therefore, that the Court of Appeal is entitled and ought to re-hear the case as at the time of re-hearing, and if any authority were required for this proposition, it is to be found in *Quilter* v. *Mapleson* (7). In that case an action of ejectment had been brought under a provision of re-entry for breach of a covenant in a lease, and LORD COLERIDGE, C.J., gave judgment for the plaintiff. The defendant appealed and obtained a stay, so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the Conveyancing Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal, consisting of SIR GEORGE JESSEL, M.R., and LINDLEY and BOWEN, L.JJ., reserved their decision and granted the relief sought for by the defendant, holding that on a re-hearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance. In my opinion, the Court of Appeal were entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard.

Then it was urged by the appellant that the Court of Appeal had no power to take the course which they took of ordering a reference to Sir William Ramsay, and ought not, on the materials before them, to have reversed the decision of the learned judge. The question before the Court of Appeal was this. The respondents did not dispute that the decision was right at the time when it was given, subject to the minor question aforesaid, but they said in substance that the disposition of their sewage was a matter which required the expenditure of vast sums of money and the application of highly scientific means for properly dealing with it.

> "We have expended immense sums and adopted the most advanced scientific processes, so much so that our works have become renowned. We have been engaged for a considerable time upon this work, and although, at the time of the hearing before the learned judge, we had not produced completely successful results, we have now done so, and there is no need for an injunction."

The appellant disputed this, and maintained that there was still a breach of the statute. The dispute was dealt with in the conflicting affidavits in the Court of Appeal, but in viva voce evidence appears to have been tendered. In these circumstances the Court of Appeal appears to have made use of the powers conferred by s. 13 (1) and s. 17 of the Arbitration Act, 1889, which are as follows:

> Section 13 (1). Subject to rules of court, and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry and report to an official or special referee. . . . Section 17: His Majesty's Court of Appeal shall have all the powers conferred by this Act on a court or judge thereof, under the provisions relating to references by order of the court." [See now Administration of Justice Act, 1956, s. 15, and 30 HALSBURY'S LAWS (3rd Edn.) 439 et seq.]

It is contended by the appellant that the court had no power to make the order referring the questions above set out to Sir William Ramsay, except by consent, and that no consent was given by them. I do not think that this contention can be supported. In my opinion, the court had power to make the order without consent. On reading through the discussion before the Court of Appeal, it does not appear that consent to the order can be inferred against the appellant, but to my mind the real objection of the appellant was not that the court had no power to make an order if they had jurisdiction to entertain the question of the setting aside of the injunction, but that, the injunction being right at the time, they could

not and ought not to interfere. The order was made, and the discussion showed that, so far as the terms in which it was couched are concerned, no objection to it was raised by the appellants.

But the next point was that a reference for inquiry and report under the section is to be as prescribed by rules of court and subject thereto as the court or judge may direct (s. 15), and that the reference in question should have been held in the ordinary way, with evidence and the hearing of the parties. It is clear that Ord. 36, r. 55c, makes the provisions of rr. 48 to 55 of that order and of r. 55b apply to such a reference, but parties may waive the formalities of procedure which would render the carrying out of a reference of this kind inconvenient and impracticable, and accordingly we find that the parties do not appear to have required a formal hearing, and although the appellant had obtained the insertion in the order of the provision that an engineer on each side should accompany Sir William Ramsay on his first visit, they left him to make his inquiry and report in the practical way which was obviously contemplated. I find from his report that the engineers on both sides were present during his first visit, and accompanied him over the whole of the sewage works, that the documents mentioned by him were placed at his disposal, and that analyses, reports, and surveys, &c., were supplied to him. The result was his report already mentioned.

According to s. 13 (2) of the Arbitration Act, 1889, the court may, but is not bound to, adopt wholly or partially a report by an official or special referee. In this case the court adopted the report of Sir William Ramsay, and no application was made to them to hear further viva voce evidence. It is said that an affidavit criticising the report was tendered by the appellant, but, as I understand, it was only referred to in the address of counsel for the respondents, when the court intimated that they did not wish to hear it. It does not appear to have been mentioned again, and neither it nor any other evidence appears to have been formally tendered. I feel sure that the Court of Appeal must have considered that to commence a fresh affidavit controversy was a useless proceeding, and that they were therefore entitled to exercise their powers of adopting the report as authorised by the section. The case was one very suitable for the exercise of the powers above mentioned, and the report, under the reference ordered, enabled the court to dispose of it with convenience and without the delay and expense attendant on a long trial with conflicting expert evidence.

The Court of Appeal having been satisfied that, at the time of the re-hearing, there was no longer any breach of the statute decided to reverse the decision of KEKEWICH, J., but it is said by the appellant that they ought to have left the injunction standing instead of discharging it and requiring the undertaking in the order, which, it is said, is less onerous than an injunction. On the other hand, the respondents contend that to leave an injunction outstanding when the object with which it is granted has been accomplished is unreasonable and oppressive, and may impose difficulties on the Board, and leave opportunities for motions to be made against the Board for trifling or very temporary breaches, although there has been no suggestion of nuisance against the Board, but only of statutory breach. In the first place, I do not construe the final order of the Court of Appeal as preventing the appellant from taking fresh proceedings if he thinks such proceedings necessary, but the defendants' undertaking being limited "to use their best endeavours," &c., might give rise to difficulties and be regarded as if the result of the litigation were to lessen the obligations of the relators. Secondly, even if the Court of Appeal had left the injunction standing, they had power to suspend the injunction as might be reasonable if, for instance, more time were required to finish words: see *A.-G.* v. *Colney Hatch Lunatic Asylum* (8). But here, where there was at the time of the order of the Court of Appeal no real need for an injunction, I agree with the Court of Appeal in getting rid of it. If this case had come before KEKEWICH, J., on the facts presented to the Court of Appeal, I think that he might have dismissed it, and I cannot help considering that the appellant's real point was

A that having once obtained an injunction it could not be got rid of by an appeal, although the facts had entirely changed between the two hearings.

A point was made by the appellant that in the earlier discussions before the Court of Appeal the respondents' counsel had not questioned the injunction, except with regard to storm water, and, therefore, could not question it at the final hearing, but it is obvious that the respondents were admitting that they could not B at the early stages dispute an injunction except with regard to storm water, and were applying for time to complete the works, and that the final consideration of the matter stood over until they had had the opportunity of doing so, and I cannot read what was said in the discussions as debarring the Court of Appeal from re-hearing the case fully when they came to decide it. I should add that I do not think that any question arises on the facts found by the Court of Appeal as to C whether the court was bound or had discretion to grant an injunction. Looking broadly at this case, it seems to me that it was one in which for a time there was a statutory breach for which an injunction could be obtained, but that that breach was rectified before final decision. The respondents had made every effort to cope with the difficulty, had expended large sums in doing so, and had, according to the facts found, been successful. They have been ordered to pay the costs of D the proceedings so far.

The result is that, in my opinion, there was nothing to prevent the Court of Appeal from discharging or moulding the injunction as they thought fit in the circumstances, or taking an undertaking in lieu of an injunction, but the undertaking should not give rise to questions as to lessening the future duties of the Board. I think the proper order to make should be:

E "The House being satisfied by the report of Sir William Ramsay that the sewage effluents from the defendants' works which enter the river Tame after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious matter and other foul or noxious matters that they did not affect or deteriorate the purity F of the water in such river (i) at the points of entry, or (ii) within a distance of 600 yards therefrom; and the House being of opinion that so long as that result is maintained the operations of the defendants are not in contravention of the requirements of the Public Health Act, 1875, and the defendants undertaking that these results shall be maintained in future, set aside the judgment of Nov. 21, 1907, so far as the same granted an injunction, with liberty for the plaintiff, in case of any breach of the foregoing undertaking, G to apply for an injunction, and generally as he may be advised."

I think that the order appealed from should be varied accordingly if the respondents are willing to give, and give, the undertaking which I suggest. If an application were made in case of breach of the undertaking, the court could consider and deal with the matter without the delay of a fresh action. If, however, H the respondents are unwilling to give the undertaking, it seems to me that the only alternative is to allow the injunction to continue and to restore the order granting it.

LORD ROBSON.—It is not disputed that in this case the Attorney-General properly took proceedings against the respondents and that at the date of the injunction granted by KEKEWICH, J., the wrongs complained of by the relators I were in operation, so that there was substantial ground for the injunction, but the circumstances were of a very exceptional character, and I have come to the conclusion that the Court of Appeal were, on the whole, justified in the course which they took. They gave the respondents further time in which to complete new works with the view of removing the grounds of complaint; they then heard evidence led by the parties as to the practical sufficiency of those works; that evidence being contradictory, they decided to avail themselves of expert assistance in coming to a conclusion upon it, and, being satisfied by means of such assistance that the grounds of complaint no longer existed, they discharged the injunction.

The appellant says (i) that the Court of Appeal had no jurisdiction to discharge

an injunction properly granted by the court of first instance; (ii) that the form of reference to the expert and the procedure adopted thereunder were not within the jurisdiction of the court without the consent of the relators, and that there was no such consent; (iii) that the court were wrong in refusing to let their expert's report be made the subject of further contentious affidavits; and (iv) that the additional time granted to the sewage authority was upon the express condition or understanding come to by the parties in the presence and with the approval of the court that the injunction should in any event stand to a certain agreed extent —viz., as to the dry-weather flow.

First, as to the jurisdiction of the court to discharge on appeal an injunction originally granted on good grounds by the court below. By ss. 19 and 23 of the Supreme Court of Judicature Act, 1873, the Court of Appeal has all the power, authority, and jurisdiction of the High Court of Justice, to be exercised according to the rules or orders of the court made in pursuance of the Act. Under Ord. 58, rr. 1 and 4, an appeal to the Court of Appeal is by way of re-hearing, and, in dealing with questions before it, the court has full discretionary powers to receive further evidence even as to matters which have occurred after the decision appealed from, if upon special grounds it thinks such evidence material to be considered. It may then make any order which ought to have been made, and may make also such further order as the case may require. The Court of Appeal in the present case had, therefore, jurisdiction to do whatever might have been done, and in its opinion ought to have been done, by KEKEWICH, J. If the better course would have been for the learned judge to postpone his decision as to the granting of an injunction until the new scheme of works then in progress and specially designed to remedy the statutory offence complained of had been finished and fairly tested, the same course was equally open to the Court of Appeal on the re-hearing. If KEKEWICH, J., had thus postponed his decision he might have exercised his discretion as to the grant or refusal of an injunction on a much later and more more material state of things than that which existed at the time of his judgment. The Court of Appeal could, therefore, do the same thing, and that is the course which they in fact adopted. They satisfied themselves that during the postponement which they had granted the need for the injunction had gone, and they exercised their discretion in reference to affairs as they stood when they came finally to decide the case. Unless they departed in some way from the prescribed procedure, there has, therefore, been no excess of jurisdiction.

The first hearing of the appeal was on July 13, 1908. At that time the view of the court was that, though the respondents, the Birmingham Sewage Authority, might have so far improved their works as to deal efficiently with the normal or dry-weather flow of sewage effluent into the river, yet an unusual fall of rain water, or storm water as it was called, brought about a degree of pollution of the river which amounted to a breach of the statute, so that the injunction in general form could scarcely be resisted. Holding that view, the court itself suggested that the appeal might stand over for six months on the sewage authority undertaking to proceed with the new works then in hand which would enable them to deal with the storm-water flow. To this the relators assented, and the Master of the Rolls added that KEKEWICH, J., was right in the injunction which he had granted, and that it had now become a question of storm water only. On Jan. 12, 1909, the case was again before the Court of Appeal, and counsel for the respondents admitted that, as to the dry-weather flow, they worked under the injunction, and desired only to be protected against sequestration in respect of anything beyond it—that is to say, the storm-water flow. Great works involving an immense expenditure were then being carried out by the sewage authority, but they were still incomplete, and further time was granted to the respondents. The Master of the Rolls then told the relators that the court was

> "not disposed at present to deprive you of the pressure which an injunction puts on the defendants."

A He added that

> "defendants must submit to the injunction until they satisfy us or some other tribunal that they have substantially fulfilled its requirements. [Counsel for the Board] does not ask that the injunction should be discharged now. Of course he could not. In any point of view we will not deprive you of the protection of the injunction."

B

The works were afterwards finished, and then began the war of affidavits as to their sufficiency. On June 11, 1909, the case came before the court on those affidavits, and counsel for the Board then asked that the injunction should be forthwith discharged. The court did not assent to that application. There was a question of fact to be decided on the affidavits, and the court thought it was "a matter to C send down an expert about." The Master of the Rolls said that they were entitled, whether the parties consented or not, to send an expert down, and he added:

> "I think with justice that it would be a reasonable thing for these public bodies to facilitate that course."

Counsel for the appellant, without consenting to an order being made, accepted D the view, which I think correct, that his consent was not necessary; but a question arises whether, when once the court had intimated its intention of making an order for inquiry and report, the relators did or did not agree to the procedure to be adopted on the inquiry.

Under s. 13 of the Arbitration Act, 1889, the court has power, subject to rules of court and to any right to have particular cases tried by a jury, to refer any E question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to a special referee. Under s. 14 of the same Act it may in certain cases (which might include the present case) order any question of fact to be tried before a special referee. By Ord. 36, r. 55c:

> "the provisions of rr. 48 to 55 of Ord. 36 and of r. 55b shall apply where any cause or matter, or any question or issue of fact therein, is referred to an F officer of the court or to a special referee or arbitrator."

There is no doubt as to the application of the strictly judicial procedure prescribed in these rules to s. 14 of the Arbitration Act, 1889, which deals only with questions of fact referred for trial; but when the rules come to be considered it is not so clear that they apply any such procedure to a reference for inquiry or report under s. 13, or that they affect that section at all, except where it is expressly mentioned. G It is, however, unnecessary to discuss that question, and I express no opinion upon it, seeing that, in my view, the parties expressly arranged the procedure adopted on the inquiry as being a much more prompt, convenient, and effective course than that which, it is now contended by the counsel for the appellant, ought to have been followed. In fact both parties very sensibly acted on the suggestion H of the learned Master of the Rolls that as bodies acting in the public interest they should facilitate the operations of the expert. The appellant certainly did not want the reference to proceed as a new judicial investigation with counsel and witnesses. So far from demanding that, they themselves suggested a form of reference which they thought would meet the views of the court. They were only anxious that the proposed expert should be an engineer instead of a chemist, and secured the I insertion in the order of reference of a provision that Sir William Ramsay should, on his first visit at least, be accompanied by the engineers on both sides to furnish him with information. In their letter sending the proposed form they also said that "any further visits which the expert may think necessary he may pay with or without notice and at any hour that he may select and accompanied by any assistants whom he may require." No demand or suggestion was ever made by the appellant that he should hear witnesses or proceed otherwise than in the way in which he did. Under these circumstances, I think that it is not open to the appellant to complain that the reference was conducted in a way which the Court

of Appeal could not have directed without the consent of the parties. So far as the mode of procedure was concerned, the Court of Appeal had the consent of the parties, and the appeal on this head therefore fails. Sir William Ramsay's report was in favour of the respondents. It was strenuously contested by the appellant, but it was, as might be expected, an able, careful, and conclusive report, and the Court of Appeal were well justified in relying on it for the purpose for which it was obtained—viz., to enable them to decide on the conflict of the affidavit evidence which was before them. It would have been entirely contrary to the object and agreed character of the reference if the report had been treated merely as the starting-point for more contentious affidavits.

As to the alleged understanding to the effect that the injunction should stand at least as to the dry-weather flow, there was, I think, nothing more than an expression of opinion by the court at a certain stage of the case that the injunction was well founded to that extent and should stand accordingly. The appellant says that it was on that footing alone that they assented to the further time granted by the Court of Appeal to the respondents for the completion of their works. That is putting their contention much too high. The extension of time was suggested by the court; it was most properly given; it ought, in my opinion, to have been given, and I should think that it would have been given whether the relators assented or not. The sewage authority in the performance of its public duty had already spent vast sums in honestly trying to meet the complaints which the relators in the performance of their public duty were as honestly making; they were then undertaking a novel and ingenious scheme involving a further enormous expenditure of public money with the same object, and, in such circumstances, they were entitled to all the help and consideration which the court in its judicial discretion felt able to give them. Accordingly, when Sir William Ramsay certified, to the satisfaction of the court, the success of their efforts, the court was justified in reconsidering its interlocutory expressions of opinion, and in deciding the question of the injunction according to the circumstances existing at the date of their judgment. The interests of the relators in regard to costs, both before KEKEWICH, J., and in the Court of Appeal, were, of course, protected, and if hereafter it should prove that, notwithstanding the existence of the new works, breaches of the statute in relation to this stream continue to take place, the relators will be in no way prejudiced so far as future proceedings are concerned.

It has been argued by the appellant that, as this was an action by the Attorney-General, the court was bound, on a breach of the statute being shown, to grant an injunction, and, in truth, possessed no discretion in the matter. If that proposition means that in cases where the Attorney-General is concerned the court is not entitled to allow a reasonable time within which to set the matter right, and, on its being set right, to refuse the injunction, I think that it goes much too far. It is sufficient to say that no authority to any such effect has been cited to your Lordships, and it can scarcely be supported on principle.

LORD GORELL has suggested a new form of order, which agrees with the Court of Appeal in discharging the injunction and affirms the opinion of Sir William Ramsay, to the effect that the respondents are not now acting in contravention of the Public Health Act, 1875. It goes on to exact or invite an undertaking from the respondents that the existing results as described by Sir William Ramsay shall be maintained. I concur in this form of order. The respondents were not asked in the court below to give any stronger form of undertaking than they gave there, but there seems no substantial reason why they should object to the form now proposed which is in accord with their contentions before the Court of Appeal.

THE LORD CHANCELLOR.—The practical result, I think, will be that the parties will have furnished to them the order proposed by LORD GORELL, and, if they want to make any representation, they will be able to make their representation in regard to the form of the order. Then there is also a question to be considered as to whether the respondents are prepared to give the undertaking in

question; but they will be able to discuss that and lay their views before the House before we give the final decision. The parties having agreed to an order in the form proposed by LORD GORELL, and the respondents having given an undertaking:

Decision of Court of Appeal affirmed with variation.

Solicitors: *Braikenridge & Edwards*, for *Nevill & Matthews*, Tamworth; *Sharpe, Pritchard & Co.*, for *E. V. Hiley*, Birmingham.

[*Reported by* C. F. DUNCAN, E. A. SCRATCHLEY *and* C. E. MALDEN, ESQS., *Barristers-at-Law.*]

Re THOMAS. SUTTON, CARDEN & CO., LTD. *v.* THOMAS

[COURT OF APPEAL (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), June 4, 5, 1912]

[Reported [1912] 2 Ch. 348; 81 L.J.Ch. 603; 106 L.T. 996; 56 Sol. Jo. 571]

Contempt of Court—Attachment—Attachment of executor of deceased debtor—Failure to obey personal court order to pay certified debt—"Trustee or person acting in fiduciary capacity"—Debtors Act, 1869 (32 & 33 Vict., c. 62), s. 4 (3).

Where the sole creditor of a deceased debtor obtains a judgment for the payment of his certified debt at the conclusion of an administration action and that judgment is to be satisfied by a personal order against the debtor's executor, the fiduciary relationship which hitherto existed between the creditor and the executor is determined as there is no such relationship between a judgment creditor and a judgment debtor. The creditor is no longer entitled to pursue any remedy the right to which is dependent upon the continuance of such a relationship, and, therefore, he may not obtain an order under s. 4 (3) of the Debtors Act, 1869, for the payment into court by a trustee or person acting in a fiduciary capacity of money in his possession or under his control. Further, the creditor cannot attach such person under the punitive jurisdiction conferred on the court by that section.

Notes. As to trustee or person acting in a fiduciary capacity, see 5 HALSBURY'S LAWS (3rd Edn.) 1099 et seq.; and for cases see 5 DIGEST (Repl.) 1099–1101. For Debtors Act, 1869, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 293.

Case referred to:

(1) *Re Bourne, Davey* v. *Bourne*, [1906] 1 Ch. 697; 75 L.J.Ch. 474; 94 L.T. 750; 22 T.L.R. 417, C.A.; 5 Digest (Repl.) 1101, *8892*.

Also referred to in argument:

Re Firmin, London and County Banking Co., Ltd. v. *Firmin* (1887), 57 L.T. 45; 5 Digest (Repl.) 1099, *8869*.

Taaffe v. *Fitzsimons* (1894), 1 I.R. 63.

Re Smith, Hands v. *Andrews*, [1893] 2 Ch. 1; 62 L.J.Ch. 336; 68 L.T. 337; 57 J.P. 516; 41 W.R. 289; 9 T.L.R. 238; 37 Sol. Jo. 247; 2 R. 360, C.A.; 5 Digest (Repl.) 1098, *8864*.

Marris v. *Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest (Repl.) 1100, *8875*.

Lee v. *Park* (1836), 1 Keen, 714; 6 L.J.Ch. 93; 48 E.R. 482; 24 Digest (Repl.) 864, *8589*.

Clarke v. *Earl Ormonde* (1821), Jac. 108; 37 E.R. 791, L.C.; 23 Digest (Repl.) 481, *5483*. A

Re Womersley, Etheridge v. *Womersley* (1885), 29 Ch.D. 557; 54 L.J.Ch. 965; 53 L.T. 260; 33 W.R. 935; 24 Digest (Repl.) 865, *8597*.

Appeal from a decision of JOYCE, J., in favour of the plaintiffs.

By his will, dated Dec. 4, 1906, Henry Thomas (hereinafter called "the testator") B appointed the defendant, Charles Thomas, his executor and trustee, and, after making various bequests, devised all his real estate and bequeathed all the residue of his personal estate, subject to the payment of his funeral and testamentary expenses and debts (if any) and the legacies bequeathed by his will or any codicil thereto and all death duties, unto and to the use of the defendant for his absolute use and benefit. The testator died on Nov. 26, 1909, without having revoked C or altered his will, which was, on Jan. 4, 1910, duly proved by the defendant. On Nov. 29, 1910, the plaintiffs, Sutton, Carden & Co., Ltd., who were creditors of the testator, commenced this action by an originating summons, and by an order made in this action and dated Feb. 13, 1911, full administration of the testator's estate was directed in the usual form. But none of the accounts and inquiries thereby directed, except the account of what was due to the plaintiffs and all other the D creditors of the testator, were to be proceeded with without the leave of the judge, and such account was to be limited to the plaintiff's claim. On April 5, 1911, it was duly certified by the master that the debt due to the plaintiffs at the date of the certificate was £2,155 8s. 1d.

By an order made in this action and dated May 9, 1911, it was ordered that the defendant should forthwith pay to the plaintiffs the sum of £2,155 8s. 1d. together E with interest thereon as mentioned in the order, and their costs of this action. Execution was levied on the goods of the defendant under that order on May 29, 1911, but nothing was recovered, and on June 1, 1911, he filed his petition in bankruptcy, upon which a receiving order was on the same day made. He was adjudicated bankrupt, and had not made any application for discharge.

By an order made in this action and dated June 30, 1911, a receiver of the F testator's estate was appointed, and it was ordered that the accounts and inquiries directed by the order of Feb. 13, 1911, should be proceeded with except so far as the first inquiry had been already answered by the master's certificate. The receiver was under that order in receipt of the interest payable under a mortgage for £1,400 given to the testator and dated June 29, 1903. That mortgage was for a fixed term of ten years and could not be called in until June 24, 1913. G

On July 18, 1911, the public examination of the defendant in his bankruptcy took place when he was examined by the official receiver and stated that he was aware of a letter which had been written by his solicitors to the plaintiffs dated Feb. 11, 1910, to the effect that the defendant was prepared to settle their claim of £1,500 by the end of September. The plaintiffs allowed the payment of the £1,500, the amount at which their debt had thus been conditionally agreed, to stand H over from February to September, 1910, in order that the defendant could realise certain trust securities.

By an order dated June 30, 1911, the defendant was ordered to attend and be orally examined before one of the examiners of the court as to whether any and what debts were owing to him and whether he had any and what other property or means of satisfying the order of May 9, 1911. Accordingly on July 24, 1911, I the defendant attended before the examiner appointed under the order and was examined. He stated that in September, 1910, when the mortgage of £1,500 was paid off, he knew that the plaintiffs were creditors of the testator, that he received the sum personally and banked it and drew it out of the bank again within a day or two.

By an order made in this action and dated Oct. 25, 1911, the defendant was directed within four days to lodge, inter alia, an account of the testator's personal estate come to the hands of the defendant. The defendant lodged in chambers an

account, together with an affidavit sworn on Dec. 1, 1911, verifying such account. Such account showed that he had received the sum of £3,137 17s. 3d. on account of the testator's personal estate and had paid the sum of £2,166 12s. 11d. on the same account, leaving a balance of £971 4s. 4d. in his hands. It appeared from the defendant's affidavit that the only property forming part of the testator's personal estate other than that referred to in the before-mentioned account were the household goods of the testator worth about £30 in the possession of one Mary Ann Thomas and the mortgage debt of £1,500 above referred to. There were no creditors of the testator other than the plaintiffs.

By an order in this action dated April 10, 1912, it appearing that the defendant had in his hands as executor of the will of the testator the sum of £971 4s. 4d., it was ordered that the defendant should on or before April 24, 1912, or subsequently within four days after service of the order, lodge the sum of £971 4s. 4d. into court as directed in the schedule to the order. The defendant had however failed to pay into court pursuant to such order the sum of £971 4s. 4d. or any part thereof. No part of the sum of £2,155 8s. 1d. had been paid to or received by or on behalf of the plaintiffs and the whole of that sum was still due and owing to them.

The plaintiffs then applied to JOYCE, J., and on May 10, 1912, it appearing to the satisfaction of the court that the defendant had made default in payment of the sum of £971 4s. 4d. as directed by the order of April 10, 1912, and that such default was a default made by a trustee or person acting in fiduciary capacity, and ordered to pay a sum in his possession or under his control within the meaning of the Debtors Act, 1869, an order was made that the plaintiffs should be at liberty to issue a writ or writs of attachment against the defendant for his contempt in not having lodged the said sum in court pursuant to the order. From that order the defendant now appealed.

Norton, *K.C.*, and *J. W. Manning* for the defendant.
Cozens-Hardy for the plaintiffs.

COZENS-HARDY, M.R.—This appeal raises an important and I think a novel point, and although for some reasons it might have been desirable that we should have postponed our judgment, I think that, as we have all arrived at a clear conclusion upon one point, which is sufficient to dispose of this appeal, it is expedient that we should at once give judgment.

The plaintiffs, who instituted this action on behalf of themselves and all other creditors of the testator Henry Thomas, are admittedly such creditors. That is put beyond all doubt, because at an early stage of this action the court made an order and directed that nothing should be done under the rest of the order in the first instance except to ascertain whether anything, and what, was due to the plaintiffs. That was ascertained by the master's certificate, dated April 5, 1911, which found that there was a sum altogether for principal and interest of £2,155 8s. 1d. due to the plaintiffs. Subsequently a further inquiry as to other creditors was submitted, and although the certificate has not been actually made, it has been stated—and I do not doubt correctly—that there are no other creditors of the testator. All the others have been satisfied. I am confirmed in that view because, in the account which the executor himself has delivered in this estate, there is no suggestion of any other creditors. I proceed, therefore, to deal with this case on the footing that there is no other creditor entitled under the administration order. That certificate having been obtained, immediately afterwards—that is to say, in the following month—this order was taken by the plaintiffs in chambers on May 9, 1911:

> "Upon the application of the plaintiffs by summons dated April 27, 1911, and upon hearing counsel for the applicants, and upon reading an affidavit . . . of service of this summons on the defendant, the order dated Feb. 13, 1911, and the master's certificate dated April 15, 1911, it is ordered that the defendant do forthwith pay to the plaintiffs £2,155 8s. 1d. by the master's said certificate

certified to be due from him together with interest on £1,638 at 4 per centum per annum from April 5, 1911, and also their costs of this action to be taxed by the taxing master."

So that there is a personal judgment against the defendant for principal and interest, and also for the costs of the action. That order was made, I think, upon the statement that the defendant, who was the sole executor and also the residuary legatee under the will, had received assets which were sufficient to pay the debt, and that he was personally liable de bonis propriis, to use the old-fashioned language. It was a personal judgment against the defendant differing in no respect from a judgment in an action which might have been brought in the King's Bench Division by the plaintiffs as creditors against the defendant as executor, who admitted that he had assets of the testator in his hands. That being so what happened? The plaintiffs seek now, having obtained that order, to say that the defendant is in a fiduciary character as a trustee, and that he is within the third exception to s. 4 of the Debtors Act, 1869. The plaintiffs, therefore, seek to obtain an order against him in that character, and to follow it up by attachment. That is achieved by the two subsequent orders, one dated April 10, 1912, in which there is this statement:

"And it appearing that the defendant has in his hands as executor of the will of the testator Henry Thomas, the sum of £971 4s. 4d., it is ordered that the defendant, Charles Thomas, do on or before April 24, 1912, or subsequently within four days after service of this order lodge the said £971 4s. 4d. into court as directed in the schedule hereto."

The sum of £971 4s. 4d. is the balance appearing due on account of the executor sworn to in his affidavit. That order was not complied with, and not having been complied with, there was a subsequent order of May 10, 1912, directing the attachment of the defendant.

The point first to be considered is this. The plaintiffs got judgment against the defendant upon which they could issue execution, and they did issue execution, although there was nulla bona. The defendant has been adjudicated bankrupt. He has caused himself to be made bankrupt on his own petition immediately after, or practically immediately after the order for payment. The plaintiffs proved in that bankruptcy. Under these circumstances is it competent for the plaintiffs to allege that the fiduciary relation, which undoubtedly did originally exist between the plaintiffs and the defendant in his character of executor, still exists, after the personal judgment, after the bankruptcy, and after the proof?

It must be remembered that the jurisdiction under the Debtors Act, 1869, for attachment is of a punitive character. It is not a process of execution at all, it is simply a statutory power or right to punish a man for that which the court regards as, and which undoubtedly is, dishonesty. The object of the third exception to s. 4 of the Act is to punish him if he does not discharge the debt which is still due from him in a fiduciary capacity. Can that be said in the present case? In my opinion it cannot. The plaintiffs by taking the personal judgment for the debt and interest, and the costs of this action against the defendant, it seems to me, caused the fiduciary relation as between these parties to come to an end. As against the defendant, the plaintiffs have elected to take, and they have taken that which terminated the relation, for there is no fiduciary relation between a judgment creditor and a judgment debtor. From that point of view, there being no authority directing us upon the subject, I decline to say that the circumstances of the present case are such that any order ought to have been made by the learned judge in the court below on the footing that the defendant's fiduciary relation continued towards the plaintiffs. Still less do I say that any order ought to have been made for attachment. We are not troubled here with the question of there being other creditors of the testator who might have had an interest in any moneys which might have got into court under the order for payment. That state of facts does not arise here. I desire to say nothing whatever as to what might have

been the result if there had been other creditors who could have claimed the moneys when thus brought into court. But the plaintiffs, being the only creditors, and having got personal judgment against the defendant for principal and interest, and the costs of the action, cannot, in my opinion, invoke what is really the punitive jurisdiction of the court, on the ground that that personal judgment still left untouched the fiduciary relation between the plaintiffs and the defendant. On that short ground I think that the two orders made by the learned judge in the court below ought to be discharged and the appeal allowed.

FARWELL, L.J.—I am of the same opinion and for the same reasons. We are asked to exercise the punitive jurisdiction of the court under the Debtors Act, 1869. It is very important to see that the liberty of the subject is not interfered with unless it is quite clear that the court has jurisdiction. I have no doubt, on the authority of the cases in this court which have been referred to, that an executor is in a fiduciary relation. The case of *Re Bourne*, *Davey* v. *Bourne* (1) I think is conclusive on that point. But the question here resolves itself into this: There is really only one firm of creditors of the testator. They have dealt with themselves as the only creditors. Although they took a full administration order they had all the inquiries stayed except as to their own debt. They obtained a certificate as to their own debt, and then got a personal order for the payment of it. It is exactly as if they had sued the executor in person at common law, and had got a judgment de bonis propriis. It seems to me that, after that, it is impossible for the plaintiffs to fall back upon the position of the debtor executor—whom they have chosen to deal with as their personal debtor—and say that he is executor for the purposes of asking us to put in force the quasi-criminal jurisdiction. I agree with the Master of the Rolls in thinking that we ought not to decide differently whatever we may think of the conduct of the defendant. As to that I express no opinion at all, because at present, as counsel for the defendant has said, the examination has not been properly completed. I say nothing, therefore, about that. But, whatever we might otherwise have thought, I hold that the learned judge in the court below had no jurisdiction to make the order for attachment.

KENNEDY, L.J.—I am of the same opinion. This is a novel, and, I quite agree, after the interesting argument that we have heard, that it is a difficult question which one has to settle for the first time. But I have come clearly to the same opinion in the result that the Master of the Rolls and FARWELL, L.J., have expressed.

We have only got to deal with one point. Is the relation between these parties such that, at the time of the application which has been made to JOYCE, J., the defendant ought to have been brought under the punitive jurisdiction which can be exercised under s. 4 of the Debtors Act, 1869? In other words, was he a person who was not a mere debtor, but was he a person who was in the position of a trustee, or sued in some other fiduciary relation? In my opinion he was not. The position of the executor was originally, as has been already said, so far as this court is concerned to-day, to be treated as one which in regard to creditors such as the present respondents was the position of a trustee. He was liable as a trustee—that is to say, a person who could not simply be sued in respect of certain strictly-speaking trust money, such as, for example, legacies or distributive shares payable out of the estate of the deceased, which could not, of course, be recovered in an action against him as debts. He could only be made liable at law in respect of such claims if he in some form or other admitted that he had received the money, and held it as the money of the cestui que trust. I say I assume that it is decided that as regards creditors also the executor might be treated as a trustee. But he ceased, in my opinion, to be a person who could be so treated by the present respondents so far as regards the infliction of this punitive treatment because they had taken the steps which have been already set out chronologically by the Master of the Rolls. They have chosen to say, "There is a debt due to us. We, the

creditors, sue you." And they did take proceeding and obtained the order and issued execution, and after that, after the relation has been created of judgment creditors and a judgment debtor, I can find no authority for saying that you can at the same time say: "You are the trustee for me of that money," or "You are in a fiduciary position in respect of that money. You have failed to pay, and therefore, as you are in that position, I can obtain justly from the court the special treatment and punishment of a punitive nature which only a person in that relation to me can be subjected to." Directly the matter had come before the tribunal, it appears that he is not a person in the position of a trustee, but is a person who is a judgment debtor, and a judgment debtor is not a person in the position of trustee or in a fiduciary relation to the creditors in question.

For myself I think that these proceedings of a semi-criminal nature, with the serious consequences that may follow if the money is not obtained from somewhere, ought to be very carefully watched. There are courts in which people who are fraudulent can be dealt with after proper trial before a jury. This kind of proceeding is sought to be made available I may add, in this particular case, not only against the defendant in his position of a judgment debtor, because it is an order under which the proceedings have been taken, for he is also a person who is a bankrupt and in whose bankruptcy the creditors have proved for their judgment debt. And I should look with special care to see that the law was technically correct which I was enforcing under those circumstances where one sees quite clearly that the defendant had, as the very proof shows, in the bankruptcy been treated by the creditors themselves as a man who has no means to pay, and who cannot pay what he ought to pay. I think myself that there is no such relation existing as would in a case of this kind entitle the jurisdiction to be applied.

Appeal allowed.

Solicitors: *Paterson, Candler & Sykes*; *Layton's.*

[Reported by E. A. Scratchley, Esq., *Barrister-at-Law.*]

WALFORD *v.* WALFORD

[House of Lords (Viscount Haldane, L.C., the Earl of Halsbury, Lord Ashbourne, Lord Macnaghten and Lord Atkinson), June 20, 21, 1912]

[Reported [1912] A.C. 658; 81 L.J.Ch. 828; 107 L.T. 657; 56 Sol. Jo. 631]

Will—Demonstrative legacy—Payment out of reversionary fund—Interest—From what date to be calculated.

Where no time is fixed for the payment of a legacy it bears interest from the end of a year after the death of a testator, unless a contrary intention appears in the will, even though it is directed to be paid out of a particular fund which does not fall in until after a longer interval.

The testator by his will bequeathed £10,000 to his sister to be paid out of the estate and effects inherited by him from his mother, and gave the residue of what was so inherited and all his own residue to the heir or heirs succeeding to the estate of his father under his father's will. The testator died in 1903. All property to which he was entitled under his mother's will was in reversion expectant on the life interest of his father, who died in 1910.

Held: the legacy of £10,000 was a demonstrative legacy and there was nothing in the will directing that it was not to be paid until the reversionary

A fund fell in; there was, therefore, nothing to displace the ordinary principle of administration; and interest on the legacy ran from the expiration of one year from the testator's death in 1903.

Lord v. *Lord* (1) (1867), 2 Ch. App. 782, approved and followed.

Per VISCOUNT HALDANE, L.C.: In . . . cases of wills of personal estate, it is, B in nearly all cases, useless to try to compare the will under consideration with some other will upon which there has been a decision. The will in each case must be read as a whole, and unless the words are substantially identical, very little light can be got from a decision on some other will, except so far as that decision lays down some. . . general principle of construction.

Note. As to interest on legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 327–328, C and for cases see 23 DIGEST (Repl.) 410 et seq.

Cases referred to:

(1) *Lord* v. *Lord* (1867), 2 Ch. App. 782; 36 L.J.Ch. 533; 17 L.T. 105; 15 W.R. 1118, L.JJ.; 23 Digest (Repl.) 400, *4716.*

(2) *Earle* v. *Bellingham* (*No. 2*) (1857), 24 Beav. 448; 27 L.J.Ch. 545; 30 L.T.O.S. 162; 3 Jur.N.S. 1237; 6 W.R. 45; 53 E.R. 430; 23 Digest (Repl.) 413, *4842.* D

(3) *Wood* v. *Penoyre* (1807), 13 Ves. 325; 33 E.R. 316; 23 Digest (Repl.) 411, *4823.*

(4) *Re Gyles, Gibbon* v. *Chaytor* (1907), 1 I.R. 65; 23 Digest (Repl.) 420, **1085.*

Appeal from a decision of the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.) reported [1912] 1 Ch. 219, reversing a judgment E of JOYCE, J., in favour of the appellants, who were the residuary legatees under the will of Colonel Walford, who died in 1903.

The facts of the case were not in dispute.

Buckmaster, K.C., and *J. E. Harman* appeared for the appellants.
G. Cave, K.C., and *W. M. Cann* for the respondents.

F **VISCOUNT HALDANE, L.C.**—I cannot say that I entertain much doubt about this case. The appellants are the persons, who, in the events which have happened, are entitled to the residuary estate of a certain Colonel Walford. The respondent is a legatee under Colonel Walford's will. The question in controversy is whether the legacy which was given to the legatee carries interest as from a year after the death of the testator, or whether the right to interest upon it is postponed G until the falling in of a reversionary fund out of which payment of the legacy was directed.

The facts of the case are shortly these: Mrs. Walford, the mother of the testator, died in 1900. At her death she had a testamentary power of appointment, exercisable in favour of her children by her husband, Mr. Walford, under a marriage settlement. That settlement comprised certain property of the value of some H £22,000 in which she had a first life interest under the settlement, and her husband had a subsequent life interest. By her will, which was made in 1891, she referred to the settlement, and then, in the exercise of her power of appointment, gave and appointed her estate under the settlement to her son, Colonel Walford, the testator, absolutely, on the decease of her husband. Colonel Walford thus took a reversionary interest in the corpus of the £22,000. She then gave and bequeathed I all her residue belonging to her for her separate use to her husband for life with remainder as he should by deed or will appoint, and subject thereunto between her children, Colonel Walford and his sister, the legatee, the respondent in this case. Colonel Walford survived his mother, and died in 1903. He was survived by his father, the tenant for life of the settled fund. The father did not die till 1910. Colonel Walford by his will, which was made abroad, gave to his sister, the respondent,

"the sum of £10,000 sterling as her sole and absolute property, to be paid [and these are the words on which the question of construction is raised] out of the

estate and effects inherited by me from my mother in terms of her last will and testament dated Feb. 20, 1891.... And as regards the residue of the estate and effects of my said mother so to be inherited by me in terms of her aforesaid will, and of all my estate and effects at present in my possession."

these he gave to whosoever should be the heir or heirs succeeding to the estate of his father under his father's will; and he appointed his father executor.

The question is shortly this: £10,000 under Colonel Walford's will are bequeathed to his sister, the respondent, to be paid out of the estate and effects inherited by him from his mother. Then he gives the residue of what is so inherited from his mother under her will, and all his own residue to, in the events which have happened, the persons who are the appellants in this case. The question is whether there is in this will such a direction as debars the respondent from claiming interest, now that the fund has fallen in on the death of the father, as payable to her as from a year after the death of the testator.

The principles which govern cases of this kind are fairly well settled. Legacies are of three kinds: there is the specific legacy, which is a specific res secured under the testator's will on his death; and, of course, it does not abate if the rest of the assets are insufficient for the payment of the general legacies; but it has this disadvantage, that if the particular res which is the subject of the specific legacy disappears in the meantime, then the legatee gets nothing. The class of legacy at the other extreme is a general legacy which comes out of the residue, and abates if the residue is insufficient, but, primâ facie, under a rule of administration of the court, carries interest as from a year after the testator's death. There is an intermediate class of legacy—namely, a demonstrative legacy, which is simply a general legacy, with the quality attached to it that it is directed to be paid out of a specific fund, and if there is a shortage of assets, and that fund remains, is paid out of that fund without abating. On the other hand, if the fund does disappear, then it has this advantage over a specific legacy, that it is still payable, in virtue of its quality of a general legacy, out of the testator's residue along with other general legacies. The consequence is that if the trust fund disappeared in this case, Miss Walford's legacy would have became payable out of such residue as her brother left behind him along with other legacies which he might have given. Now, it seems to me that in order to make out that the legacy of £10,000 to Miss Walford, which her brother's will directed to be paid out of the reversionary fund, is to be postponed, so far as the title to interest is concerned, until the reversionary fund falls in, you have to make out that there is, expressly or by implication, a direction that the legacy is not to be payable, that there is to be no right to payment, until a certain time, and therefore that the right to interest is postponed.

The principle of law is laid down by Lord Cairns in a passage in his judgment in *Lord* v. *Lord* (1) which is quoted by Cozens-Hardy, M.R., in his judgment in this case. Lord Cairns says (2 Ch. App. at p. 789):

"The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval."

The question, therefore, is whether, upon the words in controversy in this case, the legacy is not directed to be paid until a future date. The burden appears to me to be upon those who assert that it is so to make it out, because otherwise the general rule applies, as pointed out in *Lord* v. *Lord* (1), that the right to the payment of the money arises at once, although it is directed to be paid out of a particular fund which will not fall in until afterwards. It may be that in this case, if the testator had had his attention called to the point, he would have expressed himself differently, and would have said, "I do not intend my sister

A to have the reversionary legacy, or to claim interest upon it, until the falling in of the reversionary fund." That may be so; but, in my opinion, courts of justice are precluded from entering into such speculations. They are confined, and rightly confined, to applying common sense to the words which the testator has used in his will read as a whole. If within that you can spell out an intention such as I have referred to, well and good. If not, you must not supply it by any con-
B jectures as to what the testator would probably have said if his attention had been called to the point on which it was desirable that he should say something.

There is another general observation which I wish to make. In cases of this kind, cases of wills of personal estate, it is, in nearly all cases, useless to try to compare the will under consideration with some other will upon which there has been a decision. The will in each case must be read as a whole, and unless the
C words are substantially identical, very little light can be got from a decision on some other will, except so far as that decision lays down some such general principle of construction of wide application as was laid down in *Lord* v. *Lord* (1). Therefore I do not pause to make observations on *Earle* v. *Bellingham* (*No. 2*) (2) which was decided one way, nor on the case of *Wood* v. *Penoyre* (3) which was decided another way, nor in the Irish case of *Re Gyles*, *Gibbon* v. *Chaytor* (4),
D because those cases were decided on wills, the wording of which was very different from the wording here. What I do look at is the language which the testator has used; and the question which I put to myself is, is there to be found here a direction that the legacy is not to be paid till the fund falls in, which displaces what would be the ordinary principle of administration? I am unable to find such a direction; and, therefore, I come to the conclusion that the view taken by
E JOYCE, J., was wrong, and the view taken by the Court of Appeal was right. I agree with the judgments delivered by COZENS-HARDY, M.R., and FARWELL, L.J., and I move your Lordships that this appeal be dismissed with costs.

THE EARL OF HALSBURY and **LORD ASHBOURNE** concurred.

F **LORD MACNAGHTEN.**—I agree with the learned counsel for the appellants that the question in this case is not to be solved by simply styling this bequest a demonstrative legacy. I think, having regard to the circumstances of the case, the relationship of the parties, and the language of the mother's will, which is pointedly referred to in the testator's will, and also to the testator's own language, that it is more probable than not that the testator intended that his sister should
G have no claim for payment until the death of the father. At the same time I must say that if that was his intention he has not made it sufficiently plain to authorise your Lordships to give effect to it in this appeal.

LORD ATKINSON.—I concur. I think that there is not to be found in the will any sufficiently clear expression of an intention that the payment of the legacy should be postponed until the reversionary fund had come into possession.

H *Appeal dismissed.*

Solicitors: *Trotter & Patteson*; *Johnson, Weatherall & Sturt*, for *George Hadfield, Bennett & Carlisle*, Manchester.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

HORTON *v.* MEAD

[KING'S BENCH DIVISION (Lord Alverstone, C.J., Phillimore and Pickford, JJ.), December 13, 1912]

[Reported [1913] 1 K.B. 154; 82 L.J.K.B. 200; 108 L.J. 156; 77 J.P. 129; 23 Cox, C.C. 279]

B

Criminal Law—Soliciting for immoral purposes—Need to prove solicitation reached notice of person solicited—Vagrancy Act, 1898 (61 & 62 *Vict.*, *c.* 39), *s.* 1 (1) (*b*).

In order to convict a male person of the offence of persistently soliciting in a public place for immoral purposes, it is not necessary to prove that the solicitation should reach the mind of the person said to be solicited.

C

The appellant was watched by two police officers for over an hour and a half on a certain night, and during that time he entered public lavatories on several occasions. In the lavatories and also in the street he smiled in the faces of men, pursed his lips, and made gestures with his body, but he did not speak to or touch anybody, nor did he attempt to do so. No complaint was made by anyone as to his conduct, and no evidence was given by anyone alleging that he had been solicited, and there was no evidence that any private person had noticed his alleged solicitations, but two other officers had seen the appellant on many occasions in the same neighbourhood behaving in a similar manner. The appellant was convicted under s. 1 (1) (b), of the Vagrancy Act, 1898, for having in a public place persistently solicited for immoral purposes.

D

E

Held: that, although there was no evidence that the solicitation by the appellant had reached the mind of or been noticed by anybody, there was sufficient evidence to support the conviction.

Notes. The Vagrancy Act, 1898, has been repealed. See now the Sexual Offences Act, 1956. Section 1 (1) (b) of the 1898 Act corresponds to s. 32 of the 1956 Act.

F

Distinguished: *R.* v. *Bentley*, [1923] 1 K.B. 403.

As to soliciting for immoral purposes, see 10 HALSBURY'S LAWS (3rd Edn.) 676; and for cases see 15 DIGEST (Repl.) 899 et seq. For the Sexual Offences Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 215.

Cases referred to:

G

(1) *R.* v. *Fox* (1870) 19 W.R. 109; 14 Digest (Repl.) 121, **483.*

(2) *R.* v. *Krause* (1902), 66 J.P. 121; 18 T.L.R. 238; 14 Digest (Repl.) 120, *839.*

Also referred to in argument:

R. v. *Most* (1881), 7 Q.B.D. 244; 50 L.J.M.C. 113; 44 L.T. 823; 45 J.P. 696; 29 W.R. 758; 14 Cox, C.C. 583, C.C.R.; 14 Digest (Repl.) 121, *840.*

R. v. *McCarthy* (1903), 2 I.R. 146; 14 Digest (Repl.) 121, **483.*

H

Case Stated by the quarter sessions for the county of London.

The Case was stated upon an appeal against a certain conviction dated June 19, 1912, and made by a magistrate of the police courts of the metropolis, sitting at the Marlborough Street Police Court, whereby the appellant was convicted for that he on May 31, 1912, at the parish of St. James, Westminster, in the county of London, did unlawfully persistently solicit for immoral purposes, and was sentenced to ten weeks' imprisonment with hard labour. The appeal was heard on July 12, 1912, at the general and quarter sessions of the peace for the county of London, when the court confirmed the conviction, and dismissed the appeal, subject to the opinion of the court upon the following Case.

I

The appellant was charged under the Vagrancy Act, 1898, s. 1 (1) (b), for that he being a male person did in a public place persistently solicit for immoral purposes. At the hearing of the Case the following facts were either proved or admitted: the appellant was watched by two police officers in plain clothes from

A 11.10 p.m. to 11.50 p.m. and from 12.5 a.m. to 1 a.m. on May 31 and June 1, 1912, respectively. During that period he entered public lavatories on seven occasions. He then walked to Leicester Square Tube Station, where he was arrested. On being arrested and told the charge, he answered: "Oh dear me, this is very annoying." While in the lavatories and also while in the street he smiled in the faces of gentlemen, pursed his lips, and wriggled his body but he did not at any B time during this period speak to anybody or touch anybody, and no complaint was made by anybody as to his conduct.

No evidence was given of any person who alleged that he had been solicited by the appellant and no evidence was given that any private person had noticed the alleged solicitations, but the two officers above mentioned and two other police officers proved that they had seen the appellant on many occasions during the C month of May in the same neighbourhood late at night behaving in a similar manner. On no occasion on the night in question, however, had they seen him speak to or touch anybody or attempt to do so, though on another evening one of the officers saw him in conversation with a man. At the police station the face and lips of the appellant appeared to be artificially reddened, and in the pocket of the appellant was found a powder puff with pink powder upon it. The D appellant gave evidence on oath denying the charge. At the close of the case for the respondent it was contended on behalf of the appellant that the facts above set out were not sufficient in law to substantiate a charge of soliciting under the Vagrancy Act, 1898. The court overruled the contentions of the appellant, and, after hearing the evidence of the appellant and his witnesses, dismissed the appeal. If the court should be of opinion that the quarter sessions were wrong in law E on the facts aforesaid in dismissing the appeal, then the case was to be remitted to the quarter sessions with the opinion or direction of the King's Bench Division thereon. But if the court should be of opinion that the quarter sessions were right in dismissing the appeal, then this appeal was to be dismissed with costs.

The Vagrancy Act, 1898, provided:

F Section 1 (1). "Every male person who . . . (b) in any public place persistently solicits or importunes for immoral purposes, shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

Hemmerde, K.C. (*V. R. M. Gattie* with him), for the appellant.
Travers Humphreys, for the respondent, was not called upon to argue.

G **LORD ALVERSTONE, C.J.**—In this case the appellant was convicted before a metropolitan magistrate under s. 1 (1) (b) of the Vagrancy Act, 1898, and that conviction was affirmed by the quarter sessions. It is found in the case as a fact that while in the lavatories and also while in the street the appellant smiled in the faces of gentlemen, pursed his lips, and wriggled his body, and at the police H station his face and his lips appeared to be artificially reddened and in his pocket was found a powder puff with pink powder upon it, which is not unimportant in a case of this kind. The only suggestion made on his behalf is that inasmuch as there was no evidence that anybody had seen his solicitation, therefore the magistrate could not convict him. I should be sorry to lay down any such rule. No doubt in such cases the magistrate would carefully scrutinise the evidence of I those who were watching men of this class; but to hold that, merely because on the particular occasions the appellant did not succeed in attracting the notice of any persons, there was no evidence on which he could be convicted of solicitation, is an argument which we cannot adopt.

The cases which have been cited of *R.* v. *Fox* (1) and *R.* v. *Krause* (2) are different. The charge in those cases was a charge of soliciting a person to murder another, and the alleged solicitation was contained in a letter addressed to the particular person said to have been solicited. The letter was relied upon as having a particular effect upon the mind of the person to whom it was addressed,

and it was necessary that the receipt of the letter by that person should be proved. I think there was ample evidence in this case to support the conviction, and the appeal must therefore be dismissed.

PHILLIMORE, J.—I am of the same opinion. The point, as I understand it, which is relied upon by the appellant is that there cannot be a conviction for solicitation unless it is proved that the solicitation in some way reached the ears or affected the senses of the person solicited. It is not contended that it must have produced an influence on the mind of the person solicited, but it is said that that person must apprehend the solicitation as a fact. Having regard to the findings in this case, I have some doubt whether that point really arises. The finding that the appellant smiled in the faces of gentlemen seems to me to preclude it. If he had smiled in the face of a blind man, not observing that the man was blind, and that was the only form of solicitation alleged, then it might be that, although there was an intention to solicit, he could not have been convicted of solicitation. On the facts as stated in the case it seems to me that we must necessarily draw the inference that what the appellant did was apprehended by the senses of the persons intended to be solicited. From the fact of his smiling in the face of a person we ought to draw the inference that it was apparent to that person, if he had his eyes open, as we must assume that he had. Therefore it seems to be doubtful whether that point arises. There is an obvious distinction between cases of this kind and cases of intercepted letters of solicitation, which could not in any way have influenced the minds of the persons sought to be solicited.

AVORY.—I agree. The only point, as I understand, before us is whether it is necessary for a conviction under s. 1 (1) (b) of the Vagrancy Act, 1898, that the solicitation should reach the mind of the person said to be solicited. I do not think it is necessary. It is not necessary to consider cases decided under other Acts and other circumstances. Under this Act there was evidence upon which the magistrate and the quarter sessions could convict the appellant, and in such case it is not our duty to inquire whether or not the conviction was right.

Appeal dismissed.

Solicitors: *J. D. Langton & Passmore; Wontner & Sons.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* EVANS AND ANOTHER

[Probate, Divorce and Admiralty Division (Horridge, J.), May 18, 1911]

[Reported [1911] P. 175; 80 L.J.P. 115; 105 L.T. 79]

Probate—Grant—Grant to next-of-kin—Subsequent action to revoke will—Competency.

W. was the next-of-kin of a testator who died in November, 1908. The testator's widow obtained probate of the alleged will of the testator and died on the same day. W. did not join in her application for the grant of probate as he wished to contest the will. Subsequently W.'s solicitors advised him that it was too late to oppose the grant and that in any event he would not be prejudiced by taking out probate. Acting upon this advice, W. took out double probate. W. now wished to contest the will. It was argued by the executrices of the will of the widow, who was a beneficiary under the will of the testator, that W. was estopped from disputing the will, and that he had been guilty of laches.

Held: the question of estoppel did not arise and there was no rule of the probate court which prevented next-of-kin who had taken out probate from subsequently taking proceedings to impeach the will; W. was not barred by his laches as the estate had not been distributed and the position of the parties had not been altered: and as W. had given a satisfactory explanation of the reason which induced him to take out probate, he should be allowed to contest the validity of the will.

In the Goods of Chamberlain (1) (1867), L.R. 1 P. & D. 316, distinguished.

Notes. Referred to: *Re Coghlan*, [1948] 1 All E.R. 367.

As to the grounds for granting or refusing a revocation of a grant, see 16 Halsbury's Laws (3rd Edn.) 273 et seq.; and for cases see 23 Digest (Repl.) 252 et seq.

Cases referred to:

(1) *In the Goods of Chamberlain* (1867), L.R. 1 P. & D. 316; 36 L.J.P. & M. 52; 16 L.T. 97; 31 J.P. 247; 15 W.R. 680; 23 Digest (Repl.) 257, *3143*.

(2) *Mohan* v. *Broughton*, [1900] P. 56; 69 L.J.P. 20; 82 L.T. 29; 48 W.R. 371; 44 Sol. Jo. 210, C.A.; 23 Digest (Repl.) 258, *3147*.

Also referred to in argument.

David v. *Frowd* (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 39 E.R. 657; 24 Digest (Repl.) 856, *8513*.

Sawyer v. *Birchmore* (1837), 2 My. & Cr. 611; 1 Keen, 825; 6 L.J.Ch. 277; 40 E.R. 773, L.C.; 24 Digest (Repl.) 856, *8514*.

Argument on a preliminary point of law as to whether the plaintiff was or was not estopped from taking steps to obtain the revocation of the probate of a certain will under the circumstances hereinafter detailed. The matter came on for hearing under an order of Bargrave Deane, J., dated May 15, 1911. The following facts were agreed upon by the parties for the purpose of raising the preliminary point of law; (i) The plaintiff was the only child and next-of-kin of the testator by his first marriage. (ii) The testator died on Nov. 29, 1908. (iii) On Jan. 19, 1909, Elizabeth Williams, the widow of the deceased, obtained probate of an alleged will of the deceased, dated Sept. 26, 1906. (iv) Elizabeth Williams died on Jan. 19, 1909, without issue. (v) On Feb. 1, 1909, the defendants obtained probate of the will of Elizabeth Williams, dated Dec. 5, 1908. (vi) The plaintiff did not join Elizabeth Williams for grant of probate, as he then believed that the will was not duly executed, that the testator was not at the time when the alleged will was executed of sound mind, memory, and understanding, that the execution of the will was obtained by the undue influence of Elizabeth Williams, and that his father at the time of the alleged execution of the will did not know and approve of the contents thereof. (vii) On Mar. 16, 1909, the plaintiff consulted his solicitors with regard

to contesting the will, but his solicitors advised him that in their view it was then too late to oppose it, and that in any event he would not be prejudiced in taking proceedings to revoke the will by then taking out probate. (viii) Acting upon his solicitor's advice, the plaintiff on May 7, 1909, took out double probate of the alleged will. (ix) The plaintiff has acted as executor and intermeddled with the estate. (x) All the facts upon which the plaintiff now relies to support the allegations contained in para. 6 were known to the plaintiff at the date when he took out double probate. In the action itself the plaintiff claimed the revocation of the alleged will of Sept. 26, 1906, on the grounds (inter alia) set out in para. 6 above, and claimed to have a grant of letters of administration of the estate of his deceased father.

Barnard, K.C., and *R. W. Turner* for the defendants (the executrices of the will of Elizabeth Williams)

Llewelyn Williams for the plaintiff.

HORRIDGE, J. (after reading the order directing the issue).—I am of opinion that, although the order in terms directs a trial of the issue of estoppel only, I ought to deal with the whole question which has been raised. There are, in fact, two questions which I have to decide. The first is this—whether the plaintiff, who has taken out probate, is, as a matter of law, estopped from bringing any suit to dispute the will. I do not think that this is a case of estoppel at all. The question is really this, Is there any rule of the Probate Court which prevents the plaintiff, who has taken out probate, from taking proceedings to impeach the will? In the course of the argument reference has been made to *In the Goods of Chamberlain* (1) in which case the only title the executor had was as an executor who had clothed himself with probate. I notice the following words which occur towards the end of the judgment:

> "He [the executor] had an interest under the will, because he was an executor of it, but his title rested on the will, and stood or fell with it; and it would be a strange thing to hold that, because he was named executor if there was a will, therefore he had an interest in showing there was not."

The present case is quite different from that, and, therefore, there is nothing in it to bind me. In my opinion if the plaintiff has a real honest case he ought to be allowed to have it dealt with by the court, and, as there is no authority to the contrary, I hold that he is not estopped in this instance by anything that has been done. The second question is that of laches. On the facts, *Mohan* v. *Broughton* (2) is a very much stronger case than the present. In the course of the judgment in that case, the question of laches is dealt with, and Gorell Barnes, J., there said ([1899] P. at p. 218):

> "It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and who, upon becoming aware of the facts, seeks to make the recipients refund, and that of a person who, with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the matters upon which his rights, if any, depend, and allows the fund to be distributed, and then, after a time, seeks to reopen the whole matter."

In the present instance there is no evidence of any distribution of the estate of the testator. Again, in the same case, at a later part of his judgment Gorell Barnes, J. said (ibid. at p. 220):

> "Notwithstanding that knowledge, she [i.e., the plaintiff in that action] took no steps for three years at least after the money had been distributed amongst the next-of-kin to question the Chancery proceedings and the orders made therein."

The only alteration in the position of the parties which can be alleged here is that during the wife's survivorship of her husband, which was only a period of about seven weeks, no proceedings were taken, and that owing to her death her evidence is not now available but this has not been relied upon as being a delay of such a character as to amount to laches. There is one other matter which was urged against the plaintiff, and that is the fact that he took out double probate. I think the plaintiff has, on the assumed facts as stated, given a satisfactory explanation of the reason which induced him to make his affidavit. On the whole, I cannot say that the facts of the case are such as to induce me to hold that there has been such laches on the part of the plaintiff as to make it inequitable for him to be allowed to contest the validity of this will. On the question of costs, I am of opinion that it was quite right and proper that the question should be raised, and therefore the costs of the hearing will be costs in the action.

Solicitors: *Lloyd George, Roberts & Co.*, for *Gee & Edwards*, Swansea; *Holt, Beaver & Crowdy*, for *W. J. Williams*, Cardigan.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

VICTOR *v.* VICTOR

[COURT OF APPEAL (Cozens-Hardy, M.R., Fletcher Moulton, Farwell, L.JJ.), December 11, 1911]

[Reported [1912] 1 K.B. 247; 81 L.J.K.B. 354; 105 L.T. 887; 28 T.L.R. 131; 56 Sol. Jo. 204; 19 Mans. 53]

Husband and Wife—Separation deed—Annuity payable by husband to wife—Bankruptcy of husband—Payments due under annuity provable—Action by wife to recover payments due—Competency.

An annuity covenanted by a husband to be made to his wife under a deed of separation constitutes a debt or liability provable in his bankruptcy, and, therefore, his liability under the covenant is discharged by his bankruptcy, and no action can be maintained by the wife, either for arrears of the annuity or for future payments thereof, notwithstanding that she has not elected to prove.

Re Pannell, Ex parte Bates (1), (1879), 11 Ch.D. 914 and *Re Batey, Ex parte Neal* (2), (1880), 14 Ch.D. 579 followed. *Linton* v. *Linton* (3), (1885) 15 Q.B.D. 239 distinguished.

Notes. The provisions in the Bankruptcy Act, 1883, dealing with the proof of debts have been replaced by the Bankruptcy Act, 1914, ss. 30–36.

Referred to: *McQuiban* v. *McQuiban*, [1913] P. 208; *Dewe* v. *Dewe*, [1928] All E.R.Rep. 492.

As to proof of debts in bankruptcy and annuities and bonds, see 2 HALSBURY'S LAWS (3rd Edn.) 471 and for cases see 4 DIGEST (REPL.) 323 et seq.

Cases referred to:

(1) *Re Pannell, Ex parte Bates* (1879), 11 Ch.D. 914; 48 L.J.Bcy. 113; 41 L.T. 263; 27 W.R. 927, C.A.; 4 Digest (Repl.) 328, *2983*.

(2) *Re Batey, Ex parte Neal* (1880), 14 Ch.D. 579; 43 L.T. 264; 28 W.R. 875, C.A.; 4 Digest (Repl.) 325, *2954*.

(3) *Linton* v. *Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 33 W.R. 714; sub nom. *Re Linton, Ex parte Linton*, 49 J.P. 597; 2 Morr. 179, C.A.; 5 Digest (Repl.) 1108, *8949*.

(4) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 277, *2542*. A

(5) *Watkins* v. *Watkins*, [1896] P. 222; 65 L.J.P. 75; 74 L.T. 636; 44 W.R. 677; 12 T.L.R. 456, C.A.; 27 Digest (Repl.) 630, *5906*.

Also referred to in argument:

Re Hawkins, Ex parte Hawkins, [1894] 1 Q.B. 25; 69 L.T. 769; 42 W.R. 202; 1 Mans. 6; 10 R. 29, D.C.; 4 Digest (Repl.) 329, *2987*. B

Kerr v. *Kerr*, [1897] 2 Q.B. 439; 66 L.J.Q.B. 838; 77 L.T. 29; 46 W.R. 46; 13 T.L.R. 534; 41 Sol. Jo. 679; 4 Mans. 207; 4 Digest (Repl.) 329, *2988*.

Appeal from an order of DARLING, J., in an action brought by a wife against her husband claiming the sum of £69, representing arrears of weekly payments alleged to be due under a covenant in a deed of separation dated Feb. 18, 1905. C

The parties to the deed of separation were the husband, the wife, and a trustee. The deed contained covenants by the husband with the wife and also separately with the trustee. By cl. 1 the husband covenanted (a) That the wife might live apart from the husband; (b) that the husband would not molest the wife; (c) that the child of the marriage should spend half his school vacation with the wife and the other half with the husband, who was to maintain, clothe, and educate him; and D (d) that the husband would yearly during the wife's life pay to her the clear annuity of £156 by equal weekly payments of £3 in advance for her separate use, the first apportioned payment being made on the execution of the deed. By cl. 2 the wife and the trustee jointly and severally covenanted with the husband (a) at all times thereafter to keep the husband, his heirs, executors, and administrators indemnified against all debts, torts, and liabilities which the wife might thereafter E contract, and from all actions, claims, and demands on account thereof, and against all such costs, charges, losses, damages, and expenses whatsoever as might be incurred by the husband on account thereof; (b) that the wife would not molest the husband; and (c) that if the husband should be called upon to pay and should pay any debt or liability contracted by the wife, the trustee might retain the amount with all costs, charges, and damages out of the annuity. By cl. 4 the F covenants were to become void on the wife and husband resuming cohabitation. The husband filed an affidavit in which he deposed that on Mar. 21, 1911, he was adjudicated a bankrupt and his discharge was granted on June 27, 1911, the same, however, being suspended for a period of two years; that he had offered to pay his wife £1 a week, which she had refused, and which was the utmost that he could afford to pay; and that he had done all in his power to maintain her. G

The question was whether a wife who was party to a deed of separation could recover judgment against her husband for the amount of the arrears of payments provided for by the deed notwithstanding the bankruptcy of the husband. On July 29, 1911, the action came on for trial before DARLING, J., sitting without a jury, who was of opinion that the Bankruptcy Act, 1883, did not alter the H obligation of a husband towards his wife; that the weekly payments covenanted to be made by the deed of separation in the present case did not constitute a debt or liability capable of being proved in the husband's bankruptcy; and that his liability under the covenant contained in the deed of separation was not discharged by his bankruptcy. Judgment was accordingly entered for the wife for £69 and costs; but execution was ordered to be stayed in respect of that sum for so long as the I husband should pay to the wife the sum of £2 per week, the first payment to be made on Aug. 5, 1911. From that decision the husband now appealed.

J. G. Trapnell for the husband.

R. Vaughan Williams for the wife.

COZENS-HARDY, M.R.—This is an appeal from a decision of DARLING, J. The learned judge has held that a wife, who is a party to a separation deed, can recover judgment against her husband for the amount of the annuity provided by that deed, and claim the arrears, notwithstanding the bankruptcy—followed by the

discharge, as I understand—of the husband. With great respect to the learned judge, I am unable to assent to that view. It must suffice to say that I think it is not open to us to take any other view upon the point, having regard to the express decision of this court in two cases—namely, the case of *Re Pannell, Ex parte Bates* (1) and, still more, the case of *Re Batey, Ex parte Neal* (2) also in this court. They were both cases arising under separation deeds, and in which the decision of this court was that, according to modern bankruptcy legislation, however difficult it might be to measure the liability incurred by a husband under a separation deed, the separation ceasing when cohabitation is resumed, still it was a liability which had to be estimated, and that if it could be estimated in no other way, it must be left to the jury to estimate it.

Counsel for the wife did not really seek to dispute the argument of the husband on that point. He admitted that the decisions in *Re Batey, Ex parte Neale* (2) and *Re Pannel, Ex parte Bates* (1) bind us. But he said that there are questions of public policy which come into consideration quite apart from what was laid down by those authorities and all the cases that declare that a wife is entitled to prove in her husband's bankruptcy. He said that those decisions have no force, in so far as they purport to bind the wife, if she does not elect to prove. I cannot agree with that. It seems to me that the whole policy of the Bankruptcy Act, 1883, is that a bankrupt is to get a complete discharge from all of his contractual obligations to pay sums of money, and that the only right of any person who claims under the terms of a contract—whatever his pecuniary claim is—is to come in and prove for the same. The extent to which that doctrine has been carried is made quite plain by the case of *Hardy* v. *Fothergill* (4) in the House of Lords. That case put, certainly, an extremely wide meaning on the words in the Bankruptcy Act, 1869, and decided that a contingent future liability, however difficult it may be to assess, is something which must be taken to be capable of estimation, with one exception which is quite out of the case here—namely, where the Court of Bankruptcy may, under certain conditions, declare a liability to be incapable of being fairly estimated.

But then it is said that the court must consider the hardship placed upon the trustee in this case. The trustee has in fact said that if the husband does not make the payments, he will. But the same might be said of the ordinary case of principal and surety. If the principal becomes bankrupt the surety becomes liable. It is also said that the wife barters her rights for the sake of this covenant. I do not really care to consider that point. She may or may not have the right to pledge her husband's credit. On that I can say nothing, because it does not arise. But I do say in the present case that I am clearly of opinion that the contractual obligation was that the husband was to pay an annuity of £156 a year by weekly payments of £3 a week. That contractual obligation has been turned into a right of proof. Therefore no action can be maintained by the wife either for the arrears of the annuity prior to the bankruptcy or for the annuity in the future.

I only wish to add one word as to *Linton* v. *Linton* (3) and the subsequent cases relating to alimony. Those decisions appear to me to turn upon entirely different grounds. Alimony is payable under an order of the Divorce Court, which order may be from time to time varied by the court as the court thinks fit having regard to the circumstances of the husband and the whole conditions of the case. The Court of Appeal has held in a decision which binds us that that is pecuniary liability which is not the subject of proof in bankruptcy. The courts have distinguished in clear terms the case of alimony from the case of an annuity under a separation deed. With great respect to the learned judge in the court below, I think that his decision is wrong, and that this appeal must be allowed.

FLETCHER MOULTON, L.J.—I am of the same opinion, for the same reasons; and I will only add one word as regards the cases which relate to alimony. The mere fact that a husband has become bankrupt does not free him from his liability to support his wife, and the order for alimony is an order of the Divorce Court

enforcing that surviving liability. From time to time the court can vary the amount of alimony directed to be paid. Moneys, payable, therefore, under orders for alimony stand in a totally different position from moneys payable under a contract like a separation deed. I have no doubt whatever that the intention of the Bankruptcy Act, 1883, was to grant the bankrupt a discharge from all pecuniary liabilities, the breadth and extent of which are entirely immaterial, whether or not the persons who have claims against him choose or do not choose to prove in the bankruptcy. The point, therefore, which counsel for the wife attempted to raise, indicating that there is a difference between the cases of *Re Batey, Ex parte Neal* (2) and *Re Pannell, Ex parte Bates* (1) and the one now before us has, in my opinion, no foundation.

FARWELL, L.J.—I am entirely of the same opinion. I think that it is not open to us to entertain the question raised by the wife in this court. We are bound by the decisions cited by the Master of the Rolls so far as an annuity under a separation deed is concerned, and we are equally bound by the decisions of this court so far as alimony is concerned. The two stand on an entirely different footing. I may add that it has been decided that alimony is inalienable, and is a purely personal allowance: see *Watkins* v. *Watkins* (5).

Appeal allowed.

Solicitors: *H. Vaughan Whitehead*; *Colyer & Colyer.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

TURNER *v.* TURNER

[Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Buckley, L.JJ.), March 30, 31, 1911]

[Reported [1911] 1 Ch. 716; 80 L.J.Ch. 473; 104 L.T. 901]

Will—Debt owing to testator—Right of executor to retain—Debt owing by partnership firm in which beneficiary partner.

The doctrine that a legatee is not entitled to receive out of the estate of a testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of debts owing to the testator's estate does not apply where the debt is due from a partnership of which the legatee is a member and the legacy is given to him individually.

Smith v. *Smith* (1) (1861) 3 Giff. 263 explained and distinguished.

Notes. As to legacies to debtors in general, see 16 Halsbury's Laws (3rd Edn.) 321–322; and for cases see 23 Digest (Repl.) 444 et seq.

Cases referred to:

(1) *Smith* v. *Smith* (1861), 3 Giff. 263; 31 L.J.Ch. 91; 5 L.T. 302; 7 Jur.N.S. 1140; 66 E.R. 408; 23 Digest (Repl.) 446, *5150.*

(2) *Cherry* v. *Boultbee* (1839), 2 Keen 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, *3967.*

Also referred to in argument:

Courtenay v. *Williams* (1844), 3 Hare, 539; 13 L.J.Ch. 461; 8 Jur. 844; 67 E.R. 494; affirmed (1846), 15 L.J.Ch. 204, L.C.; 4 Digest (Repl.) 553, *4855.*

Jeffs v. *Wood* (1723), 2 P.Wms. 128; 24 E.R. 668; 24 Digest (Repl.) 759, *7484.*

A *Synge* v. *Synge* (1874), 9 Ch. App. 128; 29 L.T. 855; 22 W.R. 227, L.C. & L.J.; 20 Digest 438, *1650*.

Re Akerman, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163*.

Appeal from an order of NEVILLE, J., in an originating summons taken out by Douglas Turner against Bryant Turner.

B The two brothers, Bryant Turner and Douglas Turner, carried on business in partnership as merchants under the style of Abram Brooksbank & Co. In 1904 the firm owed the sum of £5,000 to Mrs. Brooksbank, who was the aunt of the brothers, and also a large sum to the Sheffield Banking Co. Ltd. By an agreement of July 2, 1904, made between Mrs. Brooksbank of the first part, the brothers of the second part, and the banking company of the third part, Mrs. Brooksbank charged the C sum of £5,000 owing to her by the firm with the payment to the bank of the balance for the time being owing to her by the firm, and she covenanted with the bank that if she should die without the affairs of the firm having been wound up in her lifetime, and if at her death there should be any debt owing from the firm to the banking company, then she would by her will bequeath to the brothers, or one of them, an amount sufficient to cover at least the liability of her debt, and D in such proportions (if more than one) as she might think fit, but such undertaking was exclusively in favour of the banking company, and was not intended to confer any right on the brothers or either of them. By her will, dated June 13, 1903, Mrs. Brooksbank bequeathed to Bryant the sum of £1,500, and to Douglas the sum of £1,200, and her residuary estate to Bryant and her niece H. K. Bradbury in E equal shares, and she appointed Bryant and two others trustees and executors of her will. In 1904 she executed a codicil to her will not material to the present case. By a second codicil, dated Oct. 2, 1906, after reciting the agreement of July 2, 1904, and the bequest of the legacies above mentioned to Bryant and Douglas, and the moiety of her residuary estate to Bryant, she provided as follows:

> "Now I hereby direct my executors in the first place to set off the pecuniary F bequests contained in my said will in favour of the said Bryant Turner against the debt which may be due to me at the time of my decease from the firm of Abram Brooksbank & Co., and not to resort to the legacy of £1,200 bequeathed to the said Douglas Turner unless and until the pecuniary bequests in favour of the said Bryant Turner shall be insufficient for discharge of the said indebtedness."

G And she directed that either the whole or so much of the legacy of £1,200 to Douglas as might not be required to be set off against the balance of the debt should be held upon trust for his wife during her life or her widowhood, and after her death or remarriage upon trust for the children of Douglas who should attain twenty-one. Mrs. Brooksbank died on Mar. 10, 1909. At the date of her death H the whole of the principal sum of £5,000 was due from the firm to the estate, but all interest had been paid. The legacy of £1,500 and the share of the residue bequeathed to Bryant exceeded the £5,000 due to the testatrix from the firm, and the executors appropriated £5,000 out of the legacy and share of residue in discharge of the liability of the firm. In April, 1910, the partnership was dissolved, and a question arose whether in the taking of the partnership accounts the debt of the firm to Mrs. Brooksbank ought to appear in the balance-sheet or whether the effect I of the codicil was to discharge the debt altogether, and Douglas Turner took out the originating summons against Bryant Turner to have this question determined. NEVILLE, J., held that the provision in the second codicil relieved Douglas from all liability to contribute to the amount deducted from the bequests to Bryant, and the latter appealed. The case is not reported on the construction of the codicil point.

Levett, *K.C.*, and *J. G. Wood* for Bryant Turner.
Jenkins, *K.C.*, and *Underhill* for Douglas Turner.

COZENS-HARDY, M.R.—This is an appeal from the judgment of NEVILLE, J., raising a question between partners in taking the partnership accounts. It involves, in my opinion, one rather important question of law, and, incidentally, the construction of a very obscure codicil. Bryant and Douglas were two partners, and they (the firm) were indebted to their aunt in the sum of £5,000; they were also indebted to their bankers in a considerable sum. The aunt was party to an agreement which, in my view, has very little to do with the question before us, but she was party to an agreement to which Bryant and Douglas and the bank were also parties. Under that agreement she gave a charge in favour of the bank on her £5,000 debt, providing that any sums paid off in respect of that debt should go to the bank, and that any dividends received should also go to the bank; and she entered into certain covenants with the bank that she would by her testamentary instrument give to the nephews sufficient to clear off the balance of their indebtedness to her. That being so, she made a will and a codicil. Under the will she left to Douglas a legacy of £1,200, and to Bryant a legacy of £1,500; and she left Bryant in addition a moiety of her residue. Of course she could not tell what her residue would amount to at her death. She then made a codicil on the construction of which the difficulty arises.

The first point argued by counsel for Bryant Turner raises a question of law of interest and, I think, of importance. He says that when a legatee is also a debtor to the testator, the executors have a right of set-off or retainer—I care not for the moment what word you use—but the principle is that the legacy shall not be paid except out of the debt which is owing by the legatee to the testator. I do not doubt that principle. I think the more logical and correct mode of explaining the doctrine is this: You, the debtor, have in your hands part of the assets of the testator, and you cannot claim any part of the assets of the testator, out of which of course your legacy must be paid, without bringing into the estate that portion which is now in your pocket; or, in other words, your legacy must be treated as paid pro tanto out of the assets of the testator which you have in your pocket. I agree entirely with counsel to that extent. But when he says that that doctrine applies also when the debtors are a firm, when the debt is joint, and when the legacies are given only to the individual partners, I part company with him. Some confusion exists as to the position of a debt due from a firm of A. and B. It has been said again and again, although quite wrongly, that all partnership debts are joint and several. That is not so. The provisions of the Partnership Act, 1890, of course make that quite clear. By s. 9 of that Act every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm, and after his death his estate is also severally liable in due course of administration for such debts and obligations so far as they remain unsatisfied. It will be observed there that there is a distinct difference between the position of a living partner quoad the creditor and the position of the estate of a deceased partner quoad the creditor. Speaking for myself, I do not at all appreciate how it can be the right or the duty of an executor to retain or set off the debts of A. and B.—debts in respect of which A. could not be sued alone—out of or against a legacy to A.

But it has been said that the contrary was decided long ago by STUART, V.C., in *Smith* v. *Smith* (1). That case is not in all respects well reported, but I think it is easy to see the ground upon which the Vice-Chancellor based his decision. In that case there were debts due from William Smith, who was a partner in a firm, and the court held, according to the headnote, which is wrong, that the assignees of the firm indebted to the testator were not entitled to receive a legacy bequeathed to a member of the firm. William Smith was the member of the firm to whom a legacy was given, and the firm became bankrupt. It is perfectly settled law that under the bankruptcy law at that date the assignees were assignees not only of the joint estate but also of the separate estate of each partner; and it is also perfectly settled law that such separate estate was applicable first to the payment of the separate debts and next, to the extent of the surplus, to the payment of joint debts. The point was argued by counsel, not as counsel for the joint estate, but

as counsel for the assignees of the separate estate of William Smith; and the Vice-Chancellor seems to me to base his judgment on that view. Mr. Bacon appeared for the assignees in bankruptcy of William Smith, not for the assignees in bankruptcy of the firm, although they were the same individuals; but it was William Smith's assignees who were claiming in respect of his separate estate the legacy which was given to him. The Vice-Chancellor said this (3 Giff. at p. 270):

> "On the second point, the question is whether the same principle applies where a debt is not due from the legatee, but from the partnership firm of which the legatee was a member. No direct authority has been cited on either side. It seems to me that the principle which governs the case is this, that the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of the debts which may be due to that estate."

Pausing there for a moment, William Smith's separate estate was liable to the testator's estate for the debt, and that, I think, is the entire explanation of this case. Then the learned Vice-Chancellor goes on (ibid. at pp. 270, 271):

> "That seems to be an intelligible principle, and it is one which was stated by LORD COTTENHAM in the case of *Cherry* v. *Boultbee* (2). In that case LORD COTTENHAM said that the principle would be applicable where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated is countenanced by what was said by LORD COTTENHAM in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner [not the assignees of the firm] should be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged."

That may or may not be a right decision. I am not at all prepared to say it was not correct; but it does not in any way support or warrant the proposition for which it was cited. It is consistent with the principle in *Cherry* v. *Boultbee* (2), because there the testatrix's executors could have proved against the separate estate of William Smith, whose separate estate was vested in the assignees, and that brings it practically to the same position as though there had never been a firm and the debt had originally been due from the legatee. I think it right to deal expressly with that point, because I think it is a question of general importance and general interest. I start, therefore, with the proposition that the executors had not, as such, any right to refuse to pay over the legacies to the individual partners by reason of the firm's debt; in other words, they had no right to apply these legacies to the satisfaction of the firm's debt. [HIS LORDSHIP then dealt with the question of construction and agreed with the decision of NEVILLE, J.]

FLETCHER MOULTON, L.J.—I am of the same opinion. There is no power in an executor to retain a legacy to one partner of a firm by virtue of a partnership debt to the estate. I can see no authority and no justification nor reason for the contrary doctrine. I fully accept the explanation of *Smith* v. *Smith* (1) which has been given by the Master of the Rolls, and so interpreted it may have been correctly decided, but certainly it gives no justification for the principle contended for by counsel for Bryant Turner of setting off individual legacies against partnership debts. [HIS LORDSHIP then considered the question of construction.]

BUCKLEY, L.J., delivered a judgment referring only to the question of construction.

Solicitors: *Elvy Robb & Welch*, for *Turner, Turner & Martin*, Ipswich; *Taylor & Bryden*, for *Branson & Son*, Sheffield.

[*Reported* by C. W. BISS, ESQ., *Barrister-at-Law*.]

A

GENERAL ESTATES CO. *v.* BEAVER

[King's Bench Division (Hamilton and Avory, JJ.), April 2, 1912]

[Reported [1912] 2 K.B. 398; 81 L.J.K.B. 761; 106 L.T. 793]

County Court—Transfer of action to High Court—Re-transfer to High Court of action remitted to county court—County Courts Act, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 126. B

By s. 126 of the County Courts Act, 1888: "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the [county] court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable."... C

The High Court has power under s. 126 to order the re-transfer to the High Court of an action commenced in the High Court and remitted to the county court, the action having been "commenced" in the county court within the meaning of the section.

Notes. The County Courts Act, 1888, was repealed and replaced by the County Courts Act, 1934, which in turn has with a few exceptions been replaced by the County Courts Act, 1959. Section 126 of the 1888 Act corresponds to s. 115 of the 1959 Act. D

As to removal into the High Court by certiorari, see 9 Halsbury's Laws (3rd Edn.) 331–332; and for cases see 13 Digest (Repl.) 486 et seq. For the County Courts Act, 1959, see 39 Halsbury's Statutes (2nd Edn.) 102.

E

Cases referred to in argument:

Spring v. *Fernandez*, [1912] 1 K.B. 294; 81 L.J.K.B. 201; 105 L.T. 792; 56 Sol. Jo. 110, D.C.; 13 Digest (Repl.) 409, *365*.

Toon v. *Stanbury-Eardly* (1906), 22 T.L.R. 536, D.C.; 13 Digest (Repl) 398, *266*,

Cherry v. *Endean* (1886), 55 L.J.D.B. 292; 54 L.T. 763; 34 W.R. 458; 34 Digest 536, *96*.

F

Ex parte Bradlaugh (1878), 3 Q.B.D. 509; 47 L.J.M.C. 105; 38 L.T. 680; 42 J.P. 583; 26 W.R. 758, D.C.; 16 Digest (Repl.) 495, *3183*.

Dierken v. *Philpot*, [1901] 2 K.B. 380; 70 L.J.K.B. 675; 85 L.T. 246; 49 W.R. 703; 17 T.L.R. 491; 45 Sol. Jo. 557, D.C.; 13 Digest (Repl.) 409, *355*.

Skinner v. *Northallerton County Court Judge*, [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274, H.L.; 13 Digest (Repl.) 486, *1135*. G

Donkin v. *Pearson*, ante, p. 461; [1911] 2 K.B. 412; 80 L.J.K.B. 1069; 104 L.T. 643, D.C.; 13 Digest (Repl.) 487, *1146*.

Farquharson v. *Morgan*, [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152; 58 J.P. 495; 42 W.R. 306; 10 T.L.R. 240; 9 R. 202, C.A.; 13 Digest (Repl.) 491, *1199*.

H

London Corpn. v. *Cox* (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 W.R. 44, H.L.; 16 Digest (Repl.) 416, *2184*.

Broad v. *Perkins* (1888), 21 Q.B.D. 533; 57 L.J.Q.B. 638; 60 L.T. 8; 53 J.P. 39; 37 W.R. 44; 4 T.L.R. 775, C.A.; 16 Digest (Repl.) 417, *2185*.

Landens v. *Shiel* (1834), 3 Dowl. 90; 16 Digest (Repl.) 502, *3277*.

Appeal by the plaintiffs from the order of Bucknill, J., at chambers affirming I an order of Master Chitty refusing to transfer an action from the Yarmouth County Court to the High Court.

The plaintiffs commenced an action in the Chancery Division against the defendant for the disturbance by him of their rights of ferry over the river Yare. Before the statement of claim was delivered they applied for an interim injunction to Joyce, J. The learned judge refused that application and under the provisions of s. 69 of the County Courts Act, 1888, ordered the action to be transferred to the county court, his attention not being called to the fact that the county court had

no jurisdiction to try an action involving the question of a right to a franchise unless by consent in writing as provided for in s. 61 of the Act and the action was tried in the Yarmouth County Court on Sept. 15, 1910, the learned judge making an order granting an injunction against the defendant. The defendant appealed to the Divisional Court, and that court being satisfied that the defendant disputed the plaintiff's right to the franchise, and that that question had been raised in the county court, ordered a new trial on Feb. 1, 1911, but intimated the difficulty as to whether the action was one which could be tried in the county court. In November, 1911, the plaintiffs applied under s. 126 of the County Courts Act, 1888, to have the case retransferred to the High Court and this application was refused by MASTER CHITTY and BUCKNILL, J. The plaintiffs appealed.

The County Courts Act, 1888, s. 126 provided:

"It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court and upon such terms as to payment of costs, giving security or otherwise, as the High Court or a judge thereof shall think fit to impose."

Section 61 provided:

"In any action in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing shall consent in any writing signed by them or their solicitors to the judge having such power. . . ."

Danckwerts, *K.C.*, and *A. H. Poyser* for the plaintiffs.
H. Claughton Scott for the defendant.

HAMILTON, J.—This is an appeal from the refusal of BUCKNILL, J., in chambers to interfere with the decision of MASTER CHITTY, who refused to order that an action pending in the Yarmouth County Court should be removed into the High Court pursuant to s. 126 of the County Courts Act, 1888. The motion now made is that we should order this action to be removed into the High Court pursuant to that section or under some other powers which to the court may belong. First of all, as this is an appeal and as the application for the order which MASTER CHITTY refused to make was made under s. 126, I think we must treat the case here as a motion by way of appeal asking for an order for the removal of the action under that section.

The facts are these. The plaintiffs claim to be entitled to an extensive franchise of ferry on the river Yare. The defendant plied in a boat in such a manner that it appeared to the plaintiffs that he was infringing their franchise, and they issued a writ in the Chancery Division asking that he should be restrained by injunction. The action came before JOYCE, J., and before the statement of claim was delivered an interim injunction was applied for. The learned judge made an order for the transfer of the action to the county court, acting, as I am told, under the powers given to him by s. 69 of the County Courts Act, 1888, which allow him upon an application for the transfer of an action or without such application if he shall think fit to order it to be transferred. It appears that those who then represented the plaintiffs did not effectively protest against the transfer being ordered or even bring to the attention of the learned judge that it was possible that the plaintiff's title to the franchise might be in dispute. The action having been transferred, duly proceeded in the county court, and judgment was given for the plaintiffs. There was then an appeal to the Divisional Court, and the defendant moved for a new trial, and stated amongst other grounds that there was no evidence that the plaintiffs were or are entitled to or possessed of any ferry or, alternatively, that the ferry was an exclusive ferry. That motion eventually came on for hearing, and upon a perusal of the shorthand note of the proceedings in the county court

the Divisional Court ascertained, what apparently the learned county court judge did not ascertain—viz., that the solicitor who had represented the defendant in the county court, had intended to contest the plaintiffs' title, and upon this circumstance being established it became manifest that there was the gravest doubt as to whether this was an action which the county court would have jurisdiction to try. The Divisional Court made an order for a new trial pointing out the difficulty which had arisen as to whether the county court was the proper tribunal for hearing the action, and they further ordered that the costs should abide the event of any new trial. Thereupon, the plaintffs having considered their position, made an application to MASTER CHITTY for the remittal back of the action to the High Court. Section 126 of the County Courts Act, 1888, provides: [HIS LORDSHIP read the section and continued:] The ground upon which it is said that it is desirable, nay necessary, that the action in the present instance should not be tried in the county court is that the county court has no jurisdiction to try it because it involves the question of the title to a franchise. The answer is that the county court may have jurisdiction to try the case if the requisite consent has been given, and that in the present case there has been the requisite consent. Section 56 of the County Courts Act, 1888, expressly excepts from the jurisdiction of the county court any action

> "in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question,"

and s. 61 provides specifically the terms upon which, and I think upon which only, the title to any franchise may be the subject of trial in an action in the county court—namely, where the title incidentally comes in question, and where both parties at the hearing consent in any writing signed by them or their solicitors. It is common ground that no such consent in writing was obtained in the present case, either at the hearing or subsequently thereto. It is, however, suggested that the effect of s. 114 of the County Courts Act, 1888, which is in general terms, would give jurisdiction to the county court in this case. That section provides that:

> "Whenever an action or matter is commenced over which the court has no jurisdiction, the judge shall, unless the parties consent to the court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner as if the court had jurisdiction therein. . . ."

It is suggested that the way in which the parties have conducted themselves in this case, evidences the consent requisite under that section. It is said that after the solicitor for the defendant had faintly raised the question of title in the county court, because the plaintiff's counsel did not say that in those circumstances the only thing to be done was to strike the case out, and the parties proceeded to appeal and to resist the appeal respectively, and the Divisional Court having ordered a new trial, a considerable time elapsed before the application to retransfer the case was made to MASTER CHITTY that the parties must be taken to have consented to the county court having jurisdiction. I can see no evidence on these facts of any such consent.

It seems to me that the plaintiffs have done everything possible to show that they did not consent to the question of title being tried anywhere except in the High Court. Further, I do not think that s. 114 has the meaning contended for. It is a section which provides what the county court judge has to do when an action has been commenced in his court which he has no jurisdiction to try. It contains a saving, but the only saving that is in point in connection with an action to try the right to a ferry is that contained in s. 61, and therefore the words "unless the parties consent to the court having jurisdiction," means unless they consent to the court having jurisdiction in the manner provided in s. 61. The first stage, therefore, is established—viz.: that it is desirable that this action should be tried in the High Court, because there is no jurisdiction to try it in the county court.

It is next said, however, that under s. 126 there is no power to order the transfer, and, therefore, as the action cannot be tried, it must either die a natural death, or if it is set down for trial in the county court it must be put an end to under s. 114 or be discontinued by the plaintiffs, without waiting for that course to be taken. The argument is put thus: s. 126 provides specifically for the manner in which by certiorari or otherwise an action may be removed from the county court into the High Court and s. 124 prohibits any mode of doing it except such as may be in accordance with the provisions of the Act. If, therefore, it is not within s. 126 it cannot be done in any other way. I think s. 124 must be without prejudice to the common law right to have an action removed by certiorari, whatever that right may be, where the action is pending in a court which has no jurisdiction to try it. But that is not the application before the court now. It seems to me that the argument for the defendant places too narrow a construction upon s. 126. It is true that that section says:

> "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court . . . of any action commenced in the court under the provisions of this Act,"

but the words "commenced in the court" refer first to an action actually and originally commenced there, and secondly to an action which, although originally commenced in the High Court, has been under s. 65 or 66 of the Act, remitted to the county court whereupon

> "the action and all proceedings therein are to be tried and taken in such court as if the action had been originally commenced therein."

For the defendant it was argued that the section stops there, and there is no provision for the case of an action which was neither commenced in the county court nor commenced in the High Court in such circumstances that it reached the county court and was there proceeding as if it had originally been commenced there. I think it is significant that the word "originally" which occurs in ss. 65 and 66 does not occur in s. 126, and under the powers of the county court, Ord. 33, rr. 1 and 2, provide machinery which applies when an action originally commenced in the High Court has reached the officers of the county court.

There is, in my opinion, no reason for limiting the right of transfer to the High Court to cases in which the original transfer had been correctly made under ss. 65 and 66 and as it is certainly highly undesirable that an action which has been transferred under s. 69 per incuriam should not be capable of being removed back into the High Court, I think the fair construction of s. 126 is that the present case is "an action commenced in the court under the provisions of this Act" because it has been sent to the county court and being there, by Ord. 33, rr. 1 and 2, it is to proceed as if it were an ordinary action in the court. It appears to me, therefore, that we have power, under s. 126 to order the transfer of this action. If this had been strictly a matter of discretion I should have hesitated to interfere with the discretion of the learned master and the learned judge, but it appears to me so unfortunate that an action which ex hypothesi cannot be tried in the county court for want of jurisdiction, should be disposed of under s. 114 or otherwise, that it seems to me to be really a matter of right that the action should be retransferred to the High Court under this section.

AVORY, J.—I agree.

Appeal allowed.

Solicitors: *Morris & Bristow*, for *Harmer, Ruddock & Son*, Great Yarmouth; *Dubois & Co.*, for *Chamberlin, Talbot & Bracey*, Great Yarmouth.

[*Reported by* P. B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

KREGLINGER AND ANOTHER *v.* NEW PATAGONIA MEAT AND COLD STORAGE CO., LTD.

[House of Lords (Viscount Haldane, L.C., the Earl of Halsbury, Lord Atkinson, Lord Mersey and Lord Parker of Waddington), October 17, 20, 21, November 20, 1913] B

[Reported [1914] A.C. 25; 83 L.J.Ch. 79; 109 L.T. 802; 30 T.L.R. 114; 58 Sol. Jo. 97]

Mortgage—Redemption—Clog on equity—Independent term in conveyance securing collateral advantage to mortgagee—No oppressive conduct by mortgagee—No inconsistency with right to redeem—Security of floating charge. C

There is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage at the time and as a term of the advance, and in the same document as constitutes the security, provided that such collateral advantage is independent of the mortgage, that the mortgagee has not acted unfairly, oppressively, or unconscionably, that the bargain does not restrict or clog the equity of redemption, and that it is not inconsistent with or repugnant to the contractual and equitable right to redeem. D

By an agreement in writing dated Aug. 24, 1910, the appellants agreed to lend the respondents £10,000, repayable on demand, with interest at 6 per cent. If the interest was duly paid, the appellants were not to demand repayment till Sept. 30, 1915, but the respondents were to be at liberty to pay off the loan earlier. To secure the loan the respondents gave the appellants a floating charge on their undertaking and property. E

The agreement further provided that for five years from the date of the agreement (i.e., till Aug. 24, 1915) the respondents were not to sell certain of their goods to anyone excepting the appellants, so long as the latter were willing to buy at a price equal to the best price (c.i.f. London) offered by anyone else, and the respondents were to pay to the appellants a commission of 1 per cent. on the sale price of all sheepskins sold by the respondents to anyone else. In January, 1913, the respondents paid off the loan. F

Held: that the agreement with reference to the sale or purchase of the goods was a collateral agreement, and, as it was independent of the mortgage and was not a clog on the equity of redemption, it was a valid and binding agreement and did not come to an end when the respondents paid off the mortgage. G

Per Viscount Haldane, L.C.: A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem should be set aside as readily in the case of a floating security as in any other case.

Noakes & Co. v. *Rice* (1) [1902] A.C. 24, *Bradley* v. *Carritt* (2) [1903] A.C. 253, and *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ltd.* (3) [1904] A.C. 323 distinguished. H

Mortgage—Construction—Intention of parties—Consideration of all circumstances of transaction—Admission of parol evidence.

Per Lord Parker of Waddington: To determine whether or not a conveyance is a mortgage equity has always looked to the real intention of the parties, to be gathered not only from the terms of the particular instrument, but from all the circumstances of the transaction, and has always admitted parol evidence in cases where the real intention was in doubt. I

Notes. Applied: *Re Rainbow Syndicate, Owen* v. *Rainbow Syndicate*, [1916] W.N. 178; *Hopkinson* v. *Mortimer, Harley & Co., Ltd.*, [1917] 1 Ch. 646; *Re Cuban Land and Development Co., Ltd.*, [1921] All E.R.Rep. 661. Referred to: *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1940] 2 All E.R. 401.

A As to the equity of redemption, see 27 HALSBURY'S LAWS (3rd Edn.) 231 et seq.; and for cases see 35 DIGEST 343 et seq.

Cases referred to:

(1) *Noakes & Co.* v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, *19.*

B

(2) *Bradley* v. *Carritt*, [1903] A.C. 253; 72 L.J.K.B. 471; 88 L.T. 633; 51 W.R. 636; 19 T.L.R. 466; 47 Sol. Jo. 534, H.L.; 35 Digest 354, *971.*

(3) *Samuel* v. *Jarrah Timber and Wood Paving Corpn., Ltd.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 52 W.R. 673; 30 T.L.R. 536; 11 Mans. 276, H.L.; 35 Digest 353, *957.*

C

(4) *Howard* v. *Harris* (1683), 1 Vern. 190; 2 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312; Freem. Ch. 86; 23 E.R. 406; 35 Digest 240, *17.*

(5) *Biggs* v. *Hoddinott*, *Hoddinott v. Biggs*, [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504, C.A.; 35 Digest 356, *993.*

(6) *Jennings* v. *Ward* (1705), 2 Vern. 520; 23 E.R. 935; 35 Digest 356, *998.*

(7) *Re Hallett's Estate*, *Knatchbull* v. *Hallett* (1880), 13 Ch.D. 696; sub nom. *Re Hallett's Estate*, *Knatchbull* v. *Hallett*, *Cotterell* v. *Hallett*, 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 20 Digest 233, *2.*

D

(8) *Santley* v. *Wilde*, [1899] 2 Ch. 474; 68 L.J.Ch. 681; 81 L.T. 393; 48 W.R. 90; 15 T.L.R. 528, C.A.; 35 Digest 239, *1.*

(9) *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, ante; [1912] A.C. 52; 81 L.J.Ch. 137; 105 L.T. 683; 28 T.L.R. 114; 56 Sol. Jo. 175, H.L.; 10 Digest (Repl.) 805, *5225.*

E

(10) *Salt* v. *Marquess of Northampton*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 40 W.R. 529; 8 T.L.R. 104; 36 Sol. Jo. 150, H.L.; 35 Digest 352, *954.*

(11) *Mellor* v. *Lees* (1742), 2 Atk. 494; 26 E.R. 698, L.C.; 35 Digest 245, *55.*

(12) *Newcomb* v. *Bonham* (1681), Freem. Ch. 67; 2 Cas. in Ch. 58; 1 Vern. 7; 1 Eq. Cas. Abr. 313; 22 E.R. 1063, L.C.; on appeal, sub nom. *Bonham* v. *Newcomb* (1684), 2 Vent. 364; 1 Vern. 232; (1689), 1 Vern. 233, n., H.L.,

F

35 Digest 352, *946.*

(13) *Vernon* v. *Bethell* (1762), 2 Eden, 110; 28 E.R. 838, L.C.; 35 Digest 357, *1002.*

(14) *Chambers* v. *Goldwin* (1804), 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 600; 35 Digest 365, *1071.*

(15) *Potter* v. *Edwards* (1857), 26 L.J.Ch. 468; 5 W.R. 407; 35 Digest 354, *972.*

G

Also referred to in argument:

Re Panama, New Zealand, and Australian Royal Mail Co. (1870), 5 Ch. App. 318; 39 L.J.Ch. 482; 22 L.T. 424; 18 W.R. 441, L.J.; 10 Digest (Repl.) 764, *4955.*

Re Florence Land and Public Works Co., Ex parte Moor (1878), 10 Ch.D. 530; 48 L.J.Ch. 137; 39 L.T. 589; 27 W.R. 236, C.A.; 10 Digest (Repl.) 770, *5010.*

H

Re Vivian & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. *Vivian & Co., Ltd.*, [1900] 2 Ch. 654; 69 L.J.Ch. 659; 82 L.T. 674; 48 W.R. 636; 44 Sol. Jo. 530; 7 Mans. 470; 10 Digest (Repl.) 782, *5078.*

Re Borax Co., Foster v. *Borax Co.*, [1901] Ch. 326; 70 L.J.Ch. 162; 3 L.T. 638; 49 W.R. 212; 17 T.L.R. 159; 45 Sol. Jo. 138, C.A.; 10 Digest (Repl.) 776, *5046.*

I

Willett v. *Winnell* (1687), 1 Vern. 488; 23 E.R. 611, L.C.; 35 Digest 356, *996.*

Albion Steel and Wire Co. v. *Martin* (1875), 1 Ch.D. 580; 45 L.J.Ch. 173; 33 L.T. 660; 24 W.R. 134; 9 Digest (Repl.) 519, *3427.*

Browne v. *Ryan*, [1901] 2 I.R. 653; 35 Digest 352, *946iii.*

Field v. *Hopkins* (1890), 44 Ch.D. 524; 62 L.T. 774, C.A.; 35 Digest 636, *3684.*

Fairclough v. *Swan Brewery Co., Ltd.*, [1912] A.C. 565; 81 L.J.P.C. 207; 106 L.T. 931; 28 T.L.R. 450, P.C.; 35 Digest 353, *958.*

Morgan v. *Seffreys*, [1910] 1 Ch. 620; 79 L.J.Ch. 360; 74 J.P. 154; 26 T.L.R. 324; 35 Digest 301, *510*.

Illingworth v. *Houldsworth*, [1904] A.C. 355; 73 L.J.Ch. 739; 91 L.T. 602; 53 W.R. 113; 20 T.L.R. 633; 12 Mans. 141, H.L.; 10 Digest (Repl.) 770, *5008*.

Davies v. *Chamberlain* (1909), 26 T.L.R. 138, C.A.; 35 Digest 353, *962*.

Appeal by G. and C. Kreglinger, the plaintiffs in the action, from an order of the Court of Appeal (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), affirming an order of Swinfen Eady, J., made on a motion in the action, the question involved being whether a clause in an agreement between the appellants and the respondents, dated Aug. 24, 1910, was invalid in equity as amounting to a clog on the equity of redemption.

By the agreement, which was made between the respondents (thereinafter called "the company"), of the one part, and the appellants (thereinafter called "the lenders"), of the other part, the lenders agreed to lend at once to the company the sum of £10,000, and the company agreed to repay the amount on demand. Until repayment, interest at 6 per cent. was to be paid half-yearly, and, if punctually paid, if none of the events specified in the agreement happened, and if the company duly observed its obligations thereunder, the lenders agreed not to demand repayment of the £10,000 before Sept. 30, 1915, but the company could pay off at any time on giving a calendar month's notice. By cl. 5 the company charged its undertaking and all its property, both present and future, including its uncalled capital for the time being, with the payment of the principal sum and interest, to the intent that such charge should be a floating security on the undertaking and property, subject only to such of the existing debentures as should for the time being be outstanding, but so that the company was not to be at liberty to create any mortgage or charge in priority to that security without the lenders' consent in writing, or to sell its farms and lands, or any portion thereof, without the consent of the lenders. By cl. 8 it was provided as follows:

"During a period of five years from the date hereof the following provisions shall apply: (a) The company shall not sell any sheepskins to any person, firm, or company other than the lenders so long as the lenders are willing to purchase the same at a price equal to the best price (c.i.f. London) offered for the same by any such other person, firm, or company. (b) The company may by notice in writing at any time require the lenders to signify their willingness or unwillingness as the case may be to purchase any particular lot of sheepskins at the price aforesaid, and the lenders shall in that case within five days after the receipt of the notice signify to the company their willingness or unwillingness as the case may be to purchase the sheepskins referred to in the notice, and if within five days after the giving of the notice the lenders shall not have signified their willingness to purchase they shall be deemed to be unwilling to purchase the same, and for the purpose of this sub-clause any notice shall be deemed to have been received by the lenders on the day on which the notice posted in a registered letter addressed to the lenders at their above-mentioned address ought to have been delivered in due course of post or delivered at the address of the said lenders at Rio Gallegos Argentine. (c) The company will pay to the lenders a commission of one per cent. upon the sale price of all sheepskins sold by the company to any person, firm, or company other than the lenders: Provided always that no such commission shall be payable on any price less than the best price mentioned in sub-clauses (a) and (d) of this clause. (d) In the event of the lenders desiring to purchase any sheepskins wet then they shall be entitled to the benefit of sub-clause (a) of this clause if they are willing to purchase the same at a price equal to the best price offered for dry sheepskins (c.i.f. London) after making all proper deductions in respect of labour in drying, baling, shipping, freight, &c."

By cl. 11 it was provided that the agreement should be construed in accordance with English law.

In January, 1913, the respondents paid off the loan. They claimed that such payment had put an end to the option of the appellants to buy the respondents' sheepskins which, if it were valid, would continue operative until Aug. 24, 1915, contending that the stipulation restricted their freedom in conducting the undertaking or business which was the subject of the floating charge; that it was consequently of the nature of a clog on their right to redeem and invalid; and that, whether it clogged the right to redeem, or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption. The appellants said that the stipulation in question was one of a kind usual in business, and that it was in the nature, not of a clog, but of a collateral bargain outside the actual loan which they only agreed to make in order to obtain the option itself. They further said that, even if the option could be regarded as within the doctrine of equity which forbade the clogging of the right to redeem, that doctrine did not extend to a floating charge. On a motion for an interlocutory injunction to restrain the respondents from selling sheepskins to anyone else than the appellants, SWINFEN EADY, J., refused to grant an injunction on the ground that the point had been settled adversely to the appellants by decisions of the House of Lords. The case was brought formally before the Court of Appeal, but was disposed of there without argument with a view to taking the matter as speedily as possible to the House of Lords.

Frank Russell, K.C., and *J. F. W. Galbraith* for the appellants.
Micklem, K.C., and *A. L. Ellis* for the respondents.

Their Lordships took time for consideration.
Nov. 20, 1913. The following opinions were read.

VISCOUNT HALDANE, L.C., stated the facts and continued: Before I refer to the decisions of this House which the courts below have considered to cover the case, I will state what I conceive to be the broad principles which must govern it.

The reason for which a court of equity will set aside the legal title of a mortgagee and compel him to reconvey the land on being paid principal, interest, and costs, is a very old one. It appears to owe its origin to the influence of the Church in the courts of the early Chancellors. As early as the Council of Lateran in 1178, we find, according to MATTHEW PARIS (HISTORIA MAJOR, (1684 Edn.), at pp. 114–115), that famous assembly of ecclesiastics condemning usurers, and laying down that when a creditor had been paid his debt he should restore his pledge. It was, therefore, not surprising that the Court of Chancery should at an early date have begun to exercise jurisiction in personam over mortgagees. This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple should re-vest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor, notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security. This was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which

the Court of Chancery regarded as unconscientious, that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders. But whatever else may have been the intention of those judges who laid the foundations of the modern doctrines with which we are concerned in this appeal, they certainly do not appear to have contemplated that their principle should develop consequences which would go far beyond the necessities of the case with which they were dealing, and interfere with transactions which were not really of the nature of a mortgage and were free from objection on moral grounds. Moreover, the principle on which the Court of Chancery interfered with contracts of the class under consideration was not a rigid one. The equity judges looked not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Thus in *Howard* v. *Harris* (4), LORD KEEPER NORTH in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction on the right to redeem was void in equity. But he went on to intimate that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognised in later authorities.

The principle was thus in early days limited in its application to the accomplishment of the end which was held to justify interference of equity with freedom of contract. It did not go further. As established it was expressed in three ways. The most general of these was that if the transaction was once found to be a mortgage it must be treated as always remaining a mortgage and nothing but a mortgage. That the substance of the transaction must be looked to in applying this doctrine, and that it did not apply to cases which were only apparently or technically within it, but were in reality something more than cases of mortgage, *Howard* v. *Harris* (4) and other authorities show. It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest. The legislature during a long period placed restrictions on the rate of interest which could legally be exacted. But equity went beyond the limits of the statutes which limited the interest, and was ready to interfere with any usurious stipulation in a mortgage. In so doing it was influenced by the public policy of the time. That policy has now changed, and the Acts which limited the rate of interest have been repealed. The result is that a collateral advantage may now be stipulated for by the mortgagee, provided that he has not acted unfairly or oppressively, and provided that the bargain does not conflict with the third form of the principle. This is that a mortgage (subject to the apparent exception in the case of family arrangements, to which I have already alluded) cannot be made irredeemable, and that any stipulation which restricts or clogs the equity of redemption is void. It is obvious that the reason for the doctrine in this form is the same as that which gave rise to the other forms. It was simply an assertion in a different way of the principle that once a mortgage always a mortgage and nothing else.

The rules I have stated have now been applied by courts of equity for nearly three centuries, and the books are full of illustrations of their application. But what I have pointed out shows that it is inconsistent with the objects for which they were established that these rules should crystallise into technical language so rigid that the letter could defeat the underlying spirit and purpose. Their application must correspond with the practical necessities of the time.

The rule as to collateral advantages, for example, has been much modified by the repeal of the usury law and by the recognition of modern varieties of commercial

bargaining. In *Biggs* v. *Hoddinott* (5) it was held that a brewer might stipulate in a mortgage made to him of an hotel that during the five years for which the loan was to continue the mortgagor would deal with him exclusively for malt liquor. In the seventeenth and eighteenth centuries a court of equity could hardly have so decided, and the judgment illustrates the elastic character of equity jurisdiction and the power of equity judges to mould the rules which they apply in accordance with the exigencies of the time. The decision proceeded on the ground that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided, first, that no unfairness is shown, and secondly, that the right to redeem is not thereby clogged. It is no longer true that, as was said in *Jennings* v. *Ward* (6) (2 Vern. at p. 520),

> "a man shall not have interest for his money, and a collateral advantage besides for the loan of it."

Unless such a bargain is unconscionable it is now good. But none the less the other and wider principle remains unshaken that it is the essence of a mortgage that in the eye of a court of equity it should be a mere security for money, and that no bargain can be validly made which will prevent the mortgagor from redeeming on payment of what is due, including principal, interest, and costs. He may stipulate that he will not pay off his debt, and so redeem his mortgage, for a fixed period. But whenever a right to redeem arises out of the doctrine of equity, he is precluded from fettering it. This principle has become an integral part of our system of jurisprudence and must be faithfully adhered to.

The question in the present case is whether the right to redeem has been interfered with. And this must, for the reasons to which I have adverted in considering the history of the doctrine of equity, depend on the answer to a question which is primarily one of fact. What was the true character of the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option of purchase of the sheepskins of the respondents? The question is, in my opinion, not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. Putting aside for the moment considerations turning on the character of the floating charge, such an option no doubt affects the freedom of the respondents in carrying on their business even after the mortgage has been paid off. But so might other arrangements which would be plainly collateral, an agreement, for example, to take permanently into the firm a new partner as a condition of obtaining fresh capital in the form of a loan. The question is one, not of form but of substance, and it can be answered in each case only by looking at all the circumstances and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from judges in other and different cases. Some, at least, of the authorities on the subject disclose an embarrassment which has, in my opinion, arisen from neglect to bear this in mind. In applying a principle, the ambit and validity of which depend on confining it steadily to the end for which it was established, the analogies of previous instances where it has been applied are apt to be misleading. For each case forms a real precedent only in so far as it affirms a principle, the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances. If in the case before the House your Lordships arrive at the conclusion that the agreement for an option to purchase the respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases cease to present any difficulty. In questions of this kind the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is

to be preserved from becoming unsettled and vague. In this respect the previous decisions of a court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours is than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be used for edification, but it can rarely yield authoritative guidance. I desire to associate myself with what was said on this subject by SIR GEORGE JESSEL, M.R., in *Re Hallett's Estate, Knatchbull* v. *Hallett* (7), and I will add that the view of the true limits of the use of authority, which I agree with him in holding, is of especial importance where, as here, the principle to be applied arises in the elastic jurisdiction of a court of equity, and has been established simply as an instrument to give effect to well-defined and governing purpose.

It is not, in my opinion, necessary for your Lordships to form an opinion whether you would have given the same decisions as were recently given by this House in certain cases which were cited to us. These cases, which related to circumstances differing widely from those before us, have been disposed of finally, and we are not concerned with them excepting in so far as they may have thrown fresh light on questions of principle. What is vital in the appeal now under consideration is to classify accurately the transaction between the parties. What we have to do is to ascertain from scrutiny of the circumstances whether there has really been an attempt to effect a mortgage with a provision preventing redemption of what was pledged merely as security for payment of the amount of the debt and any charges besides that may legitimately be added. It is not, in my opinion, conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem on which equity insists as regards all contracts of loan and security ought on principle to be set aside as readily in the case of a floating security as in any other case. But it is material that such a floating charge, in the absence of a bargain to the contrary effect, permits the assets to be dealt with freely by the mortgagor until the charge becomes enforceable. If it be said that the undertaking of the respondents which was charged included their entire business, including the right to dispose of the skins of which they might from time to time become possessed, the comment is that at least they were to be free, so long as the security remained a floating one, to make contracts in the ordinary course of business in regard to these skins. If there had been no mortgage such a contract as the one in question would have been an ordinary incident in such a business. We are considering the simple question of what is the effect on the right to redeem of having inserted into the formal instrument signed when the money was borrowed an ordinary commercial contract for the sale of skins extending over a period. It appears that it was the intention of the parties that the grant of the security should not affect the power to enter into such a contract, either with strangers or with the appellants, and if so I am unable to see how the equity of redemption is affected. No doubt, it is the fact that on redemption the respondents will not get back their business as free from obligation as it was before the date of the security. But that may well be because outside the security and consistently with its terms there was a contemporaneous but collateral contract, contained in the same document as constituted the security, but in substance independent of it. If it was the intention of the parties, as I think it was, to enter into this contract as a condition of the respondents getting their advance, I know no reason either in morals or in equity which ought to prevent this intention from being left to have its effect. What was to be capable of re-

A demption was an undertaking which was deliberately left to be freely changed in its details by ordinary business transactions with which the mortgage was not to interfere. Had the charge not been a floating one, it might have been more difficult to give effect to this intention.

In *Noakes & Co.* v. *Rice* (1) this difficulty is illustrated, for the House held that what had been inserted in the shape of a covenant by the mortgagor to buy the B beer of the mortgagee after redemption of the public-house mortgaged was really a term of the mortgage and was inoperative as being, not merely a collateral agreement, but in truth a restriction on the right to get back the security free from the terms of the mortgage. That was the case of a mortgage of a specific property. The decision that the transaction was what it was held to be is, at all events, readily intelligible.

C In *Bradley* v. *Carritt* (2) it was decided that the mortgagor of shares in a tea company who had covenanted that he would use his best endeavours to secure that always thereafter the mortgagee should have the sale of the company's tea had permanently fettered himself in the free disposition and enjoyment of the shares. It was held that though the covenant did not operate in rem of the shares it amounted to a device or contrivance designed to impede redemption. The D decision was a striking one. It was not unanimous, for LORD LINDLEY dissented from the conclusions of LORD MACNAGHTEN and LORD DAVEY. It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the opinions of those of your Lordships' House, who were in a majority, must be taken as of binding authority. And it certainly cannot, in my opinion, be taken as authoritatively laying down E that the mere circumstance that after redemption the property redeemed may not, as the result of some bargain made at the time of the mortgage, be in the same condition as it was before that time is conclusive against the validity of that bargain. To render it invalid, the bargain must when its substance is examined turn out to have formed part of the terms of the mortgage and to have really cut down a true right of redemption.

F I think that the tendency of recent decisions has been to lay undue stress on the letter of the principle which limits the jurisdiction of equity in setting aside contracts. The origin and reason of the principle ought, as I have already said, to be kept steadily in view in applying it to fresh cases. There appears to me to have grown up a tendency to look to the letter rather than to the spirit of the doctrine. The true view is, I think, that judges ought in this kind of jurisdiction G to proceed cautiously, and to bear in mind the real reasons which have led courts of equity to insist on the free right to redeem and the limits within which the purpose of the rule ought to confine its scope. I cannot but think that the validity of the bargain in such cases as *Bradley* v. *Carritt* (2) and *Santley* v. *Wilde* (8) might have been made free from serious question if the parties had chosen to seek what would have been substantially the same result in a different form. For H form may be very important when the question is one of the construction of ambiguous words in which people have expressed their intentions. I will add that, if I am right in the view which I take of the authorities, there is no reason for thinking that they establish another rule suggested by the learned counsel for the respondents that even a mere collateral advantage stipulated for in the same instrument as constitutes the mortgage cannot endure after redemption. The I dicta on which he relied are really illustrations of the other principles to which I have referred.

There is a further remark which I wish to make about *Bradley* v. *Carritt* (2). It is impossible to read the report without seeing that there was a marked divergence of opinion among those members of your Lordships' House who took part in the decision as to the test by which the validity of contracts collateral to a mortgage is to be determined. LORD DAVEY observes that he cannot understand how, consistently with the doctrine of equity, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the

mortgaged property after redemption. LORD LINDLEY, on the other hand, doubts whether the covenant in question, a covenant that the mortgagor would use his influence as a shareholder to secure for the mortgagee in permanence the brokerage business of the company, ought to be looked on as really forming part of the terms of the security. He points out that when the usury laws were in force, and when every device for evading them had to be defeated by equity, the proposition that everything was part of the mortgage transaction must cease with it, if it was not to infringe the doctrine that once a mortgage always a mortgage, was a convenient statement, and as free from objection as most concise statements are, but that when the usury laws were abolished the language was too wide to be accurate. The views expressed by LORD DAVEY and LORD LINDLEY are not, so far as the mere words go, contradictory. But I cannot shut my eyes to the fact that they represent divergent tendencies. LORD DAVEY seems to suggest that the doctrine about which, when expressed in general terms, there is little controversy, had become finally crystallised in the particular expressions used in certain of the earlier authorities, and that, having become thus rigid, it is today fatal to the freedom of mortgagor and mortgagee to make their own bargains even in cases where the reason for applying the doctrine has ceased to exist. The tendency of LORD LINDLEY'S language is, on the other hand, to treat the application of such a rule as a question in which the courts must not lose sight of the dominating principle underlying the reasons which originally influenced the terms of the rule, reasons which have, in certain cases, become modified as public policy has changed. Speaking for myself, and notwithstanding the high authority of LORD DAVEY, I think that the tendency of LORD LINDLEY'S conclusion is the one which is most consonant with principle, and I see no valid reason why this House should not act in accordance with it in the case now under consideration.

The decision of this House in *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.* (9), does not assist us much because it really turned on the facts. It was held that the stipulation for the licence in question was not part of the mortgage transaction, and this disposed of the appeal. The question was, however, raised, whether the general principles of equity in regard to the right to redeem apply in their integrity to mortgages by way of floating charge. I have already expressed all that it seems to me necessary to say on the point.

The result of the consideration I have given to this appeal is that I think that the contention of the appellants is right. That they should succeed on a point which was little, if at all, considered in the courts below is presumably due to the question raised having been thought to be covered by authority. That does not affect the appellants' right to argue the real point here. The parties have apparently agreed that the result of the motion should be considered as disposing of the action, and that if on the point which has been argued the decision is for the appellants they should be declared entitled to the injunction asked for. I think that the simplest way of giving effect to this agreement on the footing that the appeal is to be decided in the appellants' favour will be to declare them entitled to an injunction in terms of the notice of motion and to the costs here and in the Court of Appeal, with liberty to apply to the Chancery Division to dispose of the action. I move accordingly.

THE EARL OF HALSBURY said he had read the opinions of the LORD CHANCELLOR and LORD PARKER and concurred in them and did not desire to add anything.

LORD ATKINSON said he had also read those opinions and concurred.

LORD MERSEY.—I agree. The transaction out of which this dispute arises, though embodied in one document, is an agreement made up of two parts. The first part consists of a promise by the appellants, who are merchants, to lend to the respondents, who are a trading company, money at interest on the security of a floating charge over the company's undertaking; the second part consists of an agreement by the company to give the lenders the option of purchasing for a time

A their periodical production of sheepskins. The whole transaction is of a most ordinary commercial kind. It is contended that the contract is a mortgage to which the equitable doctrine prohibiting the imposition of a clog on the mortgagor's right to redeem applies, and that, therefore, on payment off of the loan the borrowers are entitled to have back their undertaking freed from any further obligation to sell or deliver sheepskins. Now, whether a transaction is or is not B such a mortgage is a question of intention; and it seems that it has always been the practice of the Court of Chancery to admit oral evidence to assist in solving the question. No such evidence is forthcoming in this case, so that your Lordships are left (I think rightly) to determine the intention merely from the words which the parties have used in drawing up their agreement. These words are, in my opinion, too plain and simple to leave any doubt as to their meaning. The obliga- C tion to sell sheepskins created by cl. 8 of the agreement was to endure in any event until August, 1915. That was the plain intention of both parties to the agreement, and the only effect of applying to the contract the equitable doctrine against clogging the right to redeem would be to defeat that intention and to enable one of the parties to inflict an injustice on the other. I have nothing to say about the doctrine itself. It seems to me to be like an unruly dog, which, if not securely D chained to its own kennel, is prone to wander into places where it ought not to be. Its introduction into the present case would give effect to no equity and would defeat justice.

LORD PARKER OF WADDINGTON.—The respondents in this case are appealing to the equitable jurisdiction of the court for relief from a contract which they E admit to be fair and reasonable and of which they have already enjoyed the full advantage. Their title to relief is based on some equity which they say is inherent in all transactions in the nature of a mortgage. They can state no intelligible principle underlying this alleged equity, but contend that your Lordships are bound by authority. That the court should be asked in the exercise of its equitable jurisdiction to assist in so inequitable a proceeding, or the repudiation of a fair and F reasonable bargain, is somewhat startling, and makes it necessary to examine the point of view from which courts of equity have always regarded mortgage transactions. For this purpose I have referred to most, if not all, of the reported cases on the subject, and propose to state shortly the conclusions at which I have arrived.

A legal mortgage has generally taken the form of a conveyance with a proviso G for reconveyance on the payment of money by a specified date. But a conveyance in this form is by no means necessarily a mortgage. In order to determine whether it is or is not a mortgage, equity has always looked to the real intention of the parties, to be gathered not only from the terms of the particular instrument, but from all the circumstances of the transaction, and has always admitted parol evidence in cases where the real intention was in doubt. Only if according H to the real intention of the parties the property was to be held as a pledge or security for the payment of the money, and as such to be restored to the mortgagor when the money was paid, was the conveyance considered to be a mortgage. Further, the mortgage might be given to secure not only a single money payment, but a series of money payments extending over many years, and, again, the money secured might or might not, according to the circumstances, constitute a debt I due from mortgagor to mortgagee. There might, also, be mortgages by way of security for something other than a money payment or series of money payments, for example, mortgages by way of indemnity, but these may be disregarded for the purposes of this case.

Taking the simple case of a mortgage by way of conveyance, with a proviso for re-conveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would enforce specific performance of the contract for re-conveyance. On the other hand, the mortgagor might fail to pay the money on the date

specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem there arose an equity to redeem, notwithstanding the specified date had passed. Till this date had passed there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable. The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which, from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption. If, as was not infrequently the case, such a legal mortgage as above described contained a further stipulation that, if default were made in payment of the money secured on the date specified, the mortgagor should not exercise his equitable right to redeem, or should only exercise it as to part of the mortgaged property, or on payment of some additional sum or performance of some additional condition, such stipulation was always regarded in equity as a penal clause against which relief would be given. This is the principle underlying the rule against fetters or clogs on the equity of redemption. The rule may be stated thus. The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction. This rule is equally applicable to all transactions of mortgage, whether the mortgagor is or is not under personal liability to pay the money secured, and whether or not the mortgage is given to secure a loan made at the time of the mortgage or some existing debt of the mortgagee. For example, it would be applicable to a mortgage with a proviso for re-conveyance on the payment to the mortgagee by the mortgagor or a third party of moneys owing by such third party to the mortgagee.

By way of illustration of this rule I will ask your Lordships' attention to *Salt* v. *Marquess of Northampton* (10), which came to your Lordships' House. In that case an insurance society had advanced £10,000 to Lord Compton on the security of a reversionary interest to which he was entitled if he survived his father. Pursuant to the agreement made upon the occasion of the advance, the society insured Lord Compton's life against the life of his father, and paid the premiums on this policy up to the father's death. This agreement contained a provision that if Lord Compton during his father's life repaid to the society this £10,000 and the amount of the premiums with interest, the policy should belong to Lord Compton, but if Lord Compton died in his father's lifetime without having repaid the £10,000 and the premiums with interest, the policy should belong to the society. It was this latter event which happened, and the question arose whether the policy belonged to the society or whether it was redeemable on payment of what was due in respect of the moneys advanced and the premiums and interest. If the policy when taken out pursuant to the agreement was in equity the property of the mortgagor, it was part of the property which he had mortgaged to secure the advance, and there being a contractual right to redeem during his father's life, and an equitable right to redeem arising if the contractual right were not exercised, the clause providing that if the contractual right were not exercised the policy should belong to the society was in the nature of a penalty, against which equity would relieve. It was a clog on the equity in the proper sense of that expression. It having been held that the policy did in equity from the first belong to the mortgagor, it followed that the provision in question was void as a clog on the equity.

There is another point which has some importance—namely, the terms upon which equity allowed redemption after the estate had become absolute at law. Except in the case of mortgages to secure moneys advanced by way of loan, to which I shall presently refer, equity only allowed redemption on the mortgagor giving effect so far as he could to the terms on which by the bargain between the parties he had a contractual right to redeem the property. Equity might, and most frequently did, confer further terms, e.g., payment of interest up to the

A date of redemption and proper mortgagees' costs. But except in the case of mortgages to secure moneys advanced by way of loan, I can find no trace in the authorities of any equitable right to redeem without giving effect as far as possible to the terms of the bargain. This is consistent with the principle underlying the rule as to clogging the equity. In relieving from penalties or forfeitures equity has always endeavoured to put the parties as far as possible into the position in B which they would have been if no penalty of forfeiture had occurred. It is only in the case of mortgages to secure moneys advanced by way of loan that there was ever any equity to redeem on terms not involving performance of the bargain between the parties. The reason for this exception will appear presently.

There is another point of view from which a clog or fetter on the equitable right to redeem may be properly regarded. The nature of the equitable right C is so well known that upon a mortgage in the usual form to secure a money payment on a certain day, it must be taken to be a term of the real bargain between the parties that the property should remain redeemable in equity after failure to exercise the contractual right. Any fetter or clog imposed by the instrument of mortgage on this equitable right may be properly regarded as a repugnant condition and as such invalid. There are, however, repugnant conditions which D cannot be regarded as mere penalties intended to deter in the exercise of the equitable right which arises when the time for the exercise of the contractual right has gone by, but which are repugnant to the contractual right itself. A condition to the effect that if the contractual right is not exercised by the time specified, the mortgagee shall have an option of purchasing the mortgaged property, may properly be regarded as a penal clause. It is repugnant only to the equity E and not to the contractual right. But a condition that the mortgagee is to have such an option for a period which begins before the time for the exercise of the statutory right has arrived or which reserves to the mortgagee any interest in the property after the exercise of the contractual right is inconsistent, not only with the equity, but with the contractual right itself, and might, I think, be held invalid for repugnancy even in a court of law. This consideration affords a possible F and reasonable explanation of the rule referred to in some of the authorities, to the effect that a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part of or interest in the mortgaged premises. Suppose the following simple case, namely, a conveyance by way of mortgage with a proviso for re-conveyance if the mortgagor pay to the mortgagee £500 and interest at the end of six months, and then a further stipulation G that the mortgagee should have an option of purchasing the property for another six months. If the mortgagor pays the moneys secured by the specified date the mortgagee comes under a contractual liability to re-convey, and if he does re-convey he re-conveys his whole interest in the mortgaged property, thus destroying his option. The option, therefore, is inconsistent with and repugnant to the proviso for re-conveyance, which embodies the terms of the contractual right to redeem. H It may, therefore, be rejected. It is also inconsistent with and repugnant to the equity of redemption, which arises on failure to exercise the contractual right to redeem. It is, therefore, though not strictly a penalty, sometimes referred to as a clog on this equity.

The fact that the inconsistency is most apparent in mortgages with an express proviso for redemption may account for Lord Hardwicke's inclination to confine I the rule to such mortgages: *Mellor* v. *Lees* (11). In *Newcomb* v. *Bonham* (12) the objection based on the rule is thus formulated (2 Cas. in ch. at p. 50):

> "Here is a power [the express proviso] to redeem, and it shall never be extinct by any covenant at the same time, and the court hold that this was the usual rule."

In the case of mortgages without such an express proviso there might, it is true, be a like inconsistency or repugnancy, but only if the real intention of the parties was that the property should be held as security for the moneys charged

thereon and restored intact to the mortgagor as soon as these moneys were paid, but, as in the last-mentioned case, it is always possible that this was not the true intention, and, unless it be the true intention, the transaction is not really a mortgage under the rule, but something more complex. It should be noticed that LORD HENLEY'S explanation of the rule in *Vernon* v. *Bethell* (13) is based on considerations applicable only to mortgages to secure loans, though the rule itself is not confined to such last-mentioned mortgages. Indeed, in the case of mortgages to secure loans, the mortgagee could not in LORD HENLEY'S time have contracted for an interest in or option over the mortgaged property for quite another reason.

All that I have said hitherto as to the equitable considerations affecting legal mortgages in the usual form applies equally to conveyances of equitable interests where there is an express proviso for redemption. The only difference in this case is that there is no legal estate to become absolute on failure to exercise the contractual right though there is a contract for re-conveyance for breach of which an action might lie at law. It applies also, but with some important qualifications, to mere equitable charges. In the case of a mortgagor merely charging a property with payment to the mortgagee of a sum of money not only does the mortgagee take no interest at law in the property charged, but there is no contract for re-conveyance at all. The right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free, and if the day passes without payment there will still be an equity to have the property so freed notwithstanding any provision in the nature of a penalty, such final provision being a clog on the equity. The difference between transactions by way of equitable charge and transactions by way of conveyance with a proviso for re-conveyance is chiefly important when, for the purpose of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction between the parties has to be investigated.

I have pointed out that in mortgages in common form an option to purchase is inconsistent with and repugnant to the proviso for re-conveyance on payment of the money secured. But is there any such repugnancy or inconsistency in the following case? A. agrees to give B. an option for one year to purchase a property for £10,000. In consideration of such option B. agrees to lend, and does lend, A. £1,000 to be charged on the property without interest, and be repayable at the expiration or earlier exercise of the option. I cannot myself see that there is any inconsistency or repugnancy between the provisions of this perfectly simple and straightforward transaction. It would have been very different if A. had conveyed the property to B. with a proviso that on payment of the £1,000 there should be a re-conveyance, and the deed had then provided for the year's option. Here the option would be inconsistent with, and would in fact have been destroyed by, the re-conveyance.

I desire, in connection with what I have just said, to add a few words on the maxims in which attempts have been made to sum up the equitable principles applicable to mortgage transactions. I refer to the maxims, "Once a mortgage, always a mortgage," or, "A mortgage cannot be made irredeemable." Such maxims, however convenient, afford little assistance where the court has to deal with a new or doubtful case. They obviously beg the question, always of great importance, whether the particular transaction which the court has to consider is, in fact, a mortgage or not, and if they be acted on without a careful consideration of the equitable considerations on which they are based, can only, like BACON'S idols of the market place, lead to misconception and error. We will suppose that money is advanced to a company repayable at the expiration of fifteen years, not an unusual period, and that the company by way of security subdemises (as is often the case) to trustees for the lenders a number of leaseholds, some of which

A are held for terms less than fifteen years. It would, in my opinion, be a serious error to argue that this was an attempt to make an irredeemable mortgage. There would be the same error in objecting on the like ground to a mortgage of leaseholds to secure an annuity for a period exceeding the term of the lease. If the mortgage is irredeemable at all, this arises from the nature of the property mortgaged, and not from any penal or repugnant stipulation on the part of the mort-
B gagee, and the maxim properly understood is in no way infringed. We will suppose again that a firm of manufacturers desires to take in a new partner, proposing to charge a premium of £3,000. A. wants to buy a partnership, but before entering this firm desires some further acquaintance with the extent and methods of its business. It is thereupon arranged that A. shall be taken on as clerk for a year and have a year's option of entering the firm as a partner at
C a premium of £3,000, and in the meantime shall advance the firm £3,000, charged on some partnership property, to be set off against the premium if the option be exercised, but otherwise refunded at the end of the year. To suggest that such an arrangement was bad because it infringed the maxim of "once a mortgage, always a mortgage," would, in my opinion, be absolutely erroneous.

I now come to the particular class of mortgages to which I have already referred
D —that is to say, mortgages to secure borrowed money. For the whole period during which the Court of Chancery was formulating and laying down its equitable doctrines in relation to mortgages there existed statutes strictly limiting the rate of interest which could be legally charged for borrowed money. If a mortgagee stipulated for some advantage beyond repayment of his principal with interest, equity considered that he was acting contrary to the spirit of these statutes, and
E held the stipulation bad on this ground. There thus arose the rule so often referred to in the reported decisions, that in a mortgage to secure borrowed money, the mortgagee could not contract for any such advantage. There was said to be an equity to redeem on payment of principal, interest, and costs, whatever might have been the bargain between the parties, and any stipulation by the mortgagee for a further, or as it was sometimes called, a collateral, advantage
F came to be spoken of as a clog or fetter on this equity. It is of the greatest importance to observe that this equity is not the equity to redeem with which I have hitherto been dealing. It is an equity which arises ab initio, and not only on failure to exercise the contractual right to redeem. It can be asserted before as well as after such failure. It has nothing to do with time not being of the essence of a contract, or with relief from penalties, or with repugnant conditions.
G It is not a right to redeem on the contractual terms, but a right to redeem notwithstanding the contractual terms, a right which depended on the existence of the statutes against usury and the public policy thought to be involved in those statutes. Unfortunately, in some of the authorities this right is spoken of as a right incidental to mortgages generally, and not confined to mortgages to secure borrowed money. This is quite explicable when it is remembered
H that a loan is perhaps the most frequent occasion for a mortgage. But it is, I think, none the less erroneous. I can find no instance of the rule which precludes a mortgagee from stipulating for a collateral advantage having been applied to a mortgage other than a mortgage to secure borrowed money, and there is the authority of LORD ELDON in *Chambers* v. *Goldwin* (14) for saying that this rule was based on the usury laws. The right (notwithstanding the terms of
I the bargain) to redeem on payment of principal, interest, and costs, is a mere corollary to this rule, and falls with it. It is to be observed that stipulations for a collateral advantage may be classified under two heads. First, those the performance of which is made a term of the contractual right to redeem, and, secondly, those the performance of which is not made a term of such contractual right. In the former case in settling the terms on which redemption was allowed the Court of Chancery entirely ignored such stipulation. In the latter case, so far as redemption was concerned, the stipulations were immaterial, but it is said that in both cases the Court of Chancery would have restrained an action at

law for damages for their breach. This is possible, though I can find no instance of its having been done, but clearly on a bill for an injunction to restrain an action at law the plaintiff would have to show some equity entitling him to be relieved from his contract, and such equity could, I think, have been based only on the usury laws, or the public policy which gave rise to them.

The last of the usury laws was repealed in 1854, and thenceforward there was, in my opinion, no intelligible reason why mortgages to secure loans should be on any different footing from other mortgages. In particular, there was no reason why the old rule against a mortgagee being able to stipulate for a collateral advantage should be maintained in any form or with any modification. Borrowers of money were fully protected from oppression by the pains always taken by the Court of Chancery to see that the bargain between borrower and lender was not unconscionable. Unfortunately, at the time when the last of the usury laws was repealed, the origin of the rule appears to have been more or less forgotten, and the cases decided since such repeal exhibit an extraordinary diversity of judicial opinion on the subject. It is little wonder that, with the existence in the authorities of so many contradictory theories, persons desiring to repudiate a fair and reasonable bargain have attempted to obtain the assistance of the court in that behalf. To one who, like myself, has always admired the way in which the Court of Chancery succeeded in supplementing our common law system in accordance with the exigencies of a growing civilisation, it is satisfactory to find, as I have found on analysing the cases in question, that no such attempt has yet been successful. In every case in which a stipulation by a mortgagee for a collateral advantage has, since the repeal of the usury laws, been held invalid, the stipulation has been open to objection, either (i) because it was unconscionable, or (ii) because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem, or (iii) because it was in the nature of a condition repugnant as well to the contractual as to the equitable right. It is true that in *Santley* v. *Wilde* (8) the attempt that was made to induce the court in the exercise of its equitable jurisdiction to assist in the repudiation of a fair and reasonable bargain ought, according to the opinion of other judges, to have been successful, but it is one thing to criticise a decision and quite another to take the responsibility of deciding it.

The respondents in the present case rely chiefly on three cases which came up to your Lordships' House, and to which I must shortly refer. In the first of those cases—*Noakes & Co.* v. *Rice* (1)—the collateral advantage in question was a covenant tying the mortgaged premises, which consisted of a leasehold public-house, to the mortgagee's brewery. There was a proviso for re-conveyance of the public-house to the mortgagor upon payment on demand or without demand of all moneys thereby covenanted to be paid. There was, therefore, a contractual right to a re-conveyance whenever the mortgagor thought fit to pay. The tie, however, was for the whole term of the lease, and was clearly inconsistent with and repugnant to this right. It was, therefore, bad. There is, I think, nothing at variance with anything I have suggested to your Lordships either in the decision itself or in the speeches of any of the noble Lords who advised the House, with the exception of the speech of Lord Davey. It is with the greatest diffidence that I venture to criticise any opinion expressed by so great an authority, but I cannot wholly accept what Lord Davey lays down as to the equitable principle in relation to mortgages. It appears to me that he omits to notice that the doctrine as to clogs upon the equity of redemption is applicable to all mortgages, and not confined to mortgages to secure borrowed money, and, founding himself upon considerations which apply, if they apply at all, only to the latter class of mortgage, defines the equity to redeem in such a way that in many cases it could never fit the facts at all. I can best illustrate this by supposing that in the case he was considering the mortgage had been given by way of security for the debt of a third party, the mortgagee agreeing not to enforce the debt for a specified period. The tie would still have constituted a clog, being inconsistent with the proviso for redemption and

consequently inconsistent with any equitable right to redeem, but a considerable part of LORD DAVEY'S judgment would have been entirely inappropriate. Thus, after approving LORD LINDLEY'S statement in *Santley* v. *Wilde* (8) to the effect that a clog is something inconsistent with the security, and in the nature of a repugnant condition, he proceeds as follows ([1902] A.C. at p. 34):

> "But I ask 'security' for what? I think it must be security for the principal, interest, and costs, and. I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end."

After criticising *Santley* v. *Wilde* (8) he continues (ibid.):

> "In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption."

It is evident that no part of the above can possibly apply to mortgages other than those entered into upon the occasion of a transaction of loan. It appears to me that the noble Lord is reasserting in a modified form the doctrine which prevailed prior to the repeal of the usury laws, and was based on those laws. As long as it was impossible because of the usury laws for a mortgagee before making a loan to stipulate for any collateral advantage, the equity was an equity to redeem on payment of the principal of the loan with interest and costs, and any stipulation to the contrary might be considered a clog; a mortgagee may now stipulate for a collateral advantage, but LORD DAVEY assumes that the equity remains the same; only if this be so, it follows that every collateral stipulation which cannot be considered in the nature of interest is still bad. In my opinion, the equity cannot remain the same when the only reason for its existence is gone.

Nor can I accept the proposition that upon the occasion of a loan the mortgagee cannot stipulate for any payment falling due after the principal is paid. Such a rule would seriously interfere with business transactions and would be a hardship on mortgagees and mortgagors alike. Take, for instance, a case like *Potter* v. *Edwards* (15) where in consideration of £700 a mortgagee agrees to pay £1,000 with interest on a fixed date, and the proviso for redemption is framed accordingly. This is good, but according to the proposition in question if the mortgagee had desired further time for the payment of the £300 bonus and the proviso for re-conveyance had been upon payment of the £700 and interest on the fixed date, and the £300 by instalments payable later, there would have been an illegal clog. I can see no objection to a bargain by which money is advanced for three years and the borrower pays by way of remuneration or interest for the use of money a further sum payable by instalments extending over five years Why should there be any principle of law or equity precluding free contract in this respect?

I come now to the second of the three cases to which I have referred, *Bradley* v. *Carritt* (2). Here there was a mortgage of shares in a company expressed to be by way of security for borrowed money payable on or before a fixed date, with interest in the meantime. This involved an obligation to re-transfer the shares if the money and interest were paid as agreed. On default there would be an equity to a re-conveyance on payment of principal, interest, and costs. There was a clause enabling the mortgagee on default to take over the shares in satisfaction of the debt. This was inconsistent with, and a clog on, the equity to

redeem, and, therefore, bad. There was also a provision that the mortgagee should always thereafter, as shareholder, use his best endeavours to secure that the mortgagee or his firm should have the sale of the company's teas, and in the event of such teas being sold otherwise than to the mortgagee or his firm the mortgagor was to pay the mortgagee a commission. It was as to this latter clause that the difficulty arose. Was it or was it not operative after redemption? The real question, in my opinion, was whether it was inconsistent with or repugnant to the contractual right of the mortgagor to have his property restored unfettered if he paid the money secured with interest as provided in the agreement, and the consequent equitable right to have the property so restored if he paid this money with interest and costs at any time. On this point there was room for difference of opinion, and accordingly we find BIGHAM, J., A. L. SMITH, M.R., STIRLING and VAUGHAN WILLIAMS, L.JJ., LORD LINDLEY, and LORD SHAND taking the one view, and LORD MACNAGHTEN, LORD DAVEY, and LORD ROBERTSON taking another. There is really no difficulty in the decision itself. It is merely to the effect that case was within the principle of *Noakes & Co.* v. *Rice* (1). LORD MACNAGHTEN, LORD SHAND and LORD DAVEY all thought that if the stipulations in question were binding after redemption the mortgagor could not upon redemption get back his property intact; in other words, that the stipulation was repugnant both to the contractual right and the equity. But both LORD MACNAGHTEN and LORD DAVEY also expressed opinions to the effect that all stipulations for collateral advantages, and not only those which were repugnant to the contractual or equitable right, must come to an end upon redemption. These expressions of opinion were not, I think, necessary to the decision, and though, of course, of the greatest weight, are not, I think, binding on your Lordships. I have already given my reasons for not being able to accept them. It appears to me that if they be accepted, it will be found that equity has involved itself in a Gordian knot which can only be cut by an Act of Parliament, and that unless and until the legislature finds time to intervene, your Lordships will be obliged in the name of equity to connive at, and, indeed, assist in, the violation of fair and reasonable bargains. There is, I think, nothing in the former decisions of this House which compels your Lordships to submit to this indignity.

The last case to which it is necessary to refer is *Samuel* v. *Jarrah Timber and Wood Paving Corpn., Ltd.* (3). The facts of this case were simple. There was a loan, and certain debenture stock was, by the express terms of the agreement, to be transferred, and was, in fact, transferred, to the mortgagee "as security" for the loan. This meant that on repayment of the loan with interest the stock was to be re-transferred. The loan was repayable upon thirty days' notice on either side and the mortgagee was to have an option to purchase the stock for twelve months. This option, being inconsistent with both the contractual and equitable right of redemption, was clearly invalid. To use LORD MACNAGHTEN's language ([1904] A.C. at p. 327), it is

> "an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute."

As I have already said, I think the rule depends on the inconsistency or repugnancy involved in any such provision. If once you come to the conclusion that the parties intended that the property should be re-conveyed on payment off of the moneys secured, any provision which would prevent this must be rejected as inconsistent with and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties, then the transaction is not one of mortgage at all.

After the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage,

provided such collateral advantage is not either (i) unfair or unconscionable, or (ii) in the nature of a penalty clogging the equity of redemption, or (iii) inconsistent with or repugnant to the contractual and equitable right to redeem. In the present case it is clear from the evidence, if not from the agreement of Aug. 24, 1910, itself, that the nature of the transaction was as follows. The respondent company wanted to borrow £10,000, and the appellants desired to obtain an option of purchase over any sheepskins the respondents might have for sale during a period of five years. The appellants agreed to lend the money in consideration of obtaining this option, and the respondent company agreed to give the option in consideration of obtaining the loan. The loan was to carry interest at 6 per cent. per annum, and was not to be called in by the appellants for a specified period. The respondent company, however, might pay it off at any time. It was to be secured by a floating charge over the respondent company's undertaking. The option was to continue for five years, whether the loan was paid off or otherwise, and if the appellants did not exercise their option as to any of the respondent company's skins, a commission on the sale of such skins was in certain events payable to the appellants. I doubt whether, even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. It never was intended by the parties that if the respondent company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty, nor was it nor could it ever become inconsistent with or repugnant to any other part of the real bargain between the parties. The same is true of the commission payable on the sale of skins as to which the option was not exercised. Under these circumstances it seems to me that the bargain must stand and that the appellants are entitled to the relief they claim.

Solicitors: *Alfred Double & Sons*; *Rawle, Johnstone & Co.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

Re HILLS, Ex Parte LANG

[King's Bench Division (Phillimore and Lord Coleridge, JJ.), July 15, 1912]
[Reported 107 L.T. 95]

Bankruptcy—Proof—Substitution of proof—Proof by company—Dissolution of company—Substitution of proof by equitable assignee of judgment debt.

The equitable assignee of a judgment debt may be given leave to substitute a proof in the bankruptcy of the debtor whose debt has been assigned for that of the assignor, a dissolved company, but, as the Crown may be a claimant of the debt as bona vacantia, notice of such an order must be given to the Crown.

Notes. As to distribution of property in bankruptcy after proof of debts, see 2 Halsbury's Laws (3rd Edn.) 509 et seq.; and for cases on substitution of proof, see 4 Digest (Repl.) 377.

Case referred to:

(1) *Re Iliff* (1902), 51 W.R. 80; 18 T.L.R. 819; 46 Sol. Jo. 701; 4 Digest (Repl.) 377, *3423*.

Also referred to in argument:

Re No. 9 Bomore Road, [1906] 1 Ch. 359; 75 L.J.Ch. 157; 94 L.T. 403; 54 W.R. 312; 13 Mans. 69; 10 Digest (Repl.) 1103, *7622*.

Re Higginson and Dean, Ex parte A.-G., [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.; 4 Digest (Repl.) 370, *3375*. A

Hastings Corpn. v. *Letton*, [1908] 1 K.B. 378; 77 L.J.K.B. 149; 97 L.T. 582; 23 T.L.R. 456; 15 Mans. 58; 10 Digest (Repl.) 1104, *7627*.

Appeal from Greenwich County Court. B

On Aug. 23, 1907, H. Schumacher and Co., Ltd., issued to John Lang twenty debentures of £100 each, and later further debentures. In February, 1908, the company made default in payment of the interest thereon. Thereupon Lang, as sole debenture-holder, commenced proceedings in the Chancery Division, and on May 26 the master certified that the company were indebted to Lang to the amount of £2,088 12s. in respect of the debentures, and, further, that the book debts of the company were comprised in the debenture security. Among such book debts was a judgment debt of £105 3s. 6d. and £5 6s. costs obtained by the company against T. H. Hills. This debt had remained unpaid, and the company had been admitted to prove for the full amount in the bankruptcy of Hills, which took place shortly afterwards. The company was dissolved on Aug. 29, 1909. In May, 1912, Lang applied in the Greenwich County Court, as equitable assignee of the judgment debt, to be allowed to substitute a proof for that of the dissolved company in the bankruptcy of T. H. Hills, but this application was dismissed by the registrar. C D

Edward Ford for John Lang.
Hansell for the official receiver.

PHILLIMORE, J.—This appeal must succeed and the official receiver will be given leave to place a proof by J. Lang on the file in place of the proof of H. Schumacher & Co., Ltd., as was done in *Re Iliff* (1). But the assignment to Lang is only an equitable assignment, and the Crown may claim the amount as bona vacantia. Therefore, leave to substitute a proof will only be given subject to the production of evidence that notice has been given to the Crown and that the Crown has consented, or has given no answer within one month from the date of such notice. E F

LORD COLERIDGE, J.—I agree.

Solicitors: *Henry Hilbery & Son*; *Solicitor to the Board of Trade.*

[*Reported by* Donald W. Corrie, Esq., *Barrister-at-Law.*]

A

WALLIS, SON AND WELLS *v.* PRATT AND HAYNES

[House of Lords (Lord Loreburn, L.C., Lord Ashbourne, Lord Alverstone and Lord Shaw), May 5, 1911]

B [Reported [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496]

Sale of Goods—Sale by sample and description—Exception clause—"No warranty express or implied as to growth description or any other matters"—Goods not answering description—Re-sale by buyer to third parties—Rights of buyer against seller—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *ss.* 11, 13.

C By a contract in writing the sellers agreed to sell and the buyers to buy a quantity of seed per sample described as common English sainfoin. The contract contained the following clause: "Sellers give no warranty expressed or implied as to growth or description or any other matter . . ." The seed was delivered to the buyers who re-sold it to third parties, who sowed it. When it came up it was discovered that it was not common English sainfoin, but an D inferior variety known as giant sainfoin the market value of which was considerably lower than common English sainfoin. The two seeds were, however, indistinguishable. In an action by the buyers to recover damages for breach of contract,

Held: although in the circumstances the buyers had to treat the breach of condition as a breach of warranty under s. 11(c) of the Sale of Goods Act, 1893, E the condition was not thereby degraded into a warranty, but merely entitled the buyers to the remedies which attached to a breach of warranty; the sellers were not, therefore, protected by the clause in the contract excluding liability for breach of warranty, and the buyers were entitled to recover damages.

Notes. Considered: *Re H. Bourgeois and Wilson, Holgate & Co.* (1920), 25 Com. F Cas. 260. Distinguished: *Japy* v. *Sutherland, Sutherland* v. *S. S. Thoeger* (1921), 91 L.J.K.B. 19. Considered: *Wimble, Sons & Co.* v. *Lillico & Son, London* (1922), 38 T.L.R. 296; *Szymonowski & Co.* v. *Beck & Co.*, [1923] 1 K.B. 457. Applied: *Baldry* v. *Marshall*, [1924] All E.R.Rep. 155; *William Barker (Junior) & Co., Ltd.* v. *Ed. T. Agius, Ltd.* (1927), 43 T.L.R. 751; *Huntoon Co.* v. *Kolynos (Incorporated)*, [1930] 1 Ch. 528. Considered: *Sullivan* v. *Constable* (1932), 48 T.L.R. 267; G *Andrew Bros. (Bournemouth), Ltd.* v. *Singer & Co., Ltd.*, [1933] All E.R.Rep. 479; *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.*, [1934] All E.R.Rep. 1; *Wilkinson* v. *Barclay*, [1946] 1 All E.R. 387. Applied: *Harling* v. *Eddy*, [1951] 2 All E.R. 212. Referred to: *T. and J. Harrison* v. *Knowles and Foster*, [1918–19] All E.R.Rep. 306; *Lancaster* v. *J. F. Turner & Co.*, [1924] All E.R.Rep. 189; *C. G. Dobell & Co.* v. *Barber and Garratt* (1930), 47 T.L.R. 66; *L'Estrange* v. H *Grancob, Ltd.*, [1934] All E.R.Rep. 16; *Nicholson and Venn* v. *Smith Marriott* (1947), 177 L.T. 189; *Leaf* v. *International Galleries*, [1950] 1 All E.R. 693; *Chandris* v. *Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768.

As to conditions and warranties, see 34 Halsbury's Laws (3rd Edn.) 40 et seq.; and for cases see 39 Digest 466 et seq. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 988.

I Case referred to:

(1) *Ellen* v. *Topp* (1851), 6 Exch. 424; 20 L.J.Ex. 241; 17 L.T.O.S. 52; 15 Jur. 451; 155 E.R. 609; 12 Digest (Repl.) 473, *3530*.

Appeal by the buyers, the plaintiffs in the action, from a decision of the Court of Appeal (Vaughan Williams and Farwell, L.JJ., Fletcher Moulton, L.J., dissenting) reported [1910] 2 K.B. 1003, reversing a judgment of Bray, J., reported 102 L.T. 108 in favour of the buyers upon a Special Case stated by an arbitrator.

In February, 1906, the sellers submitted to the buyers a sample of seed which they said was common English sainfoin, grown by Walker, of Tanfield, near Alvescot. The buyers examined the sample, and asked the sellers whether they were quite sure that it was common English sainfoin, and they replied that it was. The buyers thereupon agreed to buy 27½ quarters of the seed at 40s. a quarter, and the sellers handed them a sold note as follows:

> Sold to Messrs. Wallis, Son, and Wells, on the conditions printed on the back, about 27½ quarters sainfoin, 40s. Walker (common English), Alvescot. Buyers' trucks Due net cash on . . .

One of the conditions on the back was as follows:

> Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect.

The seed was delivered in due course, and was equal to sample. The buyers sold the seed as common English sainfoin in different parcels to several purchasers, including one Nicholl. Neither the sample nor the bulk was in fact common English sainfoin; both were the seed of the giant sainfoin. The two seeds are indistinguishable, at all events by any examination of a sample which is practicable in the course of a deal. The plants raised from the two seeds differ in the following respects. Giant sainfoin is coarser and grows taller than common English sainfoin; it does not cover the ground so well; if allowed to do so, it comes to seed twice in the year, and is of little, if any, use for feeding purposes after the third year from sowing. Common English sainfoin, on the other hand, "tillers out" better; it only seeds once in each year and lasts for six, seven, or even eight years; by reason of the above differences the price of common English sainfoin seed is about 10s. a quarter higher than that of giant sainfoin seed.

The seed sold by the buyers to Nicholl was sown by him and in due time came up. He then for the first time discovered that the seed supplied to him was not that of common English sainfoin. He communicated this fact to the buyers, who then for the first time became aware of it. He then made a claim for damages for breach of warranty against the buyers, which claim was reasonably and properly settled by them, after due notice to the sellers, for the sum of £14. Other similar claims had been made on the buyers by other purchasers, and had already been or were in process of being settled by them. The buyers claimed from the sellers the sum of £14 so paid to Nicholl, which sum the sellers refused to pay. The dispute was referred to an arbitrator. The sellers relied upon the clause in the contract which they alleged precluded the buyers from claiming damages. The arbitrator stated his award in the form of a Special Case for the opinion of the court, stating the facts as above. The question for the opinion of the court was whether upon those facts the buyers were entitled to recover from the sellers the sum of £14. Bray, J., gave judgment in favour of the buyers. The sellers appealed to the Court of Appeal who reversed the decision of Bray, J., Fletcher Moulton, L.J., dissenting.

The Sale of Goods Act, 1893, provides:

> "Sect. 11 (1). In England or Ireland: (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. (b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. (c) Where a contract of sale is not severable, and the buyer

A has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

B Sect. 13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

The dissenting judgment of FLETCHER MOULTON, L.J., was as follows.

C **FLETCHER MOULTON, L.J.**—In this case the court is asked to interpret a certain written contract and to state the legal consequences of its interpretation. But, although the decision relates only to this particular contract, the argument has been conducted on lines turning upon general rules of law with regard to written contracts and to the meaning and effect of the provisions of the Sale of Goods Act, and I find it necessary, therefore, to deal with the points raised in D connection therewith before I apply the law to the construction of the contract in question.

A party to a contract who has performed or is ready and willing to perform his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of E equal importance. There are some which go so directly to the essence of the contract, and are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both clauses are equally obligations under the F contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance, and (if he takes proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognising this distinction between the two classes of G obligations under a contract, there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class, and "warranty" to describe an obligation of the latter class. I do not think that the choice of terms is happy especially so far as regards the word "condition," for it is a word which is used in many other connections, and H has considerable variety of meaning. But its use with regard to the obligations under a contract is well known and recognised, and no confusion need arise if proper regard be had to the context.

This usage has been followed in the codification of the law of the contract of sale in the Sale of Goods Act. The word "condition" is used in the text of the Act, though no formal definition is given to it. But in the interpretation clause I "warranty" is expressly defined in the following terms:

> " 'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

It is clear from this definition that a breach of warranty entitles the other contracting party to damages only. In contrast to this the additional right in the

case of a breach of a condition is fully recognised in s. 11. In all this the Act adopts the well settled law that existed at the date when it was passed. It will be seen, therefore, that a condition and a warranty are alike obligations under a contract, a breach of which entitles the other contracting party to damages. But in the case of a breach of a condition he has the option of another and higher remedy—namely, that of treating the contract as repudiated. But, as I have said, he must act promptly if he desires to avail himself of this higher remedy, and in s. 11 (1) (c) two cases are given, in which he will be deemed, as a matter of law, to have elected to content himself with his right to damages. The two cases named are the case where the buyer has accepted the goods or part thereof, and the case where the contract is for specific goods the property in which has passed to the buyer. It is not necessary to consider the question whether this list is complete. I see no reason to suppose that the Act intends that these should be the only modes in which a buyer can effectively bar himself from taking advantage of the choice of remedies given in the case of a breach of a condition, but that is a point which it is not necessary to discuss in the present case. When a buyer comes within either of the cases set out in s. 11 (1) (c), he is in precisely the same position in all respects as if he had voluntarily elected to take the remedy of damages in accordance with the provisions of s. 11 (1) (a).

The contract which the court has to construe in the present case is (so far as material) as follows:

> "Sold to Messrs. Wallis, Son, and Wells, on the conditions printed on the back, about 27½ quarters sainfoin, 40s., Walker (common English).—Pratt and Haines."

On the back are printed certain conditions, i.e., terms of the contract, the only material one being as follows:

> "(2) Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect."

It will be seen therefore that the sellers, by this contract, sell to the buyers a certain quantity of common English sainfoin on the above terms. I need hardly say that the use of the word "conditions" to describe the printed terms of the contract has nothing in common with the special use of the word "conditions" in relation to contracts of sale or otherwise of which I have been speaking. This then is the contract which the court has to construe, and were it not for the difference of judicial opinion I should have looked upon it as a plain case. The contract is for the sale of a given quantity of common English sainfoin, and it is admitted by both parties that the purchaser was entitled under this contract to receive common English sainfoin. But the seller is careful to say that he gives no warranty of any kind, that is to say, using the definition of warranty in the Sale of Goods Act (which must apply since neither the context nor the subject matter otherwise requires), he makes no agreement with reference to the goods which is collateral to the main purpose of the contract, i.e., the sale of common English sainfoin. The contract, therefore, means that the purchaser has the right to have delivered to him the stipulated quantity of common English sainfoin. The contract gives to him nothing more, but certainly it gives nothing less. Now it is admitted that the vendors committed a breach of this contract in that they delivered seed of giant sainfoin, which is a different article of inferior value. Inasmuch as by the law the obligation to deliver the kind of goods stipulated for in a contract of sale is an obligation which has the status of a condition, this breach gave to the purchaser the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article. But the buyer re-sold the goods in ignorance of the breach

(the two kinds of seed bearing a close resemblance to one another in appearance), and by the fact that he has re-sold the goods he has prevented himself from exercising the higher right. He must therefore content himself with suing for damages for breach on the sellers' part of the obligation which lay upon him under the contract. This he is doing, and we are asked to say whether his claim is a good one.

I confess that for my own part I can see no possible answer to it. So soon as it is determined that there is an obligation under the contract to deliver common English sainfoin it follows that the other contracting party is entitled to damages if he has suffered from a breach of it. The ingenious argument of counsel for the sellers in this case was, in my opinion, based upon a fallacy. He was compelled to admit that the sellers undertook the obligation of delivering common English sainfoin, and that this was an obligation having the higher status of a condition. It was thus outside the language and the scope of the clause in the contract relating to warranties. But he ought to say that, although this clause as to warranties did not affect the existence of the obligation, it took away the right to damages for a breach of it. His argument was that, under s. 11, a condition becomes a warranty, if any portion of the goods are accepted. The answer to this argument is, in my opinion, twofold. In the first place s. 11 (1) does not state that a condition becomes a warranty if the goods are accepted, but only that the legal remedies for the breach of a condition become limited to the single remedy which exists in the case of a warranty—namely, suing for damages. Whether an obligation is a condition or a warranty is decided (as s. 11 (1) (b) and the definition clause show) by the contract itself and not by matters subsequent to the contract. Such matters (whether they consist of express election or election statutably implied from acts) may take away the superior legal advantages of a condition as compared with a warranty, but they do not make it a warranty, and if the language of s. 11 be carefully examined it will be seen that it nowhere states that a condition ceases to be a condition but merely that the breach of the condition can only be treated as a breach of warranty, i.e., as a ground for damages and not for repudiation. By s. 11 (1) (a) this is one of the remedies which is always open to the contracting party who is entitled to claim for a breach of a condition of the contract.

But there is another answer to the argument. The object and effect of the written contract is to define the respective obligations of the contracting parties. When the contract has been construed, i.e., when those obligations have been ascertained, the law determines the consequences of their being violated. It is admitted that the language of the contract creates the obligation to deliver common English sainfoin, and that this has the status of a condition. It cannot, therefore, be affected or limited by a clause which only negatives the existence of warranties, i.e., of stipulations in the contract which, whatever their nature, are merely collateral to the main purpose of the contract, in the delivery of common English sainfoin. Since the language of the contract is admittedly adequate to create the obligation to deliver common English sainfoin, it follows of necessity that it brings with it the legal consequence that if it is not performed the purchaser has a right of action for damages for such non-performance. Counsel for the appellants would have us read the words as saying that, although the vendor is bound to deliver common English sainfoin, he is not liable in damages if he does not do so, but delivers something else, a construction which to my mind is an impossible one. It would require express language in the contract to indicate any intention of negativing a right to damages for the breach of an obligation imposed by it, and I can find in the present contract no trace of any such language. For these reasons I am of opinion that we ought to answer the questions put to us in the Special Case in the affirmative, and that this appeal should be dismissed.

The buyers appealed to the House of Lords.

Shearman, K.C., and *C. Herbert Smith* for the buyers.

Atkin, K.C., and *Cecil Walsh* for the sellers.

LORD LOREBURN, L.C.—In this case two judges have been in favour of the buyers and two in favour of the sellers, and therefore it is impossible to doubt that there must be room for controversy in regard to the meaning of the important clause of this contract. It is agreed that this was a sale both parties to which intended that common English sainfoin was to be delivered. It is agreed that it was a condition of the contract that common English sainfoin should be delivered, but it is said that the sellers were absolved from the liability arising from the fact that something different from common English sainfoin was delivered, by virtue of a particular clause in the contract. The clause, so far as relevant, is to this effect:

> "Sellers give no warranty, express or implied, as to growth, description, or any other matters."

Now this sainfoin which was delivered turned out to be a different kind of goods; and when that was found out an action was brought against the defendants as sellers, to which they pleaded the clause which I have read.

The law on this subject is to be found in the statute, and I do not wish to obscure the statute by offering any additional commentaries of my own; but I wish to apply it, as I understand the law, to this case. If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it were a breach of warranty—that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty ab initio, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty. I forbear from further observations, because the whole of the law has been, if I may say so with respect, admirably expressed in the judgment of FLETCHER MOULTON, L.J. There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language, and I should have thought that the clearer he tries to make the language the better. I do not think that he has done so in the clause to which I have referred, and therefore I agree with FLETCHER MOULTON, L.J., and BRAY, J. I think that judgment ought to be entered for the buyers.

LORD ASHBOURNE.—I concur. I have read most carefully the judgment of FLETCHER MOULTON, L.J., and I entirely agree with and am willing to adopt it.

LORD ALVERSTONE.—I entirely concur with the judgments delivered by the LORD CHANCELLOR and LORD ASHBOURNE. I only wish to add a few words, because it is very important that on this, which, I think, is the first occasion on which your Lordships' House has had to consider it, the real effect of the Sale of Goods Act should be pointed out. Prior to that Act there had been a very great deal of litigation and of discussion as to matters which formed only ground of a breach of warranty and matters which amounted to a condition; and the remedies in the one case and in the other were the subject of a great deal of discussion. I think it desirable to point out, at any rate upon the facts of this case, that there is a clear distinction which has been recognised by the statute; and when that distinction is borne in mind I agree entirely with the opinion of FLETCHER MOULTON, L.J., that this case does not admit of serious argument. I will very briefly call attention to what I mean in the statute. I think that every section shows that the distinction between "condition" and "warranty" is clearly understood and

A recognised, and that different remedies are intended to be given in the one case and in the other. For that reason I submit that it is impossible for the sellers to contend that when the sellers said that they gave no warranty they meant to say that they would not be responsible for any breaches of condition. The definition of "warranty" in the statute is in itself clear upon the point. It says,

> "'Warranty' means an agreement with reference to goods which are the
B subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated."

As the LORD CHANCELLOR put it in the course of the argument, could it be fairly suggested that a claim to deliver goods which were not in accordance with the
C contract could be treated as "collateral to the main purpose of such contract," upon the ground that there was no liability for warranty under the contract? I turn now to s. 11; and again I find the distinction clearly maintained there:

> "(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty."

D Again the two matters are put in opposition the one to the other. Then (b) says:

> "Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the
E construction of the contract."

And the words that follow are very remarkable: "A stipulation may be a condition though called a warranty in the contract." Therefore the different position of a "condition" and a "warranty" appears upon the face of the section. Finally, cl. (c) of the same section says:

> "Where a contract of sale is not severable and the buyer has accepted the
F goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods"

—showing that, for the purpose of the remedy, that which gave different rights up
G to a certain point is only to be "treated as a breach of warranty" when this state of things has arisen. I turn for a moment to s. 13, and I find again there that that which might have been described as a "warranty," if it was so intended, is described as "a condition." This refers to the very point which has been so much argued by counsel for the respondents in his able argument at your Lordships' Bar:

> "Where there is a contract for the sale of goods by description, there is an
H implied condition that the goods shall correspond with the description"

—not an implied warranty, but "there is an implied condition." The reason is because, if there is a breach of a condition, there follows the right to reject; if the goods tendered to you are not in accordance with the description, then you have the right which flows from its being a condition of the contract as distinguished from being only a warranty. Then, finally, s. 53 says:

I
> "Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods."

I believe that there are no other sections in the Act of Parliament to which it is necessary to refer. These sections have been all very clearly dealt with by the learned counsel at the Bar, and, as has been pointed out, in each and all of those sections there is the distinction between "warranty" and "condition" and the

different consequences flowing from the one stipulation and the other. All I can say is that I think it quite impossible to suggest that in the year 1906, when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods or for the consequences of a breach of the condition. I thought it right to add these few words because I think it very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To a large extent the old law, I will not say has been swept away, but it has become unnecessary to refer to it. Within the four corners of this statute applicable to this contract we see this plain distinction between "condition" and "warranty," which has, I venture to think, been rather overlooked in this case by the majority of the judges in the Court of Appeal. I concur respectfully in the motion which has been made by my noble and learned friend on the Woolsack.

LORD SHAW.—The judgment of FLETCHER MOULTON, L.J., appears to me, had I not had the pleasure of listening to the judgments which your Lordships have pronounced, to cover this case, and I feel hesitation in adding any words of my own. But I will make reference only to s. 13 of the statute. Section 13 applies to the case of goods sold by sample plus description. In the present case the goods were sold by sample, but the sample was not considered sufficient, and a description had to be added. When the bargain was made, samples were shown and relied upon, but the description of the goods was not embraced in the contract when it was put in writing. Thereupon the buyers insisted that the description of the goods should be entered upon the contract, and this was done, the goods being described as "common English sainfoin." That description could by no circumstance have been more clearly certiorated as entering into the very essence of this contract and being one of its conditions. What has been delivered has been "giant sainfoin"—a thing as distinct in agricultural knowledge from common English sainfoin as in ordinary commerce a silver watch would be distinct from a gold watch. It is now said, however, that these two merchants, contracting with each other, when they used the word "warranty," used it in an ambulatory sense. "Warranty" was, according to the argument so ably presented to us by counsel for the respondents, to mean one thing in certain events and another thing in other contingencies. I do not think that these two English commercial men meant "warranty" in a sense of any greater refinement than the breadth of the definition in the Sale of Goods Act; and under the Sale of Goods Act it is as plain as language can make it that there are two things that are dealt with under different categories. The one is "warranty" and the other is "condition"; and it is only when you have to approach the question of finding the remedy which the statute prescribes that in the option of the person injured a condition may be converted into, or rather for remedial purposes be regarded as equivalent to, a warranty. The only other observation which I desire to make is that I view with some suspicion, if not with repugnance, any system of construing a contract ex post facto. In *Ellen* v. *Topp* (1) that very learned judge POLLOCK, C.B., observed (6 Exch. at p. 441):

> "It is remarkable [and indeed it would be most remarkable] that according to this rule the construction of the instrument may be varied by matter ex post facto."

Whoever heard in a commercial contract of construing the meaning of two business men by a principle of that kind? I cannot agree with the opinion in *Ellen* v. *Topp* (1); that opinion, in my judgment, is no part of English law. I think it a safer thing to construe this document as it was originally meant to be construed—that is to say, according to the evident intention of the contracting parties at the

time when the bargain was made. I find that the language of the statute equates with that intention; and the judgment pronounced by FLETCHER MOULTON, L.J., is in my opinion, in accord not only with the justice of the matter, but with the actual meaning of seller and of buyer.

Appeal allowed.

Solicitors: *Rooke & Sons*, for *Brain & Brain*, Reading; *Andrew Walsh, Gray & Rose.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

ROBINSON *v.* BEACONSFIELD URBAN DISTRICT COUNCIL

[COURT OF APPEAL (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), May 23, 24, 1911]

[Reported [1911] 2 Ch. 188; 80 L.J.Ch. 647; 105 L.T. 121; 75 J.P. 353; 27 T.L.R. 478; 9 L.G.R. 789]

Local Authority—Nuisance—Disposal of sewage—Liability for nuisance and trespass of contractor—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 42, *s.* 45.

A local authority, who had undertaken, under s. 42 of the Public Health Act, 1875, the cleansing of cesspools in their district, entered into a contract with H. to empty cesspools. There was no provision in the contract for the disposal of the sewage thus removed. H.'s men without leave deposited the sewage on the plaintiff's land, thereby causing a nuisance.

Held: the local authority had a duty, under s. 45 of the Act, to dispose of the sewage and could perform that duty either themselves or by a contractor, but they had not contracted with H. to discharge this duty, and, therefore, they were liable to the plaintiffs for the nuisance and trespass committed by H.

Decision of JOYCE, J., [1911] 2 Ch. 188, affirmed.

Notes. The Public Health Act, 1875, ss. 42 and 45, have been repealed. See now the Public Health Act, 1936, ss. 72 and 76.

As to cleansing of conveniences by a local authority, see 31 HALSBURY'S LAWS (3rd Edn.) 127 et seq.; and for cases see 38 Digest (Repl.) 213, 214. As to independent contractors, see 25 HALSBURY'S LAWS (3rd Edn.) 497 et seq.; and for cases, see 34 DIGEST 155 et seq. For the Public Health Act, 1936, ss. 72 and 76, see 19 HALSBURY'S STATUTES (2nd Edn.) 366, 369.

Cases referred to:

(1) *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, *1255.*

(2) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 47 W.R. 565, C.A.; 34 Digest 161, *1260.*

(3) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, *1234.*

(4) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 23, *29.*

Also referred to in argument:

Jones v. *Liverpool Corpn.* (1885), 14 Q.B.D. 890; 54 L.J.Q.B. 345; 49 J.P. 311; 33 W.R. 551; 1 T.L.R. 389, D.C.; 34 Digest 24, *34.*

Reedie v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 27, *56.*

Pendlebury v. Greenhalgh (1875), 1 Q.B.D. 36; 45 L.J.Q.B. 3; 33 L.T. 372; 40 J.P. 36; 34 W.R. 98, C.A.; 34 Digest 160, *1254.*

Taylor v. *Greenhalgh* (1874), L.R. 9 Q.B. 487; 43 L.J.Q.B. 168; 31 L.T. 184; 38 J.P. 599; 23 W.R. 4; reversed (1876), 24 W.R. 311, C.A.; 26 Digest (Repl.) 436, *1348.*

Steel v. *South Eastern Rail. Co.* (1855), 16 C.B. 550; 25 L.T.O.S. 129; 139 E.R. 875; 34 Digest 159, *1245.*

Murray v. *Currie* (1870), L.R. 6 C.P. 24; 40 L.J.C.P. 26; 23 L.T. 557; 19 W.R. 104; 30 Mar.L.C. 497; 34 Digest 25, *44.*

Lord Bolingbroke v. *Swindon Local Board* (1874), L.R. 9 C.P. 575; 43 L.J.C.P. 287; 30 L.T. 723; 23 W.R. 47; 34 Digest 147, *1159.*

Appeal by the defendants, Beaconsfield Urban District Council, from a decision of JOYCE, J., on a motion by the plaintiffs for an interlocutory judgment to restrain the defendants, their servants, agents and workmen from trespassing on the plaintiffs' lands or any part thereof, and from placing or depositing any sewage or foul matter thereon, and from doing any act thereon which might cause a nuisance to the plaintiffs or their tenants. The plaintiffs also claimed damages. The plaintiffs had commenced an action against the defendants and one Albert Edward Hook.

The facts are set out in the judgment of KENNEDY, L.J.

Hughes, K.C., and *A. J. Spencer*, for the defendants, Beaconsfield Urban District Council.

Younger, K.C., and *F. Baden Fuller* for the plaintiffs.

KENNEDY, L.J.—In this case the appeal is from a judgment of JOYCE, J., who, as regards the present appellants, has made an order in the following terms:

> "And it is ordered that the defendants the Urban District Council of Beaconsfield do pay to the plaintiffs the balance of their costs of the action remaining after deducting the said £10 paid by the said defendant Albert Edward Hook [Hook himself had submitted to a perpetual injunction and had agreed to pay £10 towards the plaintiffs' costs of the action] and also 5s. for damages."

In my opinion, the judgment appealed from was right. No doubt in many of these cases the question of the liability of a corporate body who have employed a contractor to perform certain duties is, on the facts, a question which is not easy to be decided, but the principles are, I think, clear and undoubted. In the present case the Act of Parliament applicable is the Public Health Act, 1875, of which s. 42, forming part of a group of sections which are headed "Scavenging and Cleansing," enacts as follows:

> "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for the removal of house refuse from premises; the cleansing of earth-closets privies ashpits and cesspools, either for the whole or any part of their district."

Then comes s. 45, which is as follows:

> "Any urban authority may, if they see fit, provide in proper and convenient situations receptacles for the temporary deposit and collection of dust ashes and rubbish; they may also provide fit buildings and places for the deposit of any matters collected by them in pursuance of this part of this Act."

Here we have an urban district council.

In the latter part of the year 1910, the defendants were minded to employ a man named A. E. Hook for a certain purpose which I will mention directly, as appears from the contract for the cleansing of cesspools within their district. The defendants had full power to enter into this contract under the sections which I have read. On Sept. 23, 1910, a tender was received from Hook. It was headed,

A "Beaconsfield Urban District Council. Tender for carting for the year ending Sept. 30, 1911," and there were three alternative methods of work included in that contract, the third of which was as follows:

> "To horse, sewage barrel and trolly, two horses and two men, hours of work as above, at per day (this price to include storage of barrel and trolly and fuel
B for furnace for the year), fourteen shillings and sixpence per day."

That tender was put into a concise form by a letter of Nov. 18, 1910, signed by Hook and addressed to the defendants. He there describes himself as "Coal and coke merchant, cartage contractor." The letter says:

> "In answer to your kind inquiry re sewage barrel and working same with two
C men, I am prepared to carry out the work of emptying of cesspools as follows—viz., that my two men shall work the barrel alone. I guarantee to keep cesspools clear so that there be no complaint whatsoever under the present amount of cesspools; the council pay for all repairs; also that the men come in at 1 a.m. on Saturdays to give time to do all necessary requirements to the barrel for the coming week."

D That was accepted by the defendants, and, under that engagement, Hook continued to do work in emptying these cesspools and conveying the contents to the barrel, and on two occasions he emptied the contents of a cesspool so collected in the barrel on land of the plaintiffs. The plaintiffs found that on a portion of their property Hook and his men—I draw no distinction between them—had deposited a quantity of this sewage on their property, and they brought this action complaining of this
E trespass and also of the nuisance occasioned to them and their tenants by this act. The action came on for trial before JOYCE, J., who decided against the defendants as well as against Hook, and as against these defendants he made the order which I have read.

The question is whether these defendants can be held liable for that which was done by Hook and his men. In my opinion, JOYCE, J., was right in holding that
F the action was rightly launched, and that, on the facts, there was a liability on these defendants in respect of which he awarded compensation against them. These defendants now appeal. It is unnecessary, in my view, to decided whether, even if this contract had contained words including the disposal of the sewage and anything done wrongly in such disposal, there would have been a good cause of action against these defendants, because they had a duty for the wrong perform-
G ance of which they could not have pleaded successfully the act of their contractor. There is no doubt that a public body in the position of these defendants have a duty in regard to cleansing sewers which they may undertake either by themselves or by a contractor. And, if they do undertake by a contractor, I am not going to decide to-day that they might not be liable for misfeasance for the acts of the contractor whom they chose to employ in the discharge of that duty. But I
H base my judgment on what appears to me to be a clear ground, that, in this contract, they have themselves retained the duty of disposing of the sewage, and have not, in the case of this contract, entered into any engagement with Hook for doing that which is the occasion of the present complaint. It is a contract which, in its terms, appears to me to provide only for what it says—viz., "the carrying out of the work of emptying of cesspools"—that is to say, the extracting of the
I contents of the cesspools into the barrel. It contains, no doubt, an undertaking by the contractor to keep the cesspools clear. There is no complaint as to not taking the sewage out of the cesspools. But, in respect of the place of deposit, the contractor undertakes no duty. It is clear, therefore, that that was a duty which under the contract was of necessity retained by the defendants. Under these circumstances and under this contract, they are persons who, in respect of the acts of Hook—through himself or through his servants—are under a continuing liability to see that this duty was performed without legal injury to anyone. In fact, Hook did deposit a quantity of this noxious stuff on the land of the

plaintiffs. He thereby committed an act which constituted a trespass, and which, from the nature of the deposit, constituted a nuisance also, and, there being nothing in the contract which enabled the defendants to say, "You, Hook, undertook to do this disposal work," it is clear to me that they remain liable for that which is a natural and necessary consequence of the removal—viz., that which has been described as the deposit and disposal of the sewage. Hook's work was confined to cartage and removal; the work of disposal remained under the contract with the defendants. They clearly retained the power of directing where the sewage should be deposited, and they owed a duty to give their directions clearly.

Cases have been cited which, like the present, in my opinion depend on the facts. But, in my opinion, the two cases nearest to the present are the cases relied on by JOYCE, J., in his judgment. The language used in the judgments in *Hardaker* v. *Idle District Council* (1) and in the judgments in *Penny* v. *Wimbledon Urban Council* (2) applies to this case. There was, it seems to me, a clear duty to be performed by the proper deposit of the sewage which was not contracted for by Hook, and which, if not properly performed, must be a damage to anybody on whose lands this sewage was cast if proper care were not taken for the prevention of a trespass and nuisance by the local authority. I base my judgment on the principle which I have stated, and the application of that principle to the facts of the present case. I think that the judgment of JOYCE, J., was perfectly right, and that this appeal should be dismissed.

COZENS-HARDY, M.R.—I agree, and I have nothing to add beyond this: In my view, the contents of the barrel belonged to the defendants and not to Hook, and, if any money had been paid by farmers for the stuff, Hook could not have claimed the money.

BUCKLEY, L.J.—When these defendants undertook the work of cleansing these cesspools, they became responsible for that work and owed a duty. The sewage which was collected became their property and they could have sold it, and they became responsible for it in the sense that they were bound under s. 45 of the Public Health Act, 1875, to find a proper place in which to deposit it. They owed a duty to use all reasonable skill and care so to dispose of and deposit this sewage as not to injure or cause damage to any person. They were perfectly at liberty to employ any contractor to do the work. But, if the contractor failed to do that which it was the only duty of the defendants to get done, then the defendants were liable. I will refer to the language of LORD BLACKBURN in *Dalton* v. *Angus* (3) (6 App. Cas. at p. 829) which was quoted by LINDLEY, L.J., in *Hardaker* v. *Idle District Council* (1) ([1896] 1 Q.B. at p. 342):

> "Ever since *Quarman* v. *Burnett* (4) it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

Whatever, therefore, were the contents of the contract, I think that, on this ground, the defendants were liable. They owed a duty of getting rid of this noxious stuff, and they have not performed that duty and are, consequently, liable. But there is also a second ground on which they are liable which is very much clearer. They had not imposed this duty of the disposal of the sewage on anyone. The bargain which Hook entered into was a mere cartage contract. There was first a tender, and that tender was given effect to by a letter of Nov. 18, 1910. That letter contained nothing which required Hook to find a place for the deposit of this sewage. All that he had to do was to collect the sewage. The place to which he had to take it was not provided for by the contract. There was nothing whatever

in that contract which entitled the council to render him responsible for the disposal of this sewage. In my opinion, therefore, the defendants had no independent contractor for the purpose of depositing this material in some proper place so as not to injure anybody. On that ground, the defendants have not brought themselves within the doctrine as to independent contractors, and the responsibility rests with them and they are liable. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Stow, Preston & Lyttelton*, for *Charsley & Reynolds*, Slough; *Surtees, Phillpotts & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WOOTTON *v.* SIEVIER

[COURT OF APPEAL (Cozens-Hardy, M.R., and Kennedy, L.J.), May 30, June 13, 1913]

[Reported [1913] 3 K.B. 499; 82 L.J.K.B. 1242; 109 L.T. 28; 29 T.L.R. 596; 57 Sol. Jo. 609]

Practice—Particulars—Libel action—Justification—Identification of events relied on—Disclosure of names of probable witnesses.

Libel—Particulars—Justification—Adequacy of particulars—Identification of witnesses.

In an action for libel, the plaintiff, who was a trainer of racehorses, alleged that the words complained of meant that he had conspired with other trainers and with jockeys to defraud bookmakers, owners of racehorses, and the general public. The defendant pleaded justification. The plaintiff applied for all particulars of facts and matters relied on. The defendant furnished particulars of the names of horses and races with regard to which it was alleged that the plaintiff had made bets, but the plaintiff further sought to have particulars of the names of the bookmakers with whom he had made the bets. The defendant objected to give such particulars on the ground that to do so would be to disclose the names of witnesses whom he intended to call at the trial.

Held: the plaintiff was entitled to have such information as would enable him to know to what occasions the plea of justification was intended to refer, and the defendant must deliver particulars of the names of the persons with or through whom and the times and places at which the bets had been made.

Zierenberg v. *Labouchere* (1), [1893] 2 Q.B. 183, applied.

Notes. Applied: *Godman* v. *Times Publishing Co.*, [1926] 2 K.B. 273.

As to sufficiency of particulars where justification pleaded, see 24 HALSBURY'S LAWS (3rd Edn.) 93 et seq.; and for cases see 32 DIGEST 100.

Cases referred to:

(1) *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183; 63 L.J.Q.B. 89; 69 L.T. 172; 57 J.P. 711; 41 W.R. 675; 9 T.L.R. 487; 4 R. 464, C.A.; 32 Digest 99, *1310.*

(2) *Hickinbotham* v. *Leach* (1842), I.O.M. & W. 361; 2 Dowl.N.S. 270; 11 L.J.Ex. 341; 152 E.R. 510; 32 Digest 93, *1245.*

Also referred to in argument:

Metropolitan Saloon Omnibus Co., Ltd. v. *Hawkins* (1859), 4 H. & N. 146; 32 L.T.O.S. 281; 5 Jur.N.S. 201; 157 E.R. 792; 9 Digest (Repl.) 198, *1269.*

Marriott v. *Chamberlain* (1886), 17 Q.B.D. 154; 55 L.J.Q.B. 448; 54 L.T. 714; 34 W.R. 783; 2 T.L.R. 640, C.A.; 18 Digest (Repl.) 185, *1604*.

Arnold and Butler v. *Bottomley*, [1908] 2 K.B. 151; 77 L.J.K.B. 584; 98 L.T. 777; 24 T.L.R. 365; 52 Sol. Jo. 300, C.A.; 18 Digest (Repl.) 70, *567*.

Roselle v. *Buchanan* (1886), 16 Q.B.D. 656; 55 L.J.Q.B. 376; 34 W.R. 488; 2 T.L.R. 367, D.C.; 32 Digest 90, *1207*.

Interlocutory Appeal from a decision of BAILHACHE, J., in chambers, refusing the plaintiff's application for further particulars.

The plaintiff was an owner and trainer of racehorses, and sued the defendants for libel in respect of statements published in the defendant Sievier's newspaper, the "Winning Post." The libel complained of was to the effect that the plaintiff had been guilty of gross dishonesty in the training and running of racehorses, and in particular that he had on several occasions conspired with other trainers and with jockeys to cause horses to win or lose races by dishonest means and so to defraud bookmakers and owners of racehorses and the public generally for his own pecuniary gain. The defendants put in a plea of justification, and, under an order made by the judge, delivered particulars, which specified a number of races, jockeys, and horses, with the weights carried by them, and the names of certain trainers. Paragraph 1 of the particulars contained the allegation that the plaintiff in fact trained horses which were nominally trained by other persons, and the horses apparently trained by the plaintiff's nominees did not compete with the horses trained by the plaintiff, but the plaintiff determined which horse, whether trained in his own name or in the name of one of his nominees, should endeavour to win a particular race, and such decision on the part of the plaintiff depended not on the merits of the horses entered for the race, but on which horse he had backed. The plaintiff arranged which of the horses under his control should win by putting up jockeys or apprentices in his own service to ride such horses. The jockeys and apprentices were ordered to pull horses they were riding when he was not backing the said horses, and his jockeys and apprentices had pulled the horses trained by or under the control of the plaintiff and also horses trained by other trainers when the plaintiff was not backing such horses, so that horses backed by the plaintiff had won the races. Then followed specific instances, with the names of the horse which had been backed by the plaintiff and had won the race, and of the horse which had been pulled, together with the names of the races, and of the jockeys concerned. The plaintiff then applied for an order that the defendants should deliver further and better particulars, specifying the names of the bookmakers with whom the plaintiff had backed the horses in question, together with the dates and amounts of the bets respectively. The application was heard by BAILHACHE, J., in chambers who refused to make the order. The plaintiff appealed.

McCardie for the plaintiff.

Schiller for the defendants.

Cur. adv. vult.

June 13, 1913, **KENNEDY, L.J.**, read the following judgment of the court. The degree of fullness and precision which ought to be required in an action for libel from a defendant who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate. Certain general propositions are now, I think, not open to controversy. In every case in which the defence raises an imputation of misconduct against him a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet but also of the acts which it is alleged he has committed and on which the defendant intends to rely as justifying the imputation. This rule of justice is not limited in its application to actions for libel, although of course it includes them (see per KAY, L.J., in *Zierenberg* v. *Labouchere* (1) [1893] 2 Q.B. at p. 190), and its propriety is most evident in a libel case when the defen-

dant has chosen to put the character of the plaintiff in serious jeopardy by the heinousness of the charges which are asserted or involved in the defendant's plea of justification. In such a case at all events the pronouncement of ALDERSON, B., in *Hickinbotham* v. *Leach* (2) approved and explained in reference to the modern system of pleading by LORD ESHER, M.R., in *Zierenberg* v. *Labouchere* (1) is not one whit too strong: "The plea ought to state the charge with the same precision as in an indictment."

Further, as a general rule it is now, I think, established that if the particulars are such as the defendant ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of persons whom he may intend to call as witnesses at the trial: (see per LORD ESHER, M.R. in *Zierenberg* v. *Labouchere* (1), [1893] 2 Q.B. at pp. 187, 188). At the same time, on an application by a plaintiff for particulars or for further and better particulars, the court, before acceding to it, must be careful to see that the demand is not of a vexatious or oppressive character; or, the material facts being pleaded by the defendant in the statement of defence, or stated in particulars, if such have been delivered by him, with sufficient precision to enable the plaintiff to know and to prepare himself to deal with them, that the plaintiff is not covertly endeavouring to get something more to which he is not entitled—viz., the disclosure of the evidence to prove those facts which may be in the defendants' possession. While, however, these general rules will not, I think, be challenged, the practical application of them is not always an easy task. The special circumstances of each case have to be carefully considered.

The material points in the present case are, in my judgment, these: The plaintiff, an owner and trainer of racehorses, is suing the defendants for libel which he alleges to have been published by them. The statement of claim asserts, to put the case shortly, that the meaning of the publications is that the plaintiff has been guilty of gross dishonesty in the training and running of racehorses, and particularly that he has on several occasions conspired with other trainers and with jockeys to defraud bookmakers and owners of racehorses and the public generally for his own pecuniary gain. Manifestly, if such is the meaning of the publication, the attack on the character of the plaintiff, both personally and professionally, is one of the gravest sort. It imputes to him conduct which might form the subject of criminal proceedings. Such being the nature of the case, it appears to me to be one to which the pronouncement of ALDERSON, B., in *Hickinbotham* v. *Leach* (2), quoted above, is peculiarly applicable. The defendants in their statement of defence, among other averments, including denials of all the allegations in the statement of claim, have pleaded an unqualified justification of the alleged libel with the defamatory meaning charged by the plaintiff in the statement of claim; and, under a judge's order, they have delivered particulars of the matters of justification. The question which this court has to decide on the appeal of the plaintiff is as to the sufficiency of the particulars on one point.

The particulars delivered range over a period of three years—i.e., from 1909 to 1912; the catalogue of facts begins in the autumn of 1907—i.e., more than five years ago. They specify a number of races, jockeys, and horses, with the weights carried by them, and give the names of certain trainers; and so far the plaintiff could not, and in fact does not, impeach the particulars on the ground of insufficiency. What he does complain of is that on one important matter the particulars give him no information at all. There can be no doubt—indeed the particulars themselves show it—that a most material part, if not the most material part, of the structure of the justification is the fact therein alleged that the plaintiff's object in his dishonest arrangements with certain other trainers and with certain jockeys was on several occasions to procure the success of certain horses which he had backed. Such backing is essential in paras. 3, 5, 6, 7, 9, 10, 11, and 12 of the particulars delivered. The plaintiff asks that he may have delivered to him such particulars of the betting transactions intended by this bare and general allegation

of backing as will enable him to identify them—to know, that is to say—before the trial what are the betting transactions which he is accused of having made contrary to his honour and his duty, and on which the defendants intend to found an allegation, on each of the specified occasions, of a corrupt interest. A

It appears to me, to be just, that the plaintiff should in some form be enabled to know the case he has to meet on this point. Bets may be made directly or indirectly through agents; there may or may not be a contemporary written record. The backings alleged began nearly six years ago and range, as I have said, over a period of three years. Betting books, memoranda, and letters may easily in the course of such a time have been lost or destroyed. The plaintiff, as it seems to me, might be unfairly placed in a difficulty at the trial if he does not know till then either the names of the persons with whom or through whom the defendants propose to prove that he made the bets to which they intend to refer, or the places, or the times at which the betting transaction in each case is alleged to have taken place. There can be no hardship on the defendants in ordering such further particulars as will sufficiently protect the plaintiff in this matter. If the defendants have no knowledge of the betting transactions to which the particulars refer under the general allegation of backing, they have no justification for making the allegation. The plaintiff in his summons asked for particulars, naming the bookmakers with whom the plaintiff is alleged to have backed certain horses, and the amounts of the bets respectively. B C D

The learned judge with, as I understand, some hesitation, declined to accede to any part of the application. So far as relates to the amounts of the bets, I concur in his decision. I do not see how the amounts of the bets can be material, and it is, I think, quite possible that there might be evidence of a bet on which the defendants might properly rely, as, e.g., an admission, and yet that that evidence might not include knowledge of the amount of the bet. What, for the reasons I have stated, I do think, with sincere respect to the learned judge, that the plaintiff is entitled to have is such information of the betting transactions on which the defendants intend to rely in support of the allegation of backing as will enable the plaintiff to know to what occasions it is intended to refer. For this purpose I think that our order should be for the delivery by the defendants within fourteen days of particulars of the backing by the plaintiff of the horses mentioned in paras. 3, 5, 6, 7, 9, 10, 11, and 12 of the particulars already delivered, specifying where possible in each case the name or names of the person or persons with or through whom, and the time or times, place or places, at which such backing took place. The form will follow the form of the original order in regard to giving evidence at the trial. The costs here and below to be costs in the action. E F G

Appeal allowed.

Solicitors: *Lewis & Lewis; Wontner & Sons.*

[*Reported by* R. C. Carrington, Esq., *Barrister-at-Law.*]

A

Re MIDLAND EXPRESS LTD. PEARSON *v.* MIDLAND EXPRESS LTD.

[Court of Appeal (Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), October 24, 27, 1913]

B [Reported [1914] 1 Ch. 41; 83 L.J.Ch. 153; 109 L.T. 697; 30 T.L.R. 38; 58 Sol. Jo. 47; 21 Mans. 34]

Company—Debenture-holders' action—Insufficient assets—Insufficiency to pay all debenture-holders in full—Interest paid to certain debenture-holders and not others—Claims of others to be paid arrears of interest in full before further distribution.

C Where the property of a company has been sold under the usual order for sale in a debenture-holders' action, and the proceeds of sale are insufficient for the payment in full of the principal and interest secured by the debentures, there is no equity which entitles debenture-holders who have received less interest than others to have the amount of their interest levelled up before any further distribution of assets is made.

D Decision of Sargent, J. [1913] 1 Ch. 499, affirmed.

Notes. As to priorities of debenture-holders, see 6 Halsbury's Laws (3rd Edn.) 481; and for cases see 10 Digest (Repl.) 844 et seq.

Cases referred to:

(1) *Illingworth* v. *Houldsworth*, [1904] A.C. 355; 73 L.J.Ch. 739; 91 L.T. 602; 53 W.R. 113; 20 T.L.R. 633; 12 Mans. 141, H.L.; 10 Digest (Repl.) 770, *5008.*

E

(2) *Re McNab's Receivership, Spence* v. *McNab* (1910), Jan. 29, unreported.

(3) *Wilson* v. *Paul* (1836), 8 Sim. 63; 59 E.R. 25; 23 Digest (Repl.) 370, *4396.*

(4) *Mitchelson* v. *Piper* (1836), 8 Sim. 64; Donnelly, 89; 5 L.J.Ch. 294; 47 E.R. 246; 23 Digest (Repl.) 370, *4395.*

F Also referred to in argument:

Governments Stock and Other Securities Investment Co. v. *Manila Rail. Co.*, [1897] A.C. 81; 66 L.J.Ch. 102; 75 L.T. 553; 45 W.R. 353; 13 T.L.R. 109, H.L.; 10 Digest (Repl.) 782, *5084.*

Evans v. *Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979; 79 L.J.K.B. 970; 26 T.L.R. 509; 54 Sol. Jo. 580; 18 Mans. 64, C.A.; 10 Digest (Repl.) 772, *5016.*

G

Appeal by debenture-holders from a decision of Sargant, J., reported [1913] 1 Ch. 499.

The property of a company had been sold under the usual order in a debenture-holders' action, and the proceeds of sale were insufficient for the payment in full of the principal and interest secured by the debentures. The company had issued

H a series of debentures to the amount of £100,000, of which £70,000 carried interest at the rate of 5 per cent., the remaining £30,000 carrying interest at the rate of 4½ per cent., payable out of the profits of the company.

The debentures were in the following form:

I 1. The Midland Express, Ltd. (hereinafter called the company) will on the first day of November, 1921, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to or other the registered holder for the time being hereof the sum of £ .

2. The company will during the continuance of this security pay to such registered holder interest thereon at the rate of £ per cent. per annum by half-yearly payments on May 1 and Nov. 1 in each year.

3. The company hereby charges with such payments its undertaking and all its property present and future, including its uncalled capital.

4. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed part of it.

Condition 1 was as follows:

> This debenture is one of a series of debentures of the company for securing the principal sums not at any time exceeding £ . Such debentures are all to rank pari passu as a first charge on the property hereby charged without any preference or priority over one another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures. . . .

Condition 11, which was also referred to in the course of the argument, was as follows:

> At any time after the principal moneys hereby secured become payable the registered holder of this debenture may, with the consent in writing of the holder of the majority in value of the outstanding debentures of the same issue, appoint, by writing, any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment. . . .

A receiver so appointed was to have power to take possession of, carry on, or sell the business and property of the company or make any agreement or compromise he should think expedient. All moneys received by such receiver were, after providing for certain matters specified, to be applied in or towards satisfaction pari passu of the debentures. There was no trust deed.

Some of the 5 per cent. debentures had been issued to the Tangye family, and the remainder to C. A. Pearson and the Daily Express Co., Ltd., and the 4½ per cent. debentures had been issued to the Birmingham Daily Gazette Co., Ltd. The members of the Tangye family had been paid interest by the company while carrying on its business as a going concern down to Oct. 31, 1906, but to the other debenture-holders interest was owing from November, 1902. On the assets of the company proving insufficient to provide in full for interest and principal due under the debentures, the debenture-holders to whom arrears of interest were owing now claimed to be paid in full out of the realised assets the difference between the amount they had received and the amount which they should have received if they had been paid their interest regularly down to October, 1906, and they claimed that this amount should be made up to them before any further distribution of assets was made.

The practice as given in the ANNUAL PRACTICE 1913, p. 961, was as follows:

> In taking the account of what is due to debenture-holders, it is not usual to calculate interest to date of the [master's] certificate if it is clear the assets will be insufficient to pay the principal in full, but if some debenture-holders have been paid their interest to a date later than others, such others should have their interest ascertained down to the date when some debenture-holders have been paid, as they are entitled to be paid their arrears of interest before anything further is paid to those who have had interest paid to the later date.

The question coming on for further consideration, it was held by SARGANT, J., that the contention of the debenture-holders who had not received interest to the later date was unfounded, and that the assets ought to be distributed rateably in accordance with the amounts due for principal and interest on the debentures. The unpaid debenture-holders appealed.

Alexander Grant, K.C., and *W. M. Cann* for the unpaid debenture-holders.
Gore-Browne, K.C., and *J. E. Harman* for the company.
L. Cohen as amicus curiæ.

COZENS-HARDY, M.R.—This is an appeal from SARGANT, J., and raises a point which I should have thought must have been settled long ago. It is a case

where a company has borrowed money on debentures; there is no trust deed and no trustees. The debentures are in the form of a floating charge in wide terms, and the conditions contain a statement that the debentures are to rank pari passu as a first charge on the property thereby charged without any reference or priority over one another. What happened was this: the company got into difficulties; the property has been realised; the charge has crystallised, and the security realised. There is not enough to pay all the debenture-holders in full, but one of them has received interest which was due to him on the debenture some time before the crash came. The other debenture-holders, possibly through kindly consideration for the company, or for other reasons, did not demand or enforce payment of their interest, and they now contend that in dividing the proceeds of the property realised under the charge the parties ought to be levelled up; in other words, the debenture-holders who have received interest to a later date than the others ought to receive nothing until the others have received out of the fund now to be divided the equivalent part of their interest, and it is said that that is justified under the terms of the debenture and upon the principles of equity.

What is the position of the debenture-holder? He is not a cestui que trust in any form. He is a mortgagee. He is one of several mortgagees, and by the terms of the contract between the company and each debenture-holder, the man who gets the first debenture has not a first charge in priority to the second. They all rank equally, and any further debenture which is issued is to rank pari passu and equally. It is a case of mortgagor and mortgagee. Was there any impropriety in the company paying out interest to a debenture-holder? Plainly not. The interest was immediately payable, and the duty of the company is to pay its interest as it accrues due. The company in the course of its business was plainly entitled to pay interest just as much as to pay its debts. This was a payment authorised by the debenture itself, for, without attempting to define a floating security, the company was, to use the language of Lord Halsbury in *Illingworth* v. *Houldsworth* (1) ([1904] A.C. at p. 358), entitled to carry on its business in the ordinary way just as if the debentures had not been issued. During the course of their business they made this payment of interest to a debenture-holder. That was a proper act, and there is no ground whatever for contending to the contrary.

In dividing the proceeds of the sale between the various debenture-holders the critical date is the moment when the charge crystallised. Some may then have received more interest than others, but you are then to take the actual figures for what was then due on all the debentures and divided the proceeds rateably between them. That, I think, was the substance of the decision of Sargant, J., and that is the view which we take. It is contrary to the view of Warrington, J., but the unreported case of *Spence* v. *McNab* (2) must be considered to be overruled. It is not reported, and we do not know, except from what counsel has stated, on what grounds the decision was given. Here there being no trust deed, but simply the relationship of mortgagor and mortgagee in a contributory mortgage, I think the proper thing is to take the date when the mortgage was crystallised as the material date. The appeal must be dismissed.

SWINFEN EADY, L.J.—I am of the same opinion. Some debenture-holders have received interest and the others not, and there has been inequality in the payment of interest. That happened before the floating security ceased to float or, as the term is, crystallised. Since the crystallisation the assets have been or are being realised, and the contention is that those debenture-holders who have not received interest on a par with the others must first receive a payment to level them up to what the others have received before there can be any further distribution. That contention is based on the maxim of equity that "Equality is equity," and the appellants have relied on various cases as illustrations of the way in which that maxim is applied in the administration of equity.

The class of cases relied on most was as to the administration of estates of deceased persons. Old authorities were referred to; one of these is *Wilson* v. *Paul* (3). That was the case of the administration of the estate of the deceased, and before dividend some of the creditors received 13s. 4d. in the pound, and when the funds came to be divided the question arose as to whether the unpaid creditors ought to first receive a similar dividend. It was held there that the parties who had been partly paid were not entitled to another further payment until this had been done. A similar case arose at the same time and is reported as *Mitchelson* v. *Piper* (4). Creditors had been paid there before the bill was filed for administration, before decree and after decree. The Vice-Chancellor there said (8 Sim. at p. 66):

> "I cannot but think that Mr. Bethell has pointed out the ground on which the other question ought to be decided—viz., that when a creditor goes into the master's office to establish his debt, he must show what was the amount due at the testator's death, and what he has received since; and as it is one of the leading maxims of this court that 'Equality is equity,' the creditors who have been paid in part ought not to receive any further part either of the legal or the equitable assets until the other creditors have been paid the same proportion of their debts."

It is this principle that the appellants here have urged on us. But in applying this principle one must not lose sight of the fact that in all these cases a line is to be drawn, and the question arises where one is to draw the line here. In administration the line is drawn at the death. One does not inquire what the testator himself paid in his lifetime. There is the similar principle in administering assets in bankruptcy: there one takes the position as it was at the date of the commencement of the bankruptcy. Here the question is where one is to draw the line. Is the line to be drawn where the security crystallises? As Lord Halsbury said in *Illingworth* v. *Houldsworth* (1) ([1904] A.C. at p. 358), the effect of a floating security is to

> "enable a company to carry on its business in the ordinary way; to receive the book debts that were due to them; to incur new debts, and to carry on their business exactly as if this deed had not been executed at all."

The ordinary course of the business of a company is to pay its debts. But from the time when the security crystallises there can be no priority amongst the holders of the debentures. As from that date the rule contended for by the appellants would be applied. From that date the debentures are all to rank pari passu without any preference or priority one over the other. One is to ascertain what was done to each debenture-holder on that date and then, without any preference or priority, divide the fund rateably between them.

In my opinion the principle on which the decision has been given in the court below is right, and the rule of equity does not apply in the present case in the manner suggested, but only from the date when the order was made under which the security crystallised.

PHILLIMORE, L.J.—I am of the same opinion. While the charge was floating it was the right and duty of the company to carry on its business and to pay its debts, and the company properly paid one of the debenture-holders his arrears of interest. It is agreed that here there is no question of fraudulent preference. The debenture-holder in question is a creditor; he properly received his interest, and he was not bound to inquire whether the other creditors were being paid. It may be that he has shown diligence by bringing an action or pressing for payment. At all events he has been paid certain portions of his claim with the result that when the charge crystallised and everybody had agreed to bring in his claim, his claim is for less than the other people. Why is he not to be paid pro rata on that? I

A can see no reason to require him to give credit for that which his diligence has acquired.

Appeal dismissed.

Solicitors: *Haslam & Saunders*, for *Hindle, Son & Cooper*, Darwen; *E. Flux, Leadbitter & Neighbour*, for *Slater & Co.*, Darlaston.

B [*Reported by* R. C. CARRINGTON, ESQ., *Barrister-at-Law.*]

C

Re WITTY. WRIGHT *v.* ROBINSON

[COURT OF APPEAL (Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.),
D October 21, 1913]

[Reported [1913] 2 Ch. 666; 83 L.J.Ch. 73; 109 L.T. 590; 58 Sol. Jo. 30]

Power of Appointment—Exercise—Excessive exercise—Objects and non-objects capable of benefiting—Necessity to consider facts at date of distribution.

E By her will dated June 9, 1881, J.W. gave the income of the residue of her estate to her daughter E.R. during her life and also gave her a power by will to appoint the settled fund in favour of "all . . . or any one or more of the child or children or other issue or both of my said daughter [E.R.] as may be living at her death." On Sept 2, 1888, J.W. died. By her will dated May 25, 1893, E.R. directed that the settled fund should be held in trust for her child F or children who being sons should attain the age of twenty-one years or being daughters should attain that age or be married equally if more than one, and she then declared that the share of any daughter of hers should be held on trust for such daughter during her life, and after her death for the children or remoter issue of such daughter as the daughter should by deed or will appoint, and in default of such appointment for the children of such daughter who being G sons should attain the age of twenty-one years or being daughters should attain that age or marry. Subject to the interests of the children of any such daughter, E.R. gave such daughter a general testamentary power of appointment, with remainder to the daughter's next-of-kin. E.R. died in 1911 leaving eight children. One of the children of E.R., who had four children all born during the lifetime of E.R., claimed that the settlement of her share was void H since it might extend benefits to non-objects of the power, and that the initial absolute gift to her was, therefore, not cut down.

Held: the question whether non-objects would take could not be answered until the death of each daughter, and the appointment was bad only so far as it in fact purported to operate in favour of non-objects.

Sadler v. *Pratt* (1) (1883), 5 Sim. 632, *Harvey* v. *Stracey* (2) (1852), 1 Drew. I 73 and *Re Farncombe's Trusts* (3) (1878), 9 Ch.D. 652 applied.

Notes. As to excessive execution of power of appointment, see 30 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and for cases see 37 Digest 490 et seq.

Cases referred to:

(1) *Sadler* v. *Pratt* (1833), 5 Sim. 632; 58 E.R. 476; 37 Digest 490, *849*.

(2) *Harvey* v. *Stracey* (1852), 1 Drew. 73; 22 L.J.Ch. 23; 16 Jur. 771; 61 E.R. 379; sub nom. *Harvey* v. *Stracey*, *Stracey* v. *Harvey*, 20 L.T.O.S. 61; 37 Digest 493, *869*.

(3) *Re Farncombe's Trusts* (1878), 9 Ch.D. 652; 47 L.J.Ch. 328; 37 Digest 494, *871.* A

(4) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 14 Jur. 182; 41 E.R. 1379, L.C.; 37 Digest 99, *346.*

Also referred to in argument:

Leake v. *Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 37 Digest 92, *290.* B

Re Brown's Trust (1865), L.R. 1 Eq. 74; 37 Digest 494, *874.*

Churchill v. *Churchill* (1867), L.R. 5 Eq. 44; 37 L.J.Ch. 92; 16 W.R. 182; 37 Digest 498, *907.*

Re Coulman, Munby v. *Ross* (1885), 30 Ch.D. 186; 55 L.J.Ch. 34; 53 L.T. 560; 37 Digest 422, *316.*

Appeal by the plaintiff from an order of WARRINGTON, J., dated Dec. 17, 1912. C

By her will, dated June 9, 1881, Jane Witty appointed trustees and executors thereof and after certain legacies therein set forth she bequeathed the residue of her personal estate and effects and devised all her real estate to her trustees on trust for sale and conversion, and she directed her trustees to stand possessed of the proceeds of sale on trust after payment of debts, funeral, and testamentary expenses to invest the same as therein mentioned, and out of the income to pay D an annuity to her son, and on further trust to invest the further sum of £1,000 for the benefit of her grandchild, Gertrude Martha Robinson, as therein set forth; and the testatrix directed the remainder of the income arising from the estate to be paid to her daughter Elizabeth Robinson during her life, and after the death of Elizabeth Robinson that the trustees should immediately sell (if not previously sold) the real estate and stand possessed of all moneys, capital, and income alike. E

"Upon such trusts in favour of all including my said grandchild, Gertrude Martha Robinson, or any one or more of the child or children or other issue or both of my said daughter Elizabeth Robinson as may be living at her death, and in such parts, shares, and proportions, and either by way of estate, annuity, or charge as my said daughter Elizabeth Robinson shall by her last will and F testament in writing, notwithstanding coverture, direct, limit, or appoint. And in default of such direction, limitation, or appointment, and subject thereto upon trust for the child, if only one, or all the children, if more than one, of my said daughter Elizabeth Robinson who (either before or after the limitation shall take effect in possession) shall live to attain the age of twenty-one years, or who shall die under that age leaving lawful issue living at his or her death G or respective deaths, in equal shares and proportions as tenants in common and not as joint tenants."

And if there should be no child or children who should fulfil the before-mentioned requirements, then in trust as therein mentioned. The testatrix died on Sept. 2, 1888.

Elizabeth Robinson by her will, dated May 25, 1893, after appointing executors H and trustees thereof and making a specific bequest, bequeathed the residue of her personal estate to her trustees in trust for investment and to permit her husband, William Robinson, to receive the annual income of the investments during his life provided he continued unmarried, and after his decease or second marriage the testatrix declared that her trust fund should be held by the trustees on the like trusts in all respects for the benefit of her sons and daughters and their issue, I and with the like provisions as were thereinafter declared concerning the trust funds thereinafter appointed by her under the power of appointment contained in the will of Jane Witty. Elizabeth Robinson's will then proceeded to recite the will of Jane Witty, and that she exercised the power given to her by that will, and continued as follows:

"I do hereby direct, limit, and appoint that the said trust funds and the stocks, funds, or securities which shall from time to time be comprised in and subject to the trusts of the will of the said Jane Witty, deceased, and the

interest, dividends, and income thereof . . . shall from and after my death be held upon and for the trusts, intents, and purposes hereinafter expressed (that is to say) in trust for my child, if only one, or all my children, if more than one, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married, and if more than one in equal shares; but I declare that if such child or children or any of them shall be a daughter or daughters, then the said trust fund or the share thereof to which such daughter or each of such daughters shall become entitled shall be held by my said trustees upon trust . . . to convert the same into money and invest the moneys to arise therefrom . . . and upon further trust to pay the annual income of the same moneys or the securities whereon the same shall be invested as last aforesaid as and when the same shall from time to time become actually receivable, and not by way of anticipation, into the hands of my same daughter [with the exception therein mentioned as to the share of the said Gertrude Martha Robinson] during her life for her separate use. . . ."

The will then proceeded to declare certain special provisions with reference to Gertrude Martha Robinson's share, and then continued:

"And immediately after the decease of my same daughter entitled thereto as aforesaid (save and except the said Gertrude Martha Robinson) as to as well the capital of the said settled fund as the income thenceforth to accrue due from the same, in trust for all or any of the children and remoter issue of my same daughter (save and except the said Gertrude Martha Robinson) (such remoter issue being born in her lifetime) in such proportions, for such interests, and generally in such manner as she, whether covert or sole, shall from time to time by deed, with or without power of revocation and new appointment or by her will appoint."

Then followed a hotchpot clause, and the will continued:

"And in default of appointment and subject to any partial appointment in trust for the child, if only one, or all the children, if more than one, of my same daughter (save and except the said Gertrude Martha Robinson) who either before or after her decease shall, being a son or sons attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married, such children, if more than one, to take in equal shares, and if there shall not be any child of my same daughter who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or be married, then in trust for such persons, for such interests, and generally in such manner in all respects as my same daughter (save and except the said Gertrude Martha Robinson), whether covert or sole, shall by will appoint, and in default of appointment and subject to any partial appointment in trust for the person or persons who at the decease of my same daughter shall be of her blood and of kin to her. . . ."

The will contained powers of advancement in favour of the children of the testatrix, and a proviso substituting the issue of any deceased children dying in the lifetime of testatrix for their respective parents, and declared that in case no child or other issue of the testatrix should acquire an absolutely vested interest in the trust fund, the trustees should hold the same fund in trust for William Robinson absolutely.

Elizabeth Robinson made four codicils to her will, by the third of which, dated April 13, 1911, she directed, limited, and appointed that the share of her daughter Bertha Marie Meek of and in the trust fund over which she had power to appoint under the will of Jane Witty should be £500 more than the shares of each of her other children.

Elizabeth Robinson died on June 3, 1911. She was once married only—viz., to William Robinson—and there was issue of such marriage eight children, of whom Gertrude Martha Robinson, Edith Wright, and Bertha Marie Meek were three.

All of the eight children were living at the death of Elizabeth Robinson, and all of them had attained the age of twenty-one years. Edith Wright had been once married only—namely, to Edward Wright, on Sept. 18, 1889. There had been issue of such marriage four children only.

An originating summons was taken out on behalf of Edith Wright, who claimed to be a beneficiary under the will of Jane Witty by virtue of the appointment made by the will of Elizabeth Robinson, asking (inter alia) for (i) a declaration that the provisions contained in the will of Elizabeth Robinson purporting to settle the share of the plaintiff (and the other daughters of the testatrix) appointed under the power in that behalf contained in the will of Jane Witty were invalid and unlawful; (ii) a declaration that the plaintiff was entitled to her share absolutely; (iii) in the alternative, that it might be determined to whom that share would belong on the death of the plaintiff.

Cave, K.C., and *Maugham* for the plaintiff.

Vanneck, for the defendants, the plaintiff's children, was not called on to argue.

W. H. Owen for the defendants, the trustees.

COZENS-HARDY, M.R.—This is an appeal from a decision of WARRINGTON, J., raising a question as to the validity of the exercise of a power of appointment under circumstances which I do not propose to discuss in detail, and for this simple reason: Over sixty years ago the very point was raised before a very great judge in matters of this kind—namely, KINDERSLEY, V.-C.—who gave a reasoned and most learned judgment deciding this very point. That was in *Harvey* v. *Stracey* (2). Eighty years ago the same point was decided in *Sadler* v. *Pratt* (1). LORD ST. LEONARDS, in his book on POWERS (8th Edn.) in 1861, cites *Harvey* v. *Stracey* (2) without any indication of doubt that it was perfectly good law. Thirty-five years ago HALL, V.-C., who was also, as we all of us know, in this branch of the law, a judge of the highest authority, treated the matter as quite clear in *Re Farncombe's Trusts* (3). He founded himself partly on *Harvey* v. *Stracey* (2) and partly also on *Sadler* v. *Pratt* (1). I think that it would be altogether wrong for us to disturb long-settled law laid down on such a point as this. We cannot be asked to say that the rule which has been in force for so long ought not to be applied to a case of this kind.

The principle seems to be that one must wait and see in a case of appointment. One takes the appointment as being exercised at the moment of distribution arriving, and one will then know whether the appointment is wholly to persons within the class capable of taking, or whether it is partly to persons who are in the class and partly to persons without. If it is in equal shares between persons within the class and persons out of the class there is a pro rata distribution.

WARRINGTON, J., has held that in the event of there being at the period of distribution persons, not objects of the power, to whom the shares are given, then the principle of *Lassence* v. *Tierney* (4) is applied, and the original appointment is quoad those shares cut down.

The result is that in the present case one must wait until the period of distribution to see whether there are children within the class to take, and to the extent to which they are alive and can take they will take whatever is given. So far as they are non-objects of the power their mother will take.

I think that it would be very wrong for us to entertain any doubt whatever on a matter which has, in my view, been settled for at least sixty years, and settled beyond all question The appeal must therefore be dismissed.

SWINFEN EADY, L.J.—I agree. At present there is the case of an appointment by will to take effect at a future period—that is to say, on the death of Mrs. Wright. It has been argued that as and when that period arrives there may be in existence persons who are not objects of the power, and therefore the exercise of the power is wholly void. At the present time there are children living of Mrs. Wright, and it may be that when the gift takes effect there will only be persons

objects of the power entitled to take. But still within the language of the appointment, there may be persons not objects of the power.

No question of remoteness arises. In my opinion the law on this case has been settled for many years. In *Sadler* v. *Pratt* (1) some sixty years ago, and in *Harvey* v. *Stracey* (2) these matters were decided, and HALL, V.-C., dealt with a similar point in *Re Farncombe's Trusts* (3) in 1878. He referred to the two earlier cases with approval, and he dealt with the matter not only on those two authorities but also on principle, and referring to those two cases he says that effect is to be given to the appointment in favour of such of the persons as might ultimately be objects of the power, and he states that the law is beyond doubt.

In my opinion, after that weighty authority, it would be quite wrong for this court to take a different view, or to consider that the matter was still open for further discussion.

PHILLIMORE, L.J.—I agree. I do not think it necessary to add anything.

Appeal dismissed.

Solicitors: *Percy Short*; *Cunliffe, Davenport & Blake*, agents for *Gale & Easton*, Hull.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

SANDEMAN & SONS *v.* TYZACK AND BRANFOOT STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Earl Loreburn, Lord Shaw and Lord Moulton), June 19, 23, July 18, 1913]

[Reported [1913] A.C. 680; 83 L.J.C.P. 23; 109 L.T. 580; 29 T.L.R. 694; 57 Sol. Jo. 752; 12 Asp.M.L.C. 437]

Shipping—Carriage by sea—Delivery—Short delivery—Goods at destination found to be unidentifiable—Commixtio—Liability of shipowners for value of goods not delivered.

By bills of lading relating to a shipment of jute which provided that the number of packages signed for was to be binding on the shipowners unless error or fraud was proved, an exception provided: "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped. . . ." The bills of lading, which included bales with many different marks, were endorsed to thirty-seven different consignees. All the cargo was discharged at one port, and it was then discovered that thirty-three of the consignees had received their full consignments, but that the consignments to the four others were incomplete. Eleven bales could not be identified by their marks as corresponding to any description in the bill of lading, and there was a deficiency of fourteen bales. In an action for freight by the shipowners against one of the four consignees, in which no error or fraud was alleged, and in which the consignee counterclaimed for the value of six bales not delivered to him, the shipowners admitted their liability for the value of the fourteen missing bales, but, pleading the exception, contended that the four unsatisfied consignees were

bound to allocate among themselves, in diminution of their claim against the shipowners, the eleven bales which could not be identified. A

Held: the shipowners could not avail themselves of the exception in the bills of lading or of the doctrine of commixtio because, on the facts, they had not proved that the missing bales belonging to the consignee were among the eleven unidentified bales and not among the fourteen missing bales, and because, in law, while owners of goods which had become so mixed as to be inseparable had rights among themselves, those rights could not override their contractual relations with third persons; the action being an action for freight, the shipowners had to prove that at the termination of the voyage they had duly tendered the goods shipped, and this they had failed to do; and, therefore, they were liable to the consignee on his counterclaim for the full value of the undelivered bales. B C

Spence v. *Union Marine Insurance Co., Ltd.* (1) (1868), L.R. 3 C.P. 427, distinguished.

Dictum of Lord Russell of Killowen in *Smurthwaite* v. *Hannay* (2), [1894] A.C. 494, 505, criticised.

Notes. Considered: *The Nordborg, Nordborg (Owners)* v. *C. P. Sherwood & Co.*, [1939] 1 All E.R. 70. Applied: *Gill and Duffus (Liverpool), Ltd.* v. *Scruttons, Ltd.*, [1953] 2 All E.R. 977. D

As to delivery of cargo, see 35 Halsbury's Laws (3rd Edn.) 449 et seq.; and for cases see 41 Digest 537–539.

Cases referred to: E

(1) *Spence* v. *Union Marine Insurance Co., Ltd.* (1868), L.R. 3 C.P. 427; 37 L.J.C.P. 169; 18 L.T. 632; 16 W.R. 1010; 3 Mar.L.C. 82; 41 Digest 536, *3642*.

(2) *Hannay & Co.* v. *Smurthwaite*, [1893] 2 Q.B. 412; 63 L.J.Q.B. 41; 69 L.T. 677; 42 W.R. 133, C.A.; reversed sub nom. *Smurthwaite* v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; 41 Digest 537, *3643*. F

(3) *Buckley* v. *Gross* (1863), 3 B. & S. 566; 1 New Rep. 357; 32 L.J.Q.B. 129; 7 L.T. 743; 27 J.P. 182; 9 Jur.N.S. 986; 11 W.R. 465; 122 E.R. 213; 3 Digest (Repl.) 75, *143*.

Cases referred to in argument:

Jessell v. *Bath* (1867), L.R. 2 Exch. 267; 36 L.J.Ex. 149; 15 W.R. 1041; 41 Digest 310, *1709*. G

Cox v. *Bruce* (1886), 18 Q.B.D. 147; 56 L.J.Q.B. 121; 57 L.T. 128; 35 W.R. 207; 3 T.L.R. 167; 6 Asp.M.L.C. 152, C.A.; 41 Digest 379, *2256*.

Parsons v. *New Zealand Shipping Co.*, [1901] 1 K.B. 548; 70 L.J.K.B. 404; 84 L.T. 218; 49 W.R. 355; 17 T.L.R. 274; 9 Asp.M.L.C. 170; 6 Com. Cas. 41, C.A.; 41 Digest 382, *2275*. H

Horsley v. *Grimond* (1894), 21 R. (Ct. of Sess.) 410; 41 Digest 557, *h*.

Smith & Co. v. *Bedouin Steam Navigation Co.*, [1896] A.C. 70; 65 L.J.P.C. 8; 12 T.L.R. 65, H.L.; 41 Digest 378, *2246*.

The Ida (1875), 32 L.T. 541; 2 Asp.M.L.C. 551, P.C.; 41 Digest 383, *2284*.

Horsley v. *Baxter Bros. & Co.* (1893), 20 R. (Ct. of Sess.) 333; 30 Sc.L.R. 387; 41 Digest 442, *2772 i*. I

Appeal by the defenders in the action from an interlocutor of the Second Division of the Court of Session recalling an interlocutor of the Sheriff-Substitute of Forfarshire, reported 1913, S.C. 19.

The following statement of the facts is taken from the judgment of the Lord Chancellor:

The appellants, who are spinners and manufacturers in Dundee, were the endorsees of eleven bills of lading, representing eleven separate parcels of jute,

amounting to 2,476 bales. As regards nine of these parcels delivery was made in full, but in the case of the remaining two there was a shortage in delivery. The parcels as to which there was a shortage consisted of 246 bales which were shipped under a particular bill of lading, and of 254 bales which were shipped under another. The cargo was put on board the respondents' steamer *Fulwell*, at Calcutta, in August, 1909. Bills of lading for 28,002 bales of jute were given by the master of the vessel, and were endorsed to thirty-seven different consignees. The *Fulwell* arrived at Dundee, which was the port of destination, in October, 1909, and the discharge of the cargo commenced. It was completed before the end of the month, when it was found that on the out-turn of the ship there were missing fourteen bales, and that there also remained in the harbour shed eleven bales, forming part of the vessel's cargo, which none of the consignees would accept as shipped under their respective bills of lading. Besides the appellants there were three other consignees who would not accept delivery, and these claimed against the respondents for four, eight, and seven bales respectively. The appellants claimed for shortage of six bales, the total shortage claimed for being thus twenty-five bales. All the other consignees, being thirty-three of the thirty-seven referred to, acknowledged receipt of the full quantities consigned to them. The two bills of lading, endorsed to the appellants, and over which the dispute had arisen, set forth that there had been shipped in good order and condition on board the respondents' steamer a specified number of bales of jute "being marked and numbered as per margin." In both cases the markings in the margin were in the words "J.P.S. Naraingunge, 1909–10, on end in Red R.B." The total number of bales specified in these two bills of lading was 500, but it is admitted that only 494 bales bearing the marks above mentioned were delivered to the appellants. The bills of lading contained three clauses which are material. Clause 4 declared that

> "the number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shipper's marks to be delivered."

Clause 5 declared: "Weight, measure, quality, contents, and value unknown. Clause 7 declared:

> "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped. . . ."

There having been a shortage in delivery at Dundee to the appellants of six bales, they refused to pay freight except on the footing of claiming to set off against the freight the value of the six bales not delivered to them. The respondents then raised an action in the Sheriff Court of Dundee, claiming £175 1s. 6d., being the balance of freight due in respect of the appellants' total consignment. The claim for freight was admitted by the appellants, but they counterclaimed £15 5s. 4d., being the value of the six bales which had not been delivered. The respondents in their pleadings offered to pay to the appellants and the other consignees who complained of short delivery the price of the missing fourteen bales "in such proportions as they may be found to be entitled to the same," but they maintained that, as the four consignees were, as they alleged, bound to allocate among themselves the eleven bales left in the harbour shed, they could not ascertain what part, if any, of the price of the fourteen bales would fall to the appellants. The sheriff-substitute decided that the appellants were entitled to deduct the value of the six bales not delivered from the sum sued for, and assessed their value at £15 5s. 4d. The respondents appealed to the Court of Session, and the Second Division heard the case. In the course of the argument before that court the respondents expressed their willingness to give the appellants credit for a proportion of the value of the fourteen bales irrespective of whether they would come to an agreement as to the allocation of the eleven bales remaining in the harbour shed. The Second Division reversed the decision of the sheriff-substitute. They held that the appellants were

not entitled to any further deduction than the amount which the respondents were willing to concede, which amounted to £8 11s., and they gave judgment for the difference.

Scott Dickson (*Dean of Faculty*), *Condie Sandeman*, *K.C.*, and *Arthur R. Brown* (all of the Scottish Bar) for the appellants.

R. S. Horne, *K.C.*, and *William Watson* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

July 18, 1913. The following opinions were read.

VISCOUNT HALDANE, L.C.—In this appeal the House can deal with the questions of law that arise only on the footing that the facts have been conclusively found by the court below. But I think that the facts have been so fully found that we are in a position to dispose of the case without difficulty. [His Lordship stated the facts, and continued:] The sum in dispute is, therefore, only £6 14s. 4d. The question over which the controversy has taken place is, however, one of general importance.

It is, in the view which I take of this case, important to define what was the nature of the claim made on each side. The respondents were suing for freight, and they had to show that they had performed their contract. That contract was to carry and deliver, or tender, at Dundee the bales put on board at Calcutta. Unless they fulfilled this contract they were not entitled to freight on any bales in respect of which they had not fulfilled it. The appellants, on the other hand, were entitled to have the bales put on board delivered to them as put on board, unless the special stipulations in the bills of lading protected the respondents. As the bales in question had been signed for and no error or fraud was shown within the meaning of cl. 4, the respondents could not say that the whole twenty-five bales had not been shipped. Nor does cl. 7 help them. For it can apply only if the goods are proved to have been delivered. If a number of packages were shipped, and that number was delivered to a single consignee, the shipowners, who would have satisfied cl. 4 by delivering the proper number, might be protected from inaccuracy or obliteration of marks by cl. 7. In the case before the House the court below has found as a fact that there were eleven bales not marked as described in the bills of lading, and that it is impossible to identify these bales as forming part of any parcels marked as set forth in the bills of lading, and that there are marks on the ends of these bales which showed that some of them could not have been marked "on end in Red R.B." Fourteen bales have been lost altogether, and there are four consignees to whom the respondents seek to attribute the eleven bales. Why, then, should the appellants be bound to treat their six bales as included in the eleven which have arrived rather than in the fourteen which did not arrive? It appears to me that a fallacy underlies the reasoning of counsel for the respondents. He assumed that the six bales missing could be identified as forming part of the eleven which arrived. But they may have been among the fourteen which did not arrive.

This being an action for freight, the respondents have to prove that they duly tendered the goods shipped, at the termination of the voyage. But this is just what they cannot do. It follows, not only that they must fail in their action for freight in respect of the six bales, but that the appellants are entitled to say to them that, having failed to prove this delivery, a counterclaim lies for the value of the goods shown to have been shipped but not delivered. The learned counsel for the respondents relied on *Spence* v. *Union Marine Insurance Co., Ltd.* (1), where part of a cargo of cotton arrived at Liverpool but could not be identified, and it was held that the property in the part of the cargo which arrived, but of which the marks had been obliterated, had not ceased to belong to the consignees, and that the various consignees had become tenants in common of the mass of cotton according to their respective interests. But that was a case of a claim against an insurance company as for a total loss, and the consignee who claimed

A in the action had to establish his total loss. He failed for obvious reasons. It is sufficient to say that such a claim presents no real analogy to that which is before us. In *Smurthwaite* v. *Hannay* (2), which was an action for non-delivery like the present, there is a dictum in the judgment of LORD RUSSELL OF KILLOWEN which suggests that the doctrine applied in *Spence* v. *Union Marine Insurance Co., Ltd.* (1) might be applied in a case resembling the present. But that dictum was B unnecessary for the decision of the appeal, which turned on a point of procedure only, and the other noble and learned Lords who were parties to the judgment did not express concurrence in it. For the reasons I have given, I am of opinion that the judgment of the Second Division must be reversed, and that the decision of the sheriff must be restored, with costs in this House and in the courts below.

C **EARL LOREBURN.** The able arguments to which we have listened help to reduce within a narrow compass all the material points in this case.

This ship received at Calcutta, and gave bills of lading, of which the appellants are endorsees, for 2,476 bales of jute. When she arrived at Dundee she delivered only 2,470 bales, and the question is whether or not there is a valid claim by the endorsees for the balance of six bales undelivered. The answer rests entirely upon D the seventh condition or exception in the bill of lading. It is found, as a fact, that a great many other bales of jute were shipped in this vessel. On arrival all was in order except that fourteen bales out of the total shipped, in some unexplained way, were not forthcoming at all, and eleven bales could not be identified as belonging to any consignee, by reason of defective or obliterated marking. Upon this, the shipowners admitted their responsibility to make good the shortage of E fourteen bales, but say that they are not liable at all in respect of the eleven bales, because the seventh exception relieves them. Their contention is, that all the consignees of any jute in this cargo to whom short delivery was made must be settled with upon the basis that the fourteen lost bales belonged to them in proportion to their shortage, and that the eleven unidentifiable bales also belonged to them in the same proportion. The seventh exception runs as follows:

F

> "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped. . . ."

The owners bind themselves to deliver the goods subject to the exceptions and conditions.

G In my opinion, each bill of lading evidenced or constituted a separate contract, by which the owners were bound to deliver the self-same bales that they received, but would be excused from delivery if it was made impossible by obliteration or absence of marks on the particular bales. Suppose that in this very case all the bales stowed in the ship at Calcutta had been forthcoming at Dundee, but that eleven of them had been found not capable of identification owing to obliteration H or absence of marks, so that no one could say to which bill of lading they belonged. There would have been no difficulty. All the bales incapable of identification in that case clearly belonged to one or more of the disappointed consignees in definite proportion to the shortage of which each complained, but which particular bale belonged to which particular consignee could not be proved. All the disappointed consignees were disappointed because there had been absence or obliteration of I marks on their own bales as well as upon the bales of the others complaining of shortage. And the shipowners could have said: "Our contract to deliver was conditional; the condition which excused us from delivering has arisen. The facts show that every single bale that each one of you shipped is on board, though its identity cannot be made out because of its defect in marking, for which we are not liable."

But on the facts found in the case now before your Lordships no such protection is available to the shipowners, and for this simple reason. Apart from the eleven unidentifiable bales there were fourteen missing bales. It may be that the six

which the appellants complain have not been delivered to them were among these fourteen. So the shipowners cannot prove—at least they have not proved—that the failure to deliver these six was due to any absence or obliteration of marking of such six bales. Clearly the burden of proving that the case comes within the exception lies upon the shipowners who set it up. They have failed in the proof, and stand in the position of men who contracted to deliver merchandise admittedly stowed in their vessel and have been unable to establish an excuse, however probable it may be that such an excuse really exists if the whole truth could be known. I do not say anything in regard to the argument as to commixtio, because it seems to me quite beside the facts of this case. Owners of goods which have become so mixed as to be inseparable have rights among themselves, but those rights cannot override their contractual relations with other persons. I think this appeal should be allowed.

LORD SHAW (read by LORD PARKER OF WADDINGTON).—By the two bills of lading founded on, the respondents stood charged with the receipt at Calcutta of 500 bales of jute, and they became responsible for the delivery of the same number to the defenders at Dundee. They have only, however, delivered 494. Unless excused by the conditions of or exceptions in the contract they are liable in respect of the short delivery of six bales. The appellants' goods had been shipped along with many other consignments of jute also destined for Dundee. Delivery of the cargo was made on the wharf en masse. In the reckoning eleven bales could not be identified, another fourteen had disappeared. Four merchants had short delivery —one of these, the appellant firm, to the extent of six bales. These bales have not been identified with any of the eleven whose marks have gone; on the contrary, LORD SALVESEN does not doubt that the quality of the jute in the unmarked bales did not correspond with any of the consignments upon which there had been a shortage. The truth accordingly is (i) that the respondents became charged with delivery of six bales; (ii) that they have failed to deliver; (iii) that no clause as to obliteration of marks applies to this case because the obliteration occurs on parcels of another quality of goods, and (iv) that the failure either to deliver or to identify is thus complete. On these facts I am of opinion that no case arises for the extrication of the rights of parties by applying any rule of distribution among co-owners. For the appellants are not co-owners with others of the remnant of this cargo. Their goods are not in it; and no principle of distribution, confusion, commixtio, or right in common, can apply to the case of a merchant whose goods have disappeared, and who is asked to accept in lieu of them, and in satisfaction pro tanto of his contract rights, a distributive share in something else no part of which ever belonged to him. I cannot read the opinion of LORD RUSSELL in *Smurthwaite* v. *Hannay* (2) as justifying any such proceeding. If it did, as was argued, I should respectfully disagree with an opinion to that effect. The respondents have unfortunately to face the total disappearance of fourteen bales. The appellants' six may all be among them. Had the shipowners delivered the cargo in full, and had the qualities not been so disconform to those of the goods shipped, they might well have argued with force that all the shippers of goods (and all of them parties to bills of lading in similar terms) stood together to take the risk of confusion by the loss of identifying marks. But the cardinal fact of delivery fails, and, with it awanting, the doctrine of distribution goes. Having reached this point I need go no further. For the reasoning and the language of LORD LOREBURN are such that I could not presume to add to them, and I venture to adopt in its entirety the judgment of the noble and learned Earl.

LORD MOULTON (read by LORD PARKER OF WADDINGTON).—In this case the pursuers, the present respondents, have brought an action against the appellants to recover freight upon 2,476 bales of jute delivered to them at Calcutta to be conveyed on the steamer *Fulwell* to the port of Dundee under the terms of certain bills of lading, eleven in number. The appellants admit the contracts, but allege

A that the respondents have failed to perform two of them, in that of the 500 bales specified in those two bills of lading, only 494 bales were delivered to them at the end of the voyage. They claim accordingly that the respondents have not earned the freight on the six bales short-delivered; and, further, that they are entitled to set against the freight of the bales actually carried and delivered to them the value of the bales short-delivered. The case was originally heard in the Sheriff Court at B Dundee. At the hearing the sheriff-substitute found in favour of the contentions of the appellants, and assessed the value of the bales short-delivered at £15 5s. 4d., which was the value claimed by the appellants in their pleadings, and on the basis of which they had made a proper tender for the sum due to the respondents in respect of freight. Upon certain grounds presently to be noticed, the respondents had in their pleadings expressed a willingness to allow to the appellants a credit of C £8 11s., and no more, against the full freight due. The difference between these two sums—namely, £6 14s. 4d.—was, therefore, the amount which was really in issue between the parties. The sheriff-substitute found in favour of the appellants in respect of such sum, but on appeal his decision was reversed by the Second Division of the Court of Session, and it is from their interlocutor that the present appeal is brought.

D To appreciate the point in dispute (which is one of considerable commercial importance) it is necessary to state a few facts. The ship *Fulwell* carried on this occasion a general cargo of jute, shipped under a number of separate bills of lading. Of this cargo the appellants shipped eleven parcels, the numbers and marks on which were duly recorded in the margins of the respective bills of lading. The goods shipped under nine of these bills of lading were duly delivered, but of the E goods shipped under the remaining two there was a shortage of six bales. It appears from the evidence that three other consignees also complained of short delivery to the extent of four, eight, and seven bales respectively, and the respondents do not contest the allegation that the number of bales delivered to these consignees fell short of the number specified in the respective bills of lading by these amounts. On the other hand, upon the discharge of the ship eleven bales F were found which corresponded to none of the bills of lading. The goods shipped by the respondents under the bills of lading in question purported to be of a least two different qualities, and the eleven bales found in the harbour shed did not correspond in quality with any portion of those goods, and, in short, there is no evidence whatever to show that any of the eleven bales formed part of the parcels shipped by the defenders under the two bills of lading under which there was short G delivery. It will be seen, therefore, that inasmuch as there is no question that the respondents are bound by the statements as to numbers in the bills of lading signed by the master, they are in the position of having to admit that fourteen bales were lost, and that none of the eleven bales remaining over can be identified by them as forming part of the goods shipped under the two bills of lading which formed the contracts under which they are suing the appellants.

H The respondents are, therefore, in the position of being unable to assert that they have delivered to the appellants the goods which they received on their account for carriage. Primâ facie this is a condition of their right to demand the payment of freight. It remains, therefore, to consider how they excuse themselves from proving the performance of that condition. In the first place, they set up that the I bill of lading is not an absolute contract to deliver, but a contract subject to conditions, and they contend that those conditions provide them with the requisite excuse. The two conditions to which they refer are numbered 5 and 7 in the bill of lading. No. 5 reads thus: "Weight, measure, quality, contents, and value unknown." I entirely fail to see what application this has to the circumstances of the present case. It in nowise affects the obligation of the shipowner to deliver the identical goods entrusted to him for transport. Its plain object and effect is to guard him from being supposed to warrant the accuracy of the representations as to weight, measure, quality, contents, and value that may be found in the description of the goods or their markings as appearing in the bill of lading, and

to let it be known that these appear in the bill of lading only as representations made to the master on behalf of the shipper, for the accuracy of which he is in nowise responsible. It is in strong contrast with No. 4, which provides that:

> "The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved."

Condition No. 7 reads as follows:

> "The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliteration or absence of marks, numbers or description of goods shipped, leakage, breakage, loss, or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage."

Here again there is no qualification of the absolute obligation to deliver the identical goods consigned to the shipowner for transport. It merely provides that if those goods should be injured in certain ways (one of which is the obliteration of marks), or should have been accepted by the ship without being marked in the way described in the bill of lading, the shipowner shall not be liable for their having been so injured, or for their not corresponding to the marking described in the bill of lading. Considering that bills of lading pass into other hands, such a provision is an important protection to the shipowner. The presence of a mark indicating that the goods are the manufacture of some firm of high repute, or otherwise take high rank in the market by reason of their origin, may greatly influence their value, and but for the presence of such a provision in the bill of lading a shipowner might be involved in liability if the goods on delivery were found to be without the marking stated in the bill of lading. I can see no ground for attributing to Condition No. 7 any other or different effect from this, which is the plain meaning of its words. For the purposes of this case it suffices to point out that it cannot possibly qualify the obligation to deliver the identical goods consigned for shipment, nor can it refer to the absence or obliteration of marks on any goods other than those to which the bill of lading refers.

But although these points were made the subject of argument on behalf of the respondents, they do not represent the contention upon which they principally relied, which was the ground of the decision in their favour by the Second Division of the Court of Session. Their main defence was an alleged principle of our law to the effect that, in such a case as the present, where there is a residue of unidentified goods and a shortage in delivery, the shipowner can compel the consignees to take the unidentified goods as a pro tanto fulfilment of the contract to deliver. To prove the existence of such a principle they cited the decision of the Court of Common Pleas in *Spence* v. *Union Marine Insurance Co., Ltd.* (1) and certain expressions appearing in the opinion of Lord Russell of Killowen in *Smurthwaite* v. *Hannay* (2) in this House. These cases I shall presently examine, but I think it convenient in the first place to submit to an independent examination the doctrines of our law in cases where goods belonging to different owners have become mixed, so as to be incapable either of being distinguished or separated. If we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal consequences of the goods of "A" becoming indistinguishably and inseparably mixed with the goods of "B." If the mixing has arisen from the fault of "B," "A" can claim the goods. He is guilty of no wrongful act, and, therefore, the possession by him of his own goods cannot be interfered with, and if by the wrongful act of "B" that possession necessarily implies the possession of the intruding goods of "B," he is entitled to it: 2 Kent's Commentaries (10th Edn.), p. 465. But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right, the only equitable solution of the difficulty, and the one accepted by the law, is that "A" and "B" become owners in common of the mixed property. Farther than this I

A do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shown by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental commixtio. BLACKBURN, J., in *Buckley* v. *Gross* (3) (following KENT'S COMMENTARIES) considers (3 B. & S. at p. 575) that they would be tenants in common in equal shares. In *Spence* v. *Union Marine Insurance Co., Ltd.* (1) they were judged to possess the B mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases C where they would lead to substantial injustice. For instance, if a small portion of the goods of "B" became mixed with the goods of "A" by a negligent act for which "A" alone was liable, I think it quite possible that the law would prefer to view it as a conversion by "A" of this small amount of "B's" goods rather than to do the substantial injustice of treating "B" as the owner of the whole of the mixed mass.

D It is from these propositions of law that the respondents in this case attempt to spell out a right to compel the appellants to accept a proportion of the unidentified bales as a good delivery under the bills of lading. There are, to my mind, two fatal objections to this—the one of fact and the other of law. In the first place, before any such principles can be applied it is necessary that it should be proved or admitted that the goods of the owners in question have in fact contributed to E form the mixed mass. If the goods of "A" and "B" have become mixed, and it is possible, but not proved or admitted, that some of "C's" goods are in the mixture, there cannot possibly be a presumption of law that they are or are not to be found there, and accordingly "C" cannot be compelled to take up the position of being a co-owner with "A" and "B," nor is he entitled to insist on being regarded as such co-owner if "A" or "B" objects thereto. Whether his goods are F to be found therein is a question of fact, which must be proved by the party asserting it. In the present case there is not the slightest proof that any of the goods shipped under the bills of lading issued to the appellants are to be found in the unidentifiable bales. Everything, indeed, points the other way, because they are of a wholly different quality from any of the jute purported to be shipped by the appellants. But it is not necessary to discuss this question, or to do more than G say that it is admitted that fourteen bales must be taken to have been lost, and there is no evidence, and there can be no presumption of fact, that the six bales belonging to the appellants were not among these missing bales. It follows, therefore, that, accepting to the full the above doctrines as to the effect of a confusion of goods, they afford no ground for requiring the appellants to accept the position of co-owners of the unidentifiable bales.

H But there is, in my opinion, an objection of law which is equally serious. The doctrines to which I have referred deal with property, and not with contract. To illustrate my meaning, let me take a case where the circumstances are such as would justify in the strongest manner the application of these doctrines in the case of goods shipped under bills of lading. Let me assume that "A" and "B" were the owners of two separate parcels of cargo which have become inseparably and I indistinguishably mixed, without loss and without deterioration. It may well be that they could assert the position of joint owners in the mixed cargo, and as such take action against any person who sought to get possession of it or convert it to his own use. But it does not follow that the shipowners would have performed their contract of carriage. Their duty is to deliver the goods entrusted to them for carriage, and they do not perform that duty if all that the consignee obtains is a right to claim as tenant in common a mixture of those goods with the goods of other people. No doubt, if such a right is of some value, and the consignee avails himself of it, the shipowners are entitled to the benefit of what he receives in

reduction of damages for their breach of contract, just in the same way as they would be entitled to credit for whatever value the goods possessed if they were delivered mixed up with some extraneous substance which lessened their value or compelled the consignee to go to expense in separating it out. In the present instance, therefore, the appellants were, under the bills of lading, entitled to the delivery of their goods, and even if the respondents could compel them to take up the position of co-owners of the mixed mass, it would not be a defence to their claim for breach of contract to deliver, nor would it affect the damages recoverable thereunder, except so far as they had received or could receive payment representing the value of that co-ownership. The respondents would have no right to claim that the right of the shippers to the proceeds of the goods as co-owners was a fulfilment of their own contract of carriage. They could only claim that any payment so received or receivable would be pro tanto a reduction of their liability in damages by reason of the appellants having received, or being in a position to receive, payment to that extent, so that the damages which they would suffer from the breach of contract would be diminished by a like amount. In the present case the appellants have received no payment of this kind, and for all that appears in the case the unidentifiable bales may possess no appreciable value, so that (apart from all other grounds) the respondents are not on this account in a position to claim any reduction of the damages primâ facie due from them to the appellants for their breach of contract to deliver. The nature and consequences of the contention of the respondents are well illustrated by considering the manner in which they have arrived at the sum of £8 11s. for which they express their willingness to credit the appellants. The number of bales short-delivered was twenty-five, of which fourteen are admitted to have been lost. The value of the six bales short-delivered to the appellants is fixed at £15 5s. 4d., and £8 11s. is arrived at by taking fourteen twenty-fifths of that sum. The respondents, therefore, contend that they have specifically performed their contract with respect to the remaining eleven twenty-fifths of the missing six bales (i.e., two and sixteen twenty-fifth bales) by telling the appellants to take their share of eleven unclaimed bales which are not shown to be identical with or to correspond in any particular with the bales which they undertook to deliver.

I now turn to the decisions which it is contended establish doctrines inconsistent with the above conclusions. The chief decision to which we are referred is that of *Spence* v. *Union Marine Insurance Co., Ltd.* (1). The facts of that case were as follows. Cotton belonging to different owners was shipped for Liverpool in bales specifically marked. On her voyage the ship was wrecked, all the cotton was more or less damaged, some of it was lost, and some was so damaged that it had to be sold at an intermediate port. The rest was sent on to Liverpool. By reason of the ship being wrecked the marks on all but a portion of that sent on to Liverpool were obliterated. The plaintiffs were the holders of a bill of lading for forty-three bales, and of these two only were identifiable at Liverpool, and were duly received by them. They had insured the whole parcel, and the action was by them against the underwriters, as for a total loss of the forty-one bales. I should add that the unidentifiable portion of the cargo had all been sold (under an arrangement whereby the sale was to be without prejudice to the rights of the parties), and the proceeds divided among the owners who had not received their goods, in proportion to the number of bales short-delivered. On these facts there are three matters worthy of special notice. In the first place, it was not disputed that all the goods had been duly shipped, and that the loss had been occasioned entirely by the ship being wrecked. In the second place, the goods appear to have been all of the same character, so that it was only a question of the number of bales belonging to each particular owner. In the third place, the action was one of insurance, and the sole question was whether the plaintiffs were entitled to say that there had been a total loss of the forty-one missing bales. There was no question of breach of contract to deliver. It was, therefore, open to the court to regard the case as one in which, by reason of the perils of the sea and from no other cause, it came about,

first, that the goods became indistinguishably mixed, and, secondly, that a portion of this mixed mass was lost. Under those circumstances the owners of the goods were clearly entitled to take up the position of having become co-owners of the mixed mass, and of every part of it, and, therefore, of the surviving portion of it, and seeing that the goods were all of the same quality, this was the only position they could take up in fairness to the underwriters. Everything had been done consistently with this view, and all that the court decided was that this was the proper view to take of the matter. If the judgment be carefully read, it will, in my opinion, appear that the court arrived at its decision from the considerations that I have enumerated above, and did not purport or intend to make any addition to the law as to the effect of commixtio as previously enunciated by recognised authority.

Smurthwaite v. *Hannay* (2) is of a different character. In that case bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, and upon arrival it was found that the number of bales landed fell short of those shipped, and that the marks upon some of the bales so landed had become obliterated, so that identification was impossible. These latter bales were sold and their proceeds distributed proportionately among the several consignees who had received short delivery. It would seem that all the bales were treated as being similar. Under these circumstances sixteen holders of bills of lading joined in one action against the shipowners, claiming damages for non-delivery of the specified number of bales. The defendants applied to stay the action on the ground that neither R.S.C., Ord. 16, nor Ord. 18, r. 1, justified the joinder of such causes of action. The sole question before the court, therefore, was as to the construction of these rules. The Court of Appeal had decided in favour of the plaintiffs, and from that judgment the defendants appealed to this House. In the result the appeal was allowed, and it was decided that on the true construction of the rules in question the various holders of the bills of lading could not combine as co-plaintiffs in one and the same action. In the course of the argument counsel for the appellants suggested that unless holders of bills of lading could thus join in one action, they would be placed in a position of some difficulty, because the defendants might attribute a sufficient number of the unmarked bales to the particular plaintiff suing, and so meet his claim. I have some difficulty in appreciating the legitimacy of such an argument, when the sole point before the court was as to the construction of the language of certain rules. There is certainly no presumption that such rules are sufficient to prevent difficulties arising in practice, and it is evident that LORD RUSSELL did not base his opinion on any such ground, for he says ([1894] A.C. at p. 505):

> "The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has in the facts of this case much weight, but whether it has or has not, it cannot be regarded, if, as I think, the orders and rules do not authorise that joinder of plaintiffs which has here been attempted."

Nevertheless, it is true that he does say in his judgment that the difficulty suggested by the plaintiffs was not a real one, because the defendants could only attribute to each single owner of a bill of lading a proportion of the unidentified bales in answer to their claim for non-delivery. Under the circumstances of the case this could be nothing other than an obiter dictum. It was doubtless justified in that particular case by the fact that it was common ground that all the bales were similar, and that the parties had been acting on the basis of their being owners in common of the unidentifiable bales, seeing that the proceeds of the sale of those bales had been divided among them proportionately. Under those circumstances no objection could be made to the statement that they were owners of the unidentifiable bales in proportion to their respective interests. But if the noble and learned Lord intended to go further than the circumstances of that case, and to say that a tender of a proportion of unidentifiable bales is to the extent of that

number of bales an answer to a claim of the holder of a bill of lading for short delivery, I am of opinion that the dictum was erroneous and cannot be justified. But I see no reason for thinking that his Lordship intended to lay down any such principle, or that he had before his mind the general case of short delivery under bills of lading. For these reasons I am of opinion that this appeal ought to be allowed.

Solicitors: *Linklater, Addison & Brown*, for *Johnstone, Simpson & Thomson*, Dundee, and *Elder & Aikman*, Edinburgh; *Beveridge, Greig & Co.*, for *J. & H. Patullo & Donald*, Dundee, and *Alex. Morison & Co.*, Edinburgh.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

Re LAW CAR AND GENERAL INSURANCE CORPORATION

[Court of Appeal (Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.), April 2, 3, 4, May 7, 1913]

[Reported [1913] 2 Ch. 103; 82 L.J.Ch. 467; 108 L.T. 862; 29 T.L.R. 532; 57 Sol. Jo. 556; 6 B.W.C.C. 100; 20 Mans. 227]

Insurance—Insurance company—Winding-up—Employer's liability—Claims provable in winding-up—Ascertained amounts due under policy—Continuing liabilities for weekly payments—Loss of benefit of policy in respect of contingent liabilities—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 17 (1), *Sched.* 6, *Part* (*D*).

In 1909 an employers' liability policy was issued to a trading company by an insurance company indemnifying the trading company in respect of accidents to their employees under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 and 1906. The policy was for one year from July 1, 1909, at a single annual premium of £147 16s. 3d. It was renewed for one year from July 1, 1910, the last premium having been paid on June 22, 1910, to cover the assured up to July 1, 1911. On Dec. 8, 1910, a petition was presented to wind-up the insurance company, and on Dec. 20, 1910, a compulsory order was made.

Held: the assured were entitled to prove in the winding-up for (i) ascertained amounts which at the date of the winding-up order had become due to them from the insurance company under the policy; (ii) liabilities in respect of weekly payments which had emerged before the date of the winding-up order and were continuing liabilities, these liabilities being valued in accordance with the provisions of the Assurance Companies Act, 1909, Sched. 6, Part (D), first paragraph; (iii) the loss of the benefit of the policy as from the date of the winding-up order, valued, not on the basis of an estimate of contingent liabilities emerging after the date of the winding-up order, but as being such portion of the last premium paid as was proportionate to the unexpired portion of the period in respect of which the premium was paid, as provided in the second paragraph of Part (D) of Sched. 6 to the Act of 1909.

Notes. Section 17 (1) of the Assurance Companies Act, 1909, has been replaced by s. 17 (2) of the Insurance Companies Act, 1958 (38 Halsbury's Statutes (2nd Edn.) 127), and Sched. 6, Part (D), of the Act of 1909 by Sched. 3, paras. 6 and 7, of the Act of 1958.

Considered: *Re Profits and Income Insurance Co.*, [1928] All E.R.Rep. 378. Referred to: *Re United London and Scottish Insurance, Newport Navigation Co.'s Claim*, [1915] 2 Ch. 12; *Re City Life Assurance Co., Ltd.*, [1925] All E.R.Rep. 453; *Re Parent Trust and Finance Co.*, [1936] 1 All E.R. 641.

As to winding-up of insurance companies, see 22 HALSBURY'S LAWS (3rd Edn.) 434–442; and for cases see 10 DIGEST (Repl.) 1160 et seq.

Cases referred to:

(1) *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1880), 17 Ch.D. 337; 50 L.J.Ch. 273; 44 L.T. 299; 10 Digest (Repl.) 1171, *8150.*

(2) *Re Albert Life Assurance Co., Bell's Case, Kerr's and Stubbs' Cases, Bleackley's Case, Craig's Executors' Case, Wilson's Case* (1870), L.R. 9 Eq. 706; 39 L.J.Ch. 539; 22 L.T. 697; 18 W.R. 688, 784; 10 Digest (Repl.) 1166, *8118.*

(3) *Re Albert Life Assurance Co., Lancaster's Case* (1871), L.R. 14 Eq. 72, n.; 16 Sol. Jo. 103; 10 Digest (Repl.) 1171, *8146.*

(4) *Re English Assurance Co., Holdich's Case* (1872), L.R. 14 Eq. 72; 42 L.J.Ch. 612; 26 L.T. 415; 20 W.R. 567; 10 Digest (Repl.) 1171, *8145.*

(5) *Wallberg's Case* (1872), European Assurance Arbitration (Lord Westbury's decisions) 65.

(6) *Re Life and Health Assurance Association, Ltd., Berry's Claim*, [1913] 2 Ch. 137, n.; 10 Digest (Repl.) 1170, **3400.*

Also referred to in argument:

Re Dodds, Ex parte Pritchard (1890), 59 L.J.Q.B. 403; sub nom. *Re Dodds, Ex parte Vaughan's Executors*, 25 Q.B.D. 529; 62 L.T. 837; 39 W.R. 125; 6 T.L.R. 293; 7 Morr, 199; 4 Digest (Repl.) 328, *2984.*

Re Great Britain Mutual Life Assurance Society (1882), 20 Ch.D. 351; 51 L.J.Ch. 506; 46 L.T. 73, 616; 30 W.R. 374, C.A.; 10 Digest (Repl.) 1174, *8176.*

Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co. (1868), 4 Ch. App. 112; 38 L.J.Ch. 38; 19 L.T. 465; 17 W.R. 181; 3 Mar.L.C. 119, L.C.; 10 Digest (Repl.) 971, *6695.*

Appeal by the liquidator in the winding-up of the Law Car and General Insurance Corpn., Ltd.

Younger, K.C., and *Maugham* for the liquidator.

Frank Russell, K.C., and *D. M. Kerly* for J. J. King & Sons, Ltd., the assured.

Cur. adv. vult.

May 7, 1913. The following judgments were read.

COZENS-HARDY, M.R.—This appeal raises the question whether under an employers' liability policy the holder can prove in respect of claims maturing after the date of a winding-up order.

The policy in question in this case was issued in 1909 and was renewed in 1910. It covered the insured up to July 1, 1911. On Dec. 8, 1910, a petition to wind-up the insuring company was presented and a compulsory order to wind-up was made on Dec. 20, 1910. A proof was brought in claiming (a) in respect of accidents prior to December, 1910, as to which no question arose, and (b) in respect of accidents in March, 1911. The liquidator rejected the latter, and the matter was brought by way of appeal before NEVILLE, J.

Prior to the Employers' Liability Insurance Companies Act, 1907, there was no special legislation affecting insurance companies. The company would have been wound-up under the Companies Acts then in force. A policy-holder would have been entitled to prove, first, on account of accidents prior to the winding-up order. An estimate would be made under s. 158 of the value as at that date of any weekly payments. With regard to any capital sum, whether for arrears due to the workman or for compensation in case of death to the dependants of the workman, no

estimate would be needed; secondly, for the loss to the policy-holder by reason of the repudiation of the contract at the date of the winding-up order. This must often be matter of speculation. But if during the currency of the policy an accident occurred which, if the contract of indemnity had not been repudiated, would have entitled the holder to £x, the court treated that fact as evidence pro tanto of the value of the indemnity, and the holder could have proved for £x less a discount for the period between the winding-up order and the date of the accident. This would not have exhausted the right of proof, for there might be a necessity for speculation as to the value of the indemnity beyond £x. This was the principle of SIR GEORGE JESSEL, M.R.'s decision in *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1). The claim could be made at any time during the continuance of the winding-up, but not so as to disturb prior dividends. That was a claim under a fire policy, to which also there was no special legislation applicable.

The Employers' Liability Insurance Companies Act, 1907, for the first time made special provisions with reference to employers' liability policies. It is not necessary to refer more particularly to that Act. It was repealed by the Assurance Companies Act, 1909, which is now the governing statute [repealed by Insurance Companies Act, 1958: see note supra]. The necessity for some special legislation is obvious. The number of policies and still more the number of workmen whose claims are covered by policies is very great, and the task of investigating the value of a weekly payment, depending to some extent on the personal conditions of health of each payee, was as a matter of business impossible. The Workmen's Compensation Act, 1906, in Sched. 1, s. 17, stated the terms upon which the employer could redeem a weekly payment, and the legislature adopted those terms as defining the value as between the assured and the company. It also laid down a rule for ascertaining the value to the assured of the indemnity which by the repudiation of the contract he has lost.

Whether the legislature has done more than this, and, if so, how much more, is the crucial question on this appeal. The answer depends upon a careful consideration of some obscure language in the Act of 1909. Section 1 defines employers' liability insurance business. It apparently covers only the business of insuring employers against liability to pay compensation or damages to workmen in their employment. These words do not extend to claims of dependants under the Workmen's Compensation Act, and possibly not to damages under Lord Campbell's Act. But a company carrying on employers' liability insurance business may grant a policy extending to wider claims. Section 15 makes the Companies (Consolidation) Act, 1908 [now Companies Act, 1948], apply to all assurance companies except so far as specially modified by the Act. Section 17 (1) is as follows:

> "Where an assurance company is being wound-up by the court, or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be value in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by Sched. 6 to this Act."

There are several points of difficulty on this subsection. The "value of a policy" is one thing; a "liability under such a policy" is a different thing. I think the latter words refer to a liability which has emerged and which may or may not "require to be valued." For example, a capital sum due to dependants under the Workmen's Compensation Act, or damages recovered in an action do not require to be valued, whereas a weekly payment to an injured workman does require to be valued or estimated. I think that the earlier words refer to the value of the indemnity given by the policy, viewed as on the date of the winding-up. For it must not be forgotten that a workman is not taken out of the policy by the receipt of a weekly payment. The policy covers any further accident, during the currency of the policy, to the same workman, or—in most cases—to any other workman who may take his place.

A Turning to Sched. 6, Part (D), which is applicable to the present case, the first part is headed "Rule for valuing a weekly payment." It is substantially taken from the redemption section of the Workmen's Compensation Act, 1906. It prescribes the mode in which, if the incapacity is permanent, the value of the weekly payment must be ascertained. Where the incapacity is not permanent no rule is laid down. In that case s. 206 of the Companies (Consolidation) Act, 1908, B must be applied. It is, I think, plain that this first part is not exhaustive. It cannot be that capital sums due in respect of accidents are not to be provided for. They fall under the general provisions of the Act of 1908. It is, in my opinion, clear that the date of the winding-up order, and not the commencement of the winding-up, is the critical date for the purpose of s. 206. This is the necessary effect of rr. 96 and 97, and, apart from those rules, form 63, so far as it is C applicable, proceeds on the same lines. The second part of (D) is headed "Rule for valuing a policy," and is as follows:

> "The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment."

D

The words at the end of this second part create a difficulty. They seem like a duplication of the first part. But I think this is not so. The first part deals with the simple case of an emerged liability under a policy which may or may not be current. For example, the present case, where an accident happened (say) shortly after the policy was issued in 1909. A rule for valuing that liability as on Dec. 20, E 1910, is given in the first part. The second part presupposes a current policy. The main element which has to be valued is ascertained by reference to the unexpired rateable proportion of the premium paid. But there may be at the date of the winding-up order some weekly payment actually payable in respect of an accident during the currency of the policy. And in that event the present value, ascertained as directed in the first part, must be added.

F It is important to observe that s. 17 deals only with matters which require to be valued as distinct from capital liabilities, which do not call for any valuation, and Part (D) in Sched. 6 accurately supplies the want in cases where weekly payments are secured. It follows that s. 17 and Sched. 6 (D) are imperative, and exclude any other mode of valuation. In short, they negative the principle of *Macfarlane's Claim* (1). I am unable to accept the view of NEVILLE, J. I think that the only G proof, except that in respect of accidents prior to December, 1910, must be for the apportioned part of the premium paid for the period from Dec. 20, 1910, to July 1, 1911. In my opinion, NEVILLE, J.'s order should be discharged, and a declaration to the above effect be substituted. This being a test case, the costs of all parties of the appeal will be paid by the liquidator out of the assets.

H **BUCKLEY, L.J.**—With much of the reasoning of the judgment just delivered I agree. From its conclusions I respectfully differ. Subject to a variation which is not unimportant, the order under appeal I think is right.

This company is in liquidation under a compulsory order made on Dec. 20, 1910, on a petition presented on Dec. 8, 1910. Messrs. King & Sons, Ltd., are policy-holders holding a policy current for the year July 1, 1910, to June 30, 1911, on I which they had before the winding-up paid a premium of £147 16s. 3d. to insure them in respect of liability under the Employers' Liability and Workmen's Compensation Acts in respect of a large number of servants whose wages amounted in the aggregate to £6,150. On Jan. 27, 1911, the policy-holders lodged a first proof upon which nothing arises, and on Oct. 4, 1911, lodged a second proof, in which they included a proof for two sums of £328 and £661 in respect of accidents to servants which occurred in March, 1911, at a date that is subsequent to the winding-up and before proof. The question is whether the liquidator ought to admit a proof for a sum in the estimate of which there ought to be taken into

account the fact that accidents resulting in liabilities to the extent of those two sums had occurred before proof admitted. The question turns upon s. 206 of the Companies (Consolidation) Act, 1908, s. 17 of the Assurance Companies Act, 1909, and Sched. 6 to the last-mentioned Act.

Section 158 of the Companies Act, 1862, which is reproduced with some alteration in s. 206 of the Act of 1908 [now re-enacted in s. 316 of Companies Act, 1948], was a section which admitted to proof in the winding-up debts and claims under very large words of description. Under other provisions of the Act it resulted that when a company went into liquidation its assets were to be got in and realised, and the resulting fund was to be divided in satisfaction pro rata of its debts. Sections 98 and 107 of the Act of 1862 are sufficient for reference to show that in respect of debts existing at the time of the winding-up there was to be a right of proof and distribution. But s. 158 rendered admissible to proof debts payable on a contingency, and claims against the company present or future, certain or contingent, ascertained or sounding only in damages, and went on to say how obligations or liabilities of that kind were to be dealt with. The relevant words are:

> "a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

Any liability falling within the words of the section which was not a debt at the winding-up was by that section admissible to proof, and the proof was to be of "the value" of the debt or claim to be estimated if it was subject to a contingency or did not bear a certain value. In 1870 JAMES, V.-C., in *Re Albert Life Assurance Co., Craig's Executors' Case* (2) (L.R. 9 Eq. at pp. 711–720), held that where the claim in question was that of the holder of a policy of life assurance in a winding-up in which the order was made on Sept. 17, 1869, and a death occurred on Nov. 5, 1869, the executors were entitled to prove for the amount insured by the policy. The reasons given by the Vice-Chancellor were that the dropping of the life before proof, though it would not entitle the policy-holder to full payment, would be taken into consideration by the court as affording evidence of the value of the life at the time of taking in the claim. The decision was that under s. 158 that which is admissible to proof is the value of the claim which at the date of the winding-up was contingent, and whose value was to be estimated upon a just estimate being made so far as possible, and that the fact that the life had dropped was admissible for the purpose of showing what was at the date of the winding-up the just estimate of the value of the then contingent claim. The proof was admitted for the amount insured by the policy, not because that amount could be claimed against the company as a debt, but because the subsequent facts showed that at the date of the winding-up the value of the contingent claim was the present value of that sum. The value of the claim at the date of the winding-up had to be estimated, and the true figure of the estimate could be assisted by the fact that the life had dropped before proof. No one seems to have suggested that the proper amount was not the sum assured, but the present value of the sum assured. The latter is, however, the accurate amount, and it follows from the Vice-Chancellor's language, I think, that if the point had been mentioned he would have so directed.

In 1872 the Life Assurance Companies Act, 1872, came into operation. Section 5 of that Act and the schedules contain statutory provisions as to the manner in which the value of life annuities and life policies requiring to be valued in the winding-up are to be estimated. There had arisen in *Re Albert Life Assurance Co., Bell's Case* (2); *Re Albert Life Assurance Co., Lancaster's Case* (3); and *Re English Assurance Co., Holdich's Case* (4) conflicting views as to what was the proper principle of valuation, and it is the fact that the result of the Act was to adopt one of those views—namely, that of LORD CAIRNS in *Lancaster's Case* (3) to the exclusion of that of JAMES, V.-C., in *Bell's Case* (2). The assured in the present case say that that was the whole effect of that Act of Parliament, and that it contained no general statutory enactment as to the mode of valuation which is

to be adopted where, upon a policy current at the winding-up, there emerges an ascertained liability before proof. I do not assent to this argument. After the Act the policy-holder must, I agree, take that which the Act gives him, and can have no more. But from this proposition does not follow that which the liquidator says results. In 1880 there arose, in *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1), not upon a life policy, but upon a fire policy, a question similar to that which had arisen upon a life policy in *Craig's Executors' Case* (2). The winding-up order there was made on Dec. 13, 1879, on a petition presented on Nov. 26, 1879. The premises were burnt down on Jan. 22, 1880. It was held that the policy-holder was entitled to prove for the full amount of the loss covered by the policy although the fire was subsequent to the winding-up. The decision is, I think, similar to that in *Craig's Executors' Case* (2). The principle is this. For the purpose of proof under s. 158 there is to be ascertained the value at the winding-up of the contingent claim. In ascertaining what that value was at the winding-up the subsequent fact that there was a fire may be taken into account. The proof is not for the amount insured by the policy as a debt, but is a proof for the estimated value of the claim at the winding-up, and upon the question of that value a subsequent fire is admissible evidence. In 1908 the Companies (Consolidation) Act was passed, and s. 158 of the Act of 1862 was repealed and reproduced in s. 206 of the Act of 1908. For the present purpose s. 206 is in the same terms as s. 158, with the addition of words which substantively rendered applicable in the case of insolvent companies the law of bankruptcy. In 1909 was passed the Assurance Companies Act, 1909. It dealt with companies of five classes—life assurance, fire insurance, accident insurance, employers' liability insurance, and bond investment business. The question in this case is as to the effect of s. 17 of that Act and Sched. 6. That schedule relates to employers' liability policies. It is with that subject-matter alone that we have to do. Section 17 speaks of two things whose value was to be dealt with—namely, (i) a policy, and (ii) a liability under a policy.

I will first say what I think is here meant. The Act was dealing with policies of many different kinds, including many upon which a liability might have arisen upon some one event having happened, and at the same time the policy might remain current to cover like risks if further events happened. For example, the policy might insure 1,000 workmen for a year; accidents might have accrued to two of them; like accidents during the currency of the policy might occur to others. As regards the two workmen there has in that state of facts arisen a liability under the policy. As regards the 1,000 there is a still current policy. The schedule is going to tell us how to value each of these two things. The section uses the words "requiring to be valued." As I have already pointed out, it was necessary for the purposes of s. 158 of the Act of 1862 while it existed, and it is necessary for the purposes of s. 206 of the Act of 1908 as it exists, to find the value of the contingent debt or claim, for that is the amount admissible to proof. Every obligation which is not a debt, but which is by virtue of s. 206 of the Act of 1908 to be provable and to take a dividend although it is not a debt, is a thing requiring to be valued. The words "requiring to be valued" apply, I think, to both the subject-matters previously mentioned—namely, (i) the policy, and (ii) the liability under the policy. The policy itself is, of course, a liability of the insuring company, and the value of the policy to the policy-holder is the value of that liability. But the words "liability under a policy" are obviously used in some other sense. They mean, I think, that which has emerged as a liability, emerged, that is, at the relevant date—namely, the date of the winding-up. Schedule 6, Part (D), of the Act of 1909, which is the one relevant to the particular sort of policy with which I have to do, is then in two parts. The one is relevant to "a weekly payment" and the other to "a policy." That relating to "a weekly payment" is addressed, I think, to that which s. 17 of the Act calls "a liability under a policy"—that is to say, that which previously to the winding-up has emerged as a liability under the policy, while that relating to "a policy"—the second paragraph, that is, of (D)—relates

to valuing the still current policy covering risks which at the winding-up have not yet resulted in claims. A

The matter then works out as follows. At the date of the winding-up there may have emerged a liability under the policy say, first, in respect of a death before winding-up. The result is that a liquidated sum has become payable. This is a debt and nothing is wanted to ascertain its amount. Secondly, suppose there has before the winding-up arisen an accident producing permanent or temporary incapacity. B There will then exist at the winding-up a liability under the policy to periodical payments in future of sums whose amount may vary from time to time, and the period over which they are payable will be uncertain. The first paragraph of (D) supplies a rule as to how such a liability as this is to be estimated for the purposes of proof. The language follows that of s. 17 of Sched. 1 to the Workmen's Compensation Act, 1906. Liabilities under the policy emerged before the winding-up are then disposed of. C It remains to value the policy. The second paragraph of (D) is then to be applied. The rule is that the value is the apportioned amount of the premium for the unexpired period together with a further sum in the case in which a weekly payment is payable under the policy. Bear in mind that every employers' liability policy carries with it liability to make weekly payments in certain events. The words "in the case of a policy under which any weekly payment is payable" must, therefore, mean "has become payable." D Has become payable when? This cannot be a weekly payment which became a liability before the winding-up, for that has already been estimated and provided for under the first half of (D). The only thing which can be meant is a weekly payment which has become payable under the policy not before the winding-up, but before the proof. It is true that the provision thus made is not exhaustive. E There may have been a death after winding-up and before proof. As to this the Act is silent. There may have been a claim not under the Workmen's Compensation Act, but for damages under the Employers' Liability Act. As to this the Act is silent. But the fact that it is not exhaustive does not in any way affect the fact that the weekly payment mentioned in the second half of (D) must, in my view, be a weekly payment in respect of a liability which has not emerged before winding-up, for that F is covered by the first half of (D). It must be a weekly payment the liability in respect of which has emerged at some other time, and that must be after winding-up and before proof.

It is pressed upon us that this view results in giving the policy-holder a right of proof twice for the same liability. I think not. The question to be answered is: What was the value of the policy at the date of the winding-up? What is the G pecuniary equivalent of the contract to the policy-holder? Make the assumption that as from the date of the winding-up there is no contract, what is the proper sum which the policy-holder can claim as putting him in as good a position as if there had been a contract? The value is to be substituted for the contract and is to be the equivalent sum. At the date of the winding-up the contract indemnified the policy-holder against liability in respect of all accidents which happened during H the currency of the policy, and all risk in respect of accidents which did not happen. If before proof an accident occurs, he receives the equivalent as measured by subsequent events if he receives the pecuniary amount for which he is chargeable by reason of the accident, and also protection against all other accidents, if any should occur, but not if he receives a less sum. The apportioned premium represents the latter of them. The present value of the accident liability represents I the former. Thus, if the policy covered 1,000 servants and two of them after winding-up and before proof sustained an accident, the contract was one which indemnified him against the accident to the two men which actually did occur and the risk of accident to the 1,000 in the event of its occurrence. The proportionate amount of the premiums is the actuarial sum to cover the latter, and none the less because in fact a right has arisen to receive the former. If an accident occurs or a sum becomes payable the premium to cover future risks is not thereby reduced.

It is true that the proof for the proportionate amount of premiums results in

payment to the insuring company of no premium for a period covering the date at which the accident happens, and it is argued that the result is that the policy-holder gets the benefit of insurance at a date over which he has not paid a premium. This is not so. The fallacy lies in thinking that he gets the accident money because an accident occurs while the policy is current. He does not. The policy-holder has no claim to have payment of the sum attributable to the accident as a debt. The company is not indebted to him in that sum at all. The company was not assuring him at that date. The hypothesis is to be made that the contract of assurance came to an end at the winding-up. What the policy-holder is entitled to is the value of the contract at the date of the winding-up, and the fact that there was an accident and the amount recoverable in respect of it are no more than evidence to show what at the date of the winding-up was the value to him of the contract contained in his policy which as at that date is to be taken to have come to an end. The same proposition may be stated in other words as follows: At the date of proof what would another office want as the price of taking over as from the date of the winding-up the liability on the policy? Obviously it would want the sum payable to the workman who had been injured since that date, and in addition the proportionate amount of the premium to cover the still current risk. I agree, subject to something to be stated presently, that after the statute the policy-holder must take that which the statute gives him and no more. The doctrine of *Craig's Executors' Case* (2) and *Macfarlane's Claim* (1) is applicable, I think, not because it must be taken to survive by reason of the fact that the statute has not by so many words taken it away, but because the principle is as applicable under the statute as it was before. The estimated value under the statute is to include, in the case of a policy such as here in question, the present value of the weekly payment. To ascertain what that value is at the date of the winding-up, subsequent facts can be taken into account, and in that way the value as at the date of the winding-up of the subsequently arising liability to pay the accident moneys is an element in determining the proper figure.

It remains, however, to point out that under the Act of 1909 (as was also the case under the Act of 1872) the rules in the schedule are (see s. 17 (2)) to be of the same force as if they were rules under s. 238 of the Companies (Consolidation) Act, 1908—that is to say, were "rules of procedure"—and may be repealed, altered, or amended as there provided. The result, I think, is not to substitute arbitrary statutory rules of valuation, but to lay down rules of procedure which are by virtue of the statutes to be applied until some alteration is validly made. The order under appeal is, I think, in substance right, but the language is not accurate. The policy-holder is not entitled to proof for obligations incurred under the contract after the winding-up. He is entitled to prove for the value of the policy at the date of the winding-up, and in that value ought to be included the value as at the date of the winding-up of any sums which before proof admitted have merged as liabilities in respect of weekly payments. The declaration ought to be altered by striking out (ii) and (iii) and substituting words to the effect that the assured are entitled to prove for the value of the policy according to the rule in the second paragraph of Sched. 6, Part (D), of the Act of 1909, including the present value as at the date of the winding-up of the weekly payments or other moneys for which liability has arisen under accidents which have occurred after winding-up and before proof. The manner in which the present value of a weekly payment is to be ascertained for the purposes of the second paragraph of (D) is not stated in the statute. It is for the judge, therefore, to ascertain that as he thinks right. I apprehend that it would be right to proceed on the same principle as is by the first paragraph of (D) required in the case of a weekly payment in respect of an accident which has resulted in a liability before the winding-up. The order, I think, should be varied in the respects which I have stated.

KENNEDY, L.J.—This case is one of general importance, because it involves the consideration of the rights under the Assurance Companies Act, 1909, in a

winding-up of a company of all those—and there are many—who as assurers or as assured are parties to policies of insurance issued by a company which carries on employers' liability insurance business. It is also a case of some difficulty, and the opinion which I have formed differs from that which appears in the judgment of NEVILLE, J., in the court below. It becomes, therefore, from every point of view my duty to state fully, though as shortly as is practicable, the reasons which have led me to the conclusion at which I have arrived.

The material facts are these. Joseph John King & Sons, Ltd. (the respondents in this appeal) in the year 1909 effected an employers' liability policy with the Law Car and General Insurance Corpn., Ltd., and that policy was renewed in the year 1910 and would have remained current until June 30, 1911. In December, 1910, however, a winding-up petition was presented, and a compulsory winding-up order was made on the 20th of that month. Upon the same day a liquidator, who is the appellant in this appeal, was duly appointed. In the liquidation the respondents sent in a proof on Jan. 27, 1911, and a further proof on Oct. 4, 1911, and in the latter proof they claimed, as under the policy, in respect of compensation due to workmen for accidents which occurred in March, 1911—that is to say, between two and three months after the date of the winding-up order. The liquidator rejected this second proof, and the question of its admissibility came before my brother NEVILLE. On Dec. 10, 1912, the learned judge made the following declaration and order in favour of the respondents:

> "This court doth order that the company are entitled to prove in respect of: (i) Obligations presently incurred under the contract of assurance at the date of the winding-up; (ii) obligations presently incurred under the contract of assurance since the date of the winding-up; and (iii) estimated loss incurred by them by the repudiation of the contract of insurance. And doth order that the said liquidator do admit the proofs of the applicant on the footing of this declaration."

The appeal of the liquidator before this court relates to para. (ii) of the foregoing order which admits to proof obligations which came into being after the date of the winding-up order, and which, therefore, sanctions the claim of the respondents to include in their proof the head of compensation in respect of the accidents to workmen which occurred in March, 1911. The appellant asks that the declaration and order made by NEVILLE, J., may be set aside and that it may be declared in lieu thereof that the respondents are entitled to prove only for such portion of the last premium paid by them under the policy as is proportional to the unexpired portion of the period in respect of which the said premium was paid.

The case turns upon the interpretation of one section—s. 17—of the Assurance Companies Act, 1909, and of Part (D) of Sched. 6, which is referred to in that section. The Act contains a number of provisions on the regulation of assurance companies, and is described in its title as a consolidating and amending Act. It is an Act which carefully distinguishes and legislates separately, as their essential differences require, for five classes of insurance—i.e., life assurance, fire insurance, accident insurance, employers' liability insurance, and bond investment. In the case of a winding-up of any of these assurance companies, s. 15 no doubt makes the provisions of the Companies (Consolidation) Act, 1908, applicable with certain modifications. But Sched. 6 prescribes a separate and distinct method of valuation for the purposes of proof in regard to each one of the five different classes of insurance. It follows, therefore, in my view, that, in dealing with the present case, which relates to employers' liability insurance, as it is legislated for in this Act, we are likely not to clarify, but rather to confuse, our judgment, if we import into its consideration inferences drawn either from the provisions which the Act confines to other classes of insurance or from judicial decisions or dicta which have been pronounced before this Act came into force in regard to the valuation for the purpose of proof in a winding-up under policies which belonged to a different class of insurance.

A It is well, I think, before considering the provisions of the statute which we have to interpret, to see what are the risks which are covered by the policy in question. The Law Car and General Insurance Corpn., Ltd., contracted with the respondents to indemnify them against all sums for which, during the currency of the policy, the assured, in respect of personal injuries by accident or disease happening to any of their employees, should be liable to pay under the Fatal B Accidents Act, 1846, the Employers' Liability Act, 1880, the Workmen's Compensation Acts, 1897, 1900, and 1906, or at common law. The liability of the respondents under these various statutes is not uniform in character. Under the Fatal Accidents Act, 1846, it is a liability to pay compensation to the relatives or representatives of the deceased workman in case of death only. Under the Employers' Liability Act, 1880, it is a liability, in certain events, to pay compen- C sation to the workman who is not fatally injured, and to his legal representatives if the injury results in his death. The liability of the employer under both of these Acts and under the common law presents one common feature. The claim to compensation is a claim in damages to be assessed once and for all. Under the Workmen's Compensation Acts, 1897–1906, however, there are three classes of compensation. There is provision for payment of compensation in the shape of a D lump sum to a workman's dependants if the accident is a fatal accident; there is provision for periodical weekly payments to the injured workman during the period of his incapacity to work; and, in the case of the period of his incapacity exceeding six months, for the commutation of such payments for a lump sum. Indemnity to the employer for compensation in all these forms is included in the business denominated as "Employers' Liability Policies" in Sched. 6, Part (D), of the Act E of 1909.

Suppose the insuring company to be, as the Law Car and General Insurance Corpn., Ltd., is in the present case, wound-up during the currency of a policy. What are the proper constituent elements of the proof of the assured in the winding-up? As to one element there can be no sort of doubt. The proof will include all liquidated amounts which, in respect of compensation under any of the statutes F that I have mentioned, have become due and payable by the insurance company to the assured before the date of the winding-up order, but in respect of which the assured has not before that date been indemnified by the company. As to proof in respect of such claims, there is no sort of difficulty; no calculation or estimate is required. They are in the nature of debts, the amount of which is either actually ascertained or certainly ascertainable. There was, therefore, no necessity in the G Act of 1909 to legislate in regard to the proof of the assured in respect of liquidated claims of this sort which had become due before the date of the winding-up order. But it is clear that, the policy being at that date a current policy of the class of an employers' liability insurance, the assured's right of proof in the winding-up of the insurance company must, in order to do him justice, include two other elements of a different, because of an unascertained and contingent, character. H The winding-up order deprives him in regard to both of the protection to which he was entitled for the unexpired portion of the period covered by the policy. In respect of both these elements the value of the policy for this unexpired portion has to be estimated. The first of these two elements is this. The winding-up order leaves the assured without indemnity under his policy for the future unexpired period of the policy in respect of the weekly payments falling due under I the Workmen's Compensation Act for the assured workmen whose injuries have taken place before the date of the winding-up order and whose incapacity has not ceased at that date. The liability in each of such cases has emerged before the date of the winding-up. But it is continuing after that date, and the assured clearly has a right to have a valuation in his proof in respect of the loss of indemnity as to such continuing weekly payments. It is one which must be the subject of valuation. The continuance of the incapacity of the workman, and, therefore, of the weekly payment, is, of course, in any case uncertain. But the proof will be incomplete unless it includes some estimate of this element. The

second element, requiring valuation, is the loss of the benefit of the policy as a protection to the assured against the contingency of future liability in respect of compensation which may become payable to workmen in respect of injuries happening after the date of the winding-up order and during the portion of the period covered by the policy which is at that date unexpired. Section 17 and Sched. 6, Part (D), prescribed in both of these two respects the method of valuation for the purposes of proof.

Section 17 (1) is in the following terms:

> "Where an assurance company is being wound-up by the court, or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by Sched. 6 to this Act."

It is, in my opinion, clear from the text and from the terms of the schedule, which I shall presently quote, and both of the parties to this appeal agree, that the words "liability under such a policy requiring to be valued" refer to a liability that has emerged before the date of the winding-up of the nature which I have just stated—i.e., a liability to indemnify the assured in respect of weekly payments due to injured workmen under the Workmen's Compensation Act which has emerged before the date of the winding-up order and is still continuing. It is equally clear, I think, that the expression "the value of a policy . . . requiring to be valued" in regard to employers' liability insurance refers to the value of the policy, independently of its covering emerged liabilities, as providing an indemnity to the assured against possible contingent claims in respect of injuries to workmen which have not emerged before the date of the winding-up order, but which may emerge during the yet unexpired period of the policy.

Turning to Sched. 6, we find under Part (D) the method of valuation which the Act prescribes in respect of both heads of valuation. First comes the

> "Rule for Valuing a Weekly Payment.—The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper."

Having thus provided for the valuation of liabilities which have emerged and are still continuing, the schedule proceeds in the next following paragraph to prescribe how the policy—that is, the contract to indemnify the assured during the yet unexpired period of the policy—is to be valued, and it does so in the following terms:

> "The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment."

In my judgment, the meaning of this rule is intelligible and clear. The legislature might have enacted—and I think that, if the Act had not made this special and explicit provision, the courts would probably have held—that the assured might value his policy as best he could, estimating, according to general experience of the risk of accidents in his trade and his own experience in the past, and the number of his workmen exposed to such risks, what, for the value of the policy during the unexpired period of his policy, was a fair figure to insert in his proof, in addition to the valuation of the "emerged liabilities" made under the preceding paragraph of Part (D). In the case of such an estimate there would be no inconsistency in allowing, as Sir George Jessell, M.R., held to be right in *Macfarlane's*

Claim (1), that, if, before the proof was put in, a contingency covered by the terms of the policy occurred, the loss so ascertained might be taken into consideration in estimating the value of the policy. But the legislature has, in my judgment, in plain terms in this paragraph of Sched. 6, Part (D), chosen to prescribe an essentially different method of valuation—a method which certainly has the merit of simplicity. It has said to the assured: "You shall in regard to the value of the policy not enter into any estimate of contingencies at all. The amount for which you shall prove shall be such portion of the last premium paid by you as the consideration for the current policy as is proportionate to the unexpired portion of the period covered by the policy; that, together with the sum which represents the present value of the emerged liabilities for weekly payments, which is to be ascertained in the way prescribed under the first paragraph of Part (D), shall be the amount, so far as the proof is matter of estimate and not of liquidated claim actually due, for which you shall be entitled to prove in the liquidation." It appears to me that the judgment under appeal, in effect, substitutes for the premium valuation which Sched. 6, Part (D), in express terms ordains as constituting with the present value of emerged and continuing liabilities the valuation of this class of policy, so far as valuation is required, a method of valuation on a totally different basis for which I can find no sort of authority in the text of the schedule.

There is nothing unreasonable in the scheme of a valuation on the basis of the partial return of premium. The assured is paid such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, and so receives a sum with which, in respect of that unexpired portion, he can effect a policy with other insurers to cover the same contingencies as were covered by the policy of which he has lost the benefit. And if he gets this, and also, as the same paragraph provides, the present value of every weekly payment payable at the date of the winding-up order, it appears to me that there is no basis in reason for superadding, as the respondents claim to do, a right to prove for the amount of a liability which occurs after the date of the winding-up, or, as the respondents' counsel appeared ultimately to contend, a right to prove for the value of the policy as ascertained by such subsequently arising event. Indeed, it seems to me that if the value of the policy is, as Sched. 6, Part (D), in terms expressly prescribes, together with the present value of any weekly payment, the amount of the premium for the future unexpired term of the policy, it is patently inconsistent to include in the proof with this a subsequent loss, and so give the assured both a right of proof in respect of a contingency occurring in a period after the winding-up order, and also a return of the premiums payable in respect of that period. In my judgment, it is sufficient for the decision of this case to say that the statute has prescribed a rule for valuing a policy of this class, and that rule distinctly tells you that your valuation is to consist of the amount of the premium which is proportionate to the unexpired portion of the period in respect of which the premium was paid, plus the present value of any weekly payment payable at the date of the valuation. But if you look beyond the plain meaning of the statute, and consider the reasonableness of the respondents' contention, how can it be reasonable, if the valuation of the policy is upon the basis of a repayment of premiums, to blend with that an alien and incongruous element of valuation on the basis of a valuation either of contingencies or of events happening after the winding-up? Further, as the learned counsel for the appellant pointed out in the argument, the inclusion in the valuation of the policy of events occurring subsequently to the date of the winding-up is inconsistent with the statute from another point of view. The date of the valuation as the provision as to the premiums itself shows, and as the words "is payable" in the last line of the second paragraph of Sched. 6, Part (D), pretty clearly indicate, is the date of the winding-up order. The Master of the Rolls, I think, pointed out in the course of the hearing that this is in accordance with rr. 96 and 97 and form 63 of the Companies (Winding-up) Rules, 1909; and both LORD CAIRNS in *Lancaster's Case* (3) and, in

very complete terms, LORD WESTBURY in *Wallberg's Case* (5) (EUROPEAN ASSURANCE ARBITRATION at p. 78) have held that, for the purposes of proof, the valuation must be made at the date of the winding-up order. LORD WESTBURY said: A

> "The necessity arises, as I have said, when the order to wind-up is made, and that therefore becomes necessarily the date of the valuation."

The proof, it is said, may be put in at any time. Assuming in the present case that the assured waits to send it in until June 29, 1911, the day before the date on which this policy would expire, the assured, if the judgment below is right, would then have a right to prove, not only as this statute prescribes, for so much of the premium as is proportionate to the period from Dec. 20, 1910, to June 30, 1911, but also at the same time in respect of the value of the policy as shown by the actual occurrence of liabilities covered by the policy during the whole of that period. B C

It seems to me that the construction of the statute and schedule which the appellant asks the court to adopt is not only the natural, but, so far as justice is concerned, is also the preferable construction. Let me endeavour in a few sentences to sum up the legal position as I conceive it to be. As to the proof for ascertained amounts which at the date of the winding-up order had become due from the insurance company to the assured under the policy. There was no need to legislate, and no reference to this head of proof is made in this statute. Of course, the assured can prove for all such claims. But legislation was needed in regard to the valuation for proof in the winding-up of liabilities, in the shape of weekly payments which had emerged before the date of the winding-up order, and were continuing liabilities. For the valuation of these Sched. 6 has provided in the first paragraph of Part (D). Legislation was also needed as to the method of valuing the policy (apart from its value as a protection against such emerged liabilities) as a contract of indemnity in respect of contingencies—that is to say, the risk of fresh liabilities emerging after the date of the winding-up order, and during the unexpired period of the policy. For this valuation also Sched. 6 has provided in Part (D). It has directed the valuation to take place, as at the date of the winding-up order, not on the basis of an estimate of such contingencies, but upon the basis of a partial return of premium. To this the present value of any weekly payment still payable, calculated in the manner which has been prescribed under the first paragraph of Sched. 6, Part (D), is to be added. It appears to me that the judgment appealed from, which adds to the proof another and incongruous element of valuation, is alike erroneous in regard to the construction of the statute and leads to results undesirable in point of justice. I am glad to find that I have in support of the opinion which I have formed upon this case the judgment of LORD CULLEN, of which a shorthand note has been supplied to us, in the Scottish case of *Re Life and Health Assurance Co., Berry's Claim* (6). In my opinion, for the reasons which I have stated, I think that this appeal should be allowed. D E F G

Appeal allowed. H

Solicitors: *Rawle, Johnstone & Co.*, for *Peace & Ellis*, Wigan; *W. W. Wynne & Sons*, for *Evans, Lockett & Co.*, Liverpool.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

Re PINK. PINK *v.* PINK

[Chancery Division (Eve, J.), January 25, 26, 30, 1912]

[Reported [1912] 1 Ch. 498; 81 L.J.Ch. 353; 106 L.T. 338; 56 Sol. Jo. 274]

B

[Court of Appeal (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.), July 8, 9, 1912]

[Reported [1912] 2 Ch. 528; 81 L.J.Ch. 753; 107 L.T. 241; 28 T.L.R. 528; 56 Sol. Jo. 668]

C *Administration of Estates—Debt due to testator—Release—Bankruptcy of debtor—No discharge from bankruptcy.*

Executor—Debtor of testator appointed executor—Release of debt—Imperfect gift to debtor's wife by testator during lifetime—Solvency of estate.

D At his death in July, 1910, the testator E. P., as appeared by entries in his private ledger, had advanced to his sons-in-law, E.H.R. and A.M., sums amounting to £5,800 and £9,800 respectively. E.H.R. was adjudicated bankrupt in February, 1908, and the testator signed an entry in his ledger that the debt of £5,800 was cancelled. In 1905 there was an entry that £5,000 with interest was given off A.M.'s debt for a definite object communicated to A.M.'s wife, and in June, 1909, the testator signed an entry purporting absolutely to E cancel the balance, viz., £4,800 and interest. By his will the testator appointed A.M. to be one of his executors, and settled £20,000 on each of his daughters, the wives of E.H.R. and A.M. and their children. The will contained directions postponing the calling in for five years of E.H.R.'s debt, but if interest was not punctually paid, or in case of bankruptcy, the whole amount of principal and interest was to become payable. As to A.M.'s debt the testator directed F it should not be claimed until seven years from his death, and then only if A.M.'s wife was still alive, in which case the debt was to be repayable with interest by instalments. Any loss in respect of E.H.R. or A.M.'s indebtedness should be treated as a loss to their wives' settled legacy and not to the testator's residuary estate.

G **Held** by Eve, J.: as to E.H.R.'s debt, the memorandum in the ledger did not operate as a release; E.H.R., being still undischarged, was not released from his debts, and his liability for them was not extinguished by his bankruptcy; and, therefore, the trustees should treat the whole of his indebtedness as a loss to be deducted from his wife's settled legacy.

H **Held** by the Court of Appeal: as to A.M.'s debt, the entry in the ledger relating to the £5,000, "given off this debt for a definite object", did not have the effect of releasing him to the extent of that sum because the intended gift to A.M.'s wife had not been carried out and so was an imperfect gift in respect of which no claim for release could be made; but with regard to the £4,800, while the statement of the testator, "this debt is absolutely cancelled from this date", standing by itself, would not be a sufficient release, the testator had appointed I A.M. one of his executors and the estate was solvent, and, therefore, there appeared a clear release of the debt for the benefit of A.M.

Strong v. *Bird* (1) (1874), L.R. 18 Eq. 315, applied.

Notes. Referred to: *Cashin* v. *Cashin*, [1938] 1 All E.R. 536; *Re Nelson, Nelson* v. *Nelson* (1947), 91 Sol. Jo. 533; *Re Freeland, Jackson* v. *Rodgers*, [1952] Ch. 110.

As to the appointment of a debtor as executor and legacies to debtors and executors, see 16 Halsbury's Laws (3rd Edn.) 128, 129, 321–324, and for cases see 23 Digest (Repl.) 32–34, 444 et seq.

Cases referred to:

(1) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 23 Digest (Repl.) 32, *158*.

(2) *Cherry* v. *Boultbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jnr. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, *3967*.

(3) *Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422; 60 L.J.Ch. 793; 65 L.T. 406; 40 W.R. 90; 23 Digest (Repl.) 33, *159*.

(4) *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251; 77 L.J.Ch. 525; 99 L.T. 106; 24 T.L.R. 679; 25 Digest 539, *274*.

(5) *Eden* v. *Smyth* (1800), 5 Ves. 341; 31 E.R. 620, L.C.; 44 Digest 618, *4468*.

(6) *Gilbert* v. *Wetherell* (1825), 2 Sim. & St. 254; 3 L.J.O.S.Ch. 138; 57 E.R. 343; 20 Digest 459, *1842*.

(7) *Flower* v. *Marten* (1837), 2 My. & Cr. 459; 6 L.J.Ch. 167; 1 Jur. 233; 40 E.R. 714, L.C.; 20 Digest 287, *461*.

(8) *Cross* v. *Sprigg* (1849), 6 Hare, 552; 18 L.J.Ch. 204; 13 L.T.O.S. 505; 13 Jur. 785; 67 E.R. 1283; on appeal (1850), 2 Mac. & G. 113, L.C.; 20 Digest 238, *57*.

(9) *Carey* v. *Goodinge* (1790), 3 Bro.C.C. 110; 24 Digest (Repl.) 950, *9612*.

(10) *Aston* v. *Pye* (1788), 5 Ves. 350 n; 44 Digest 245, *713*.

Also referred to in argument:

Re Hodgson, Hodgson v. *Fox* (1878), 9 Ch.D. 673; 48 L.J.Ch. 52, 27 W.R. 38; 4 Digest (Repl.) 453, *3970*.

Re Orpen, Beswick v. *Orpen*, [1880] 16 Ch.D. 202; 50 L.J.Ch. 25; 43 L.T. 728; 29 W.R. 467; 4 Digest (Repl.) 455, *3983*.

Turner v. *Turner*, ante p. 962; [1911] 1 Ch. 716; 80 L.J.Ch. 473; 104 L.T. 901, C.A.; 23 Digest (Repl.) 447, *5157*.

Herbert v. *Sayer* (1844), 5 Q.B. 965; 2 Dow. & L. 49; 1 Dav. & Mer. 723; 13 L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex. Ch.; 5 Digest (Repl.) 796, *6736*.

Richards v. *Syms* (1740), Barn. Ch. 90; 2 Eq. Cas. Abr. 617; 27 E.R. 567, L.C.; 17 Digest (Repl.) 249, *518*.

Re Hyslop, Hyslop v. *Chamberlain*, [1894] 3 Ch. 522; 64 L.J.Ch. 168; 71 L.T. 373; 43 W.R. 6; 38 Sol. Jo. 663; 8 R. 680; 23 Digest (Repl.) 34, *179*.

Re Griffin, Griffin v. *Griffin*, [1899] 1 Ch. 408; 68 L.J.Ch. 220; 79 L.T. 442; 15 T.L.R. 78; 43 Sol. Jo. 96; 24 Digest (Repl.) 858, *8523*.

Appeal from an order of EVE, J., given on an adjourned summons taken out by executors and trustees under the will, dated Mar. 12, 1908, of Edward Pink, asking whether certain debts owing to the testator in his lifetime had been released or whether the executors should take steps to have them accounted for.

By the will the testator appointed his son, the defendant Sir Thomas Pink; his son-in-law, the defendant Arthur Moore; and the plaintiffs Harold Rufus Pink and Leonard Montague Pink, executors and trustees, and after making certain specific devises and bequests and giving certain pecuniary legacies, devised and bequeathed all the residue of his real and personal estate unto his trustees upon trust for sale and conversion, and out of the money to arise from such sale and conversion and his ready money, in the first place, to pay his funeral and testamentary expenses and debts and the legacies thereinbefore bequeathed. And in the next place to set apart and appropriate, in priority to any other bequests thereby made or provided for (except as aforesaid), the sum of £20,000 for each of his two daughters—the defendants Caroline Rayner, the wife of Edward Howard Rayner, and the defendant Emily Moore, the wife of Arthur Moore—and the sum of £20,000 for the children of his deceased daughter Laura Warland, the wife of the Rev. Frederick William Warland, such three several sums of £20,000 each to be held by his trustees upon the trusts thereinafter declared concerning the same. After further directing his trustees to stand possessed of £1,500 in trust for Winifred

Martha Pink, he directed his trustees to stand possessed of the ultimate residue of his estate upon trust for his three children, Caroline Rayner, Emily Moore, and Sir Thomas Pink, and for the children of his deceased daughter Laura Warland, to the intent that one-fourth thereof should be for Caroline Rayner, one-fourth for Emily Moore, one-fourth for Sir Thomas Pink, and the remaining one-fourth for the children of Laura Warland deceased, the shares of his daughters Caroline Rayner and Emily Moore and his grandchildren, the children of Laura Warland, deceased, to be held upon the trusts thereinafter declared, and the share of Sir Thomas Pink to be paid to him absolutely. The testator declared that his trustees should stand possessed of the three several sums of £20,000 each and also the one-fourth shares of his daughters Caroline Rayner and Emily Moore and of the children of his deceased daughter Laura Warland in the residue of his estate upon trust to invest the same as therein mentioned, and to stand possessed of each sum of £20,000 and three one-fourth shares of residue upon trust, as to one such sum of £20,000 and one such one-fourth share of residue, to pay out of the income thereof to his daughter Caroline Rayner annually the sum of £600 during her life and to apply the remainder of the income thereof during the life of his daughter at their discretion towards the maintenance, education, advancement or benefit of all or any of the children of his daughter, and as to another such sum of £20,000 and one other such one-fourth share of residue to pay the income thereof to his daughter Emily Moore during her life, and as to the remaining such sum of £20,000 and another such one-fourth of residue upon the trusts thereinafter mentioned.

The will contained the following direction:

> "I direct that any sum of money that may at my death be due to me from my son-in-law Edward H. Rayner shall not be called in by my trustees for a period of five years from the date of my death, provided that interest at the rate of 4 per cent. per annum or at such other rate as may be secured to me by any mortgage or charge shall be punctually paid to my trustees by such son-in-law. But in case interest shall not be so paid or in case of the bankruptcy of my said son-in-law the whole amount of principal and interest shall in such case immediately become payable, and I further direct that any sum of money that may at my death be due to me from my son-in-law Arthur Moore shall, if my daughter Emily Moore shall have predeceased me or shall die within seven years after my death, be absolutely extinguished and to the intent that should Emily Moore survive me my trustees shall have no claim to the amount so owing as aforesaid until the expiration of seven years from the date of my decease and then only in the event of the said Emily Moore being still alive in which case my trustees may during the eighth and each subsequent year after my decease require payment of the amount owing by instalments not exceeding £250 a year with interest from time to time at the rate of 4 per cent. per annum. And I declare that any loss that may be sustained in respect of any such indebtedness whether of the said Edward H. Rayner or of the said Arthur Moore shall be treated as a loss to the trust legacy of £20,000 hereby bequeathed to the wife of the debtor and not as a loss to my residuary estate."

By a first codicil dated June 23, 1909 to his will the testator directed that in the event of the defendant Emily Moore dying in the lifetime of the defendant Arthur Moore without surviving issue one-half of the income of the settled legacy of £20,000 bequeathed to her should be paid to Arthur Moore thenceforward during his life, and the testator confirmed his will.

The testator died on July 19, 1910, and his will and codicils were duly proved by all the executors named in the will on Aug. 29, 1910. The testator from time to time in his lifetime advanced to Edward H. Rayner and the defendant Arthur Moore respectively various sums of money. An account of such sums entirely in his handwriting was kept by the testator in an account book or ledger. By 1909 the testator had advanced E. H. Rayner £5,800 and A. Moore £9,800. The accounts

of A. Moore, from 1904, and Edward H. Rayner showing the entries relied upon as releases were as follows: A

Dr. A. Moore. Cr.

		£	s.	d.			£	s.	d.	
1904	Brought over ..	2,400	0	0	1904 Jan. 1	Cheque .. .. Cash 4s. Tax £2 4s.	45	12	0	B
1905 May 5	Cheque	650	0	0	July 4	Cheque £2 12s.. .	45	8	0	
Sept. 25	Cheque	100	0	0	1905 Jan. 2	Cheque £2 8s. ..	45	12	0	
Dec. 4	Cheque	350	0	0	July 5	Cheque £2 13s. 4d.	50	15	0	
1906	[Nine cheques for sums amounting in all to]	2,750	0	0						C
1907 Feb. 5	Cheque	300	0	0		£5,000 is given off this for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date	5,000	0	0	D
		6,550	0	0						
	Per contra ..	5,000	0	0						
		1,550	0	0						

Dr. Cr.

		£	s.	d.					
May 22	.. ..	150	0	0					E
July 16	.. ..	500	0	0					
Aug. 29	.. ..	500	0	0					
Sept. 16	.. ..	500	0	0					
	Interest to Jan., 1908.								
Nov. 8	Cheque	400	0	0	1909 June 2	This debt is absolutely cancelled from this date, viz., £4,800 and interest. — Edward Pink.			F
Dec. 16	Cheque	400	0	0					
1908	Interest to Jan. 1st, 1909.								
Feb. 4	.. ..	300	0	0					
April 7	.. ..	300	0	0					
1909 Mar. 1	.. ..	300	0	0					

Dr. E. H. Rayner, Margate. Cr.

		£	s.	d.					
1887 Sept. 5	Cash	2,500	0	0					G
1888 Jan. 6	Cash	500	0	0					
Feb. 15	Cash	500	0	0					
1889 Jan. 16	Cash	300	0	0					
1890 Mar. 27	Cash	500	0	0					H
1892 Jan. 12	Cash	1,500	0	0					
		5,800	0	0					

This debt is cancelled as altogether bad, debtor being bankrupt.—E. Pink. I

No part of the sums of £5,800 and £9,800 had been repaid to the testator or his executors. There was no date attached to the entry as to Edward H. Rayner's debt. Edward H. Rayner was adjudicated a bankrupt on Feb. 10, 1908, and had not obtained his discharge. The testator did not prove in the bankruptcy in respect of the money owing to him from Edward H. Rayner. There had been issue of the marriage of Edward H. Rayner and Caroline Rayner five children—namely, the defendant Edward Stanley Rayner, who had attained twenty-one years; and four more who were all infants—namely, the defendants Elsie Laura Rayner, Arthur

Howard Rayner, Harry Lauder Rayner, and Doris Mabel Rayner. There had been no issue of the marriage of Arthur Moore and Emily Moore except a child who died shortly after birth.

The trustees caused an originating summons to be issued, asking (i) whether the debts in respect of sums of money from time to time advanced by the testator Edward Pink in his lifetime to the defendant Arthur Moore and the above-named Edward H. Rayner respectively, and not repaid by them, amounting in the aggregate to £9,800 and £5,800 respectively, or any part thereof respectively had by virtue of the entries above set out in the testator's ledger, been legally and effectually released and cancelled by the testator in his lifetime, or whether such respective sums or any part or parts thereof were due and owing to the testator at his death; (ii) if the sums advanced to Edward H. Rayner remained due and owing to the testator at his death, whether the plaintiffs and the defendants, Sir Thomas Pink and Arthur Moore, as the executors and trustees of the will of the testator ought to take any steps to recover the same or any part thereof, or should by reason of the bankruptcy of Edward H. Rayner deduct moneys so due and owing from Edward H. Rayner or any part thereof from the legacy of £20,000 bequeathed by the testator in trust for Caroline Rayner and her issue in accordance with the direction to that effect in the will; also for administration if necessary.

Bradley Dyne for the plaintiffs.

Jessel, K.C., and *H. T. Methold* for the defendants Arthur Moore and Emily Moore.

Edward Clayton, K.C., and *Owen Thompson* for the defendants Mrs. Rayner and her children.

Paul Ogden Lawrence, K.C., and *J. S. Green* for the infant children of Laura Warland.

Farwell for the defendants, Sir Thomas Pink.

EVE, J.—By this summons the plaintiffs, as two of the executors of the will and codicils of the late Mr. Edward Pink, seek the assistance of the court in determining the true state of account between the testator's estate, on the one hand, and two of his sons-in-law, Mr. Arthur Moore and Mr. Edward H. Rayner, and their respective wives and families, on the other hand. The testator died on July 19, 1910. During his lifetime he had made large advances to both sons-in-law, and the substantial question which I have to determine is whether, having regard to certain memoranda made by the testator in his private ledger, to the terms of his will, and to other events which I will mention by-and-by, there was at the time of the testator's death any indebtedness of either son-in-law which ought to be set off against, or deducted from settled legacies bequeathed for the benefit of their respective wives and families. The facts of the two cases are altogether dissimilar; and it is, therefore, necessary that I should deal with them separately.

I will take first the case of Mr. Rayner. It appears from the testator's ledger that between the month of September, 1887, and the month of January, 1892, he advanced to Mr. Rayner sums of money amounting in the whole to £5,800. Nothing was ever repaid in respect of these advances, nor was any security given therefore, or any interest paid thereon, and on Feb. 10, 1908, Mr. Rayner was adjudicated a bankrupt. No dividend has ever been paid in the bankruptcy and the debtor still remains undischarged. At the foot of Mr. Rayner's account, on folio 50 of his ledger, the testator has written and signed the following memorandum: "This debt is cancelled as altogether bad, debtor being bankrupt.—E. Pink." It is undated, but must, of course, have been written at some date subsequent to Feb. 10, 1908. [His Lordship stated the will of the testator's settling £20,000 and one-fourth of his residue upon Mrs. Caroline Rayner and her children, and the direction as to Edward H. Rayner's debts to him, stating that the bankruptcy there referred to was probably a future bankruptcy, and the declaration that any loss sustained should be treated as a loss to the trust legacy bequeathed to his wife and not as a loss to the testator's residuary estate, and continued:] Mr. Rayner not

being in a position to comply with the condition as to paying interest on the indebtedness, some of the residuary legateees argue that the £5,800 is now immediately payable, and that any loss which may arise in respect thereof ought to be deducted from Mrs. Rayner's settled legacy.

I do not see what answer there is to this contention. The memorandum in the ledger cannot operate as a release; it is a record of unpalatable but solid facts—a kind of poignant epitaph to be found inscribed on the folios of many a parental ledger. Nor do I think that there is any substance in the argument that the bankruptcy of the son-in-law put an end to his indebtedness. So long as he remains undischarged he is not released from his debts, although the right of the creditor to enforce payment by process is suspended. I do not accept the view that *Cherry* v. *Boultbee* (2) and the cases in which it has been followed proceed upon the footing that the liability of the legatee to pay the debt came to an end on his bankruptcy, and that it was the extinguishment of this liability which enabled him to insist upon payment of the legacy in full. The true ground of those decisions is that the legacy vested in the legatee as agent for his assignee in bankruptcy and, as against his principal, those accountable for the legacy could only retain thereout the payments for which the principal was liable—that is to say, the dividends distributable in the administration of the bankrupt legatee's estate. These cases, therefore, do not, in my opinion, afford any authority for the proposition that the indebtedness is put an end to by the bankruptcy. I think in Mr. Rayner's case, having regard to all the circumstances and the fact that this is a bankruptcy which began in 1908 and in which, according to the evidence, there has never been one penny of assets, the trustees ought to treat the whole of the indebtedness as a loss to be deducted from Mrs. Rayner's settled legacy. If hereafter funds are forthcoming to mitigate this loss, such funds will be applicable to recouping the legacy until, as may happen, it is made up again to its full amount.

In Mr. Moore's case the advances commenced in 1893, there were several repayments, and then subsequent advances, and in February, 1907, his indebtedness to the testator amounted to £6,550, and at this stage, but at what date does not appear, the testator made the following entry on the credit side of the ledger:

> "£5,000 is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date,"

and on the debit side he deducted the £5,000 per contra, carrying forward £1,500 as the balance of indebtedness remaining outstanding. The memorandum itself is very difficult to interpret. It would seem to imply that the debtor was to employ £5,000 for a definite object, and on the footing of his so doing the debt was to be written down by that amount; but this construction is negatived by the evidence contained in the affidavit made by Mrs. Moore from which it would appear that the writing off of the £5,000 from this debt was an alternative to another proposal altogether, whereby the testator contemplated giving her £5,000 for particular purposes which (I have no doubt for good and sufficient reasons) she has not disclosed. Moreover, the testator never communicated the purport of this entry to the debtor, nor, as I understand it, does the debtor suggest that he is under any obligation as to the application of the £5,000. In these circumstances I think it would be very difficult to treat the entry as proving an intention on the part of the testator to give the £5,000 to Mr. Moore by releasing him to that extent from his indebtedness. After February, 1907, further advances were made, and when the testator made his will in March, 1908, the indebtedness in respect of the £1,550 brought forward from February, 1907, and the new advances amounted to £4,200. The testator appointed Mr. Moore to be one of his executors, and after the date of his will made him further advances of £600 bringing up the indebtedness on capital account to £4,800. On June 2, 1909, the testator wrote and signed a memorandum on the credit side of Mr. Moore's account in these words:

> "1909, June 2. This debt is absolutely cancelled from this date—viz., £4,800 and interest. Edward Pink."

[His Lordship stated the will of the testator settling £20,000 and one-fourth of his residue upon trust for Mrs. Mooore and her children and read the direction as to any sum of money due to him from Arthur Moore and the declaration as to loss in respect of such indebtedness, and continued:] The testator made two codicils dated respectively June 23 and Dec. 14, 1909. By the first of these he gave Mr. Moore a life interest in a moiety of the £20,000 settled legacy in the event of Mrs. Moore dying in her husband's lifetime without surviving issue and confirmed his will; and by the second after some dispositions, to which I need not refer, he confirmed his will and first codicil.

On behalf of Mr. Moore it is argued that the entries in the ledger and the communication to Mrs. Moore by the testator of the fact that he had made the second entry prove an intention on the part of the testator to release the debt; that the appointment of Mr. Moore as executor releases the debt at law; and that, in the absence of evidence to the contrary, this court will infer a continuing intention to release, and, following the law, will treat the release as perfected and the debt as irrecoverable in equity. In support of this contention *Strong* v. *Bird* (1), *Re Applebee, Leveson* v. *Beales* (3), and *Re Stewart, Stewart* v. *McLaughlin* (4) are relied upon, and it is said that the direction in the will as to any sum of money that might be due from Mr. Moore to the testator at the time of his death is directed, not to any portion of the £9,800 indebtedness, but to any debt which might have arisen between Mr. Moore and the testator subsequent to the date of the entry cancelling the other debt. As already indicated, I do not feel justified in treating the entry in relation to the £5,000 as evidence proving an intention to give. I think it is quite impossible to say what it proves, and I cannot hold this transaction to be an imperfect gift perfected by the appointment of the donee as executor. As regards the £4,800, although I am not prepared as at present advised, to hold that in order to constitute a valid gift it is necessary to communicate the act of donation to the donee, I think the evidence of the gift in this case is very slight, and I doubt, even in the absence of the direction in the will, whether I should be justified in holding that there was in fact a gift intended. But even if there were, I do not think the case in respect of the £4,800 is brought within the rule laid down in *Strong* v. *Bird* (1) (L.R. 18 Eq. at p. 318) and applied in *Re Applebee, Leveson* v. *Beales* (3) and in *Re Stewart, Stewart* v. *McLaughlin* (4).

In *Strong* v. *Bird* (1) Sir George Jessel, M.R., in stating the rule says this (L.R. 18 Eq. at p. 318):

> "First of all we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or the alleged donor, had made her will, and by that will had appointed Mr. Bird, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition which is required—namely, that the release shall be perfect at law, was complied with by the testatrix making him executor."

Down to that point assuming (and for the purposes of this argument I will assume) that there is proved an intention to give, or an attempt to give on June 2, 1909, all that I have read applies to this case as it did to the case of Mr. Bird in *Strong* v. *Bird* (1). The Master of the Rolls goes on:

> "It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose."

That is equally applicable to the present case. He goes on:

> "But if the gift is clear, and there is to be no recall of the gift and no intention to recall it, so that the person who executes the legal instrument does not intend

to invest, the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect."

From that judgment I gather that what you have to find first is a clear gift, or attempt to give; then you have to be satisfied that in the appointment of the donee as executor the testator had no intention contrary to bringing about the result flowing from the appointment, and thereby to perfect the gift.

Assuming in the present case that there is evidence of an intention to give or of an imperfect gift, can I read the testator's will and come to the conclusion that the intention was a continuing one and that he intended to perfect the gift by appointing Mr. Moore an executor? I do not think I can. By the same instrument by which he appoints Mr. Moore executor, the testator directs what is to be done in respect of any sum which may be due from Mr. Moore at the time of his death. This sum of £9,800 was due in equity. The testator makes a provision to the relief of Mr. Moore. He does not, as in the case of Mr. Rayner, make it a condition of the money not being called in that interest shall be paid in the meantime, but, on the contrary, he inserts in his will provisions which in certain events will operate to release Mr. Moore entirely from his indebtedness; and, even if the debt should ultimately become payable by Mr. Moore, he inserts provisions which spread the obligation to repay over a great number of years. I think that there are no grounds here on which I ought to conclude that this was an attempted gift which the testator perfected by the appointment of Mr. Moore as executor, and, accordingly, I hold that in this case also the trustees must administer the estate on the footing that the £9,800 and interest thereon at 4 per cent. per annum from July 5, 1905, may become repayable by Mr. Moore in certain events, and that if it becomes repayable and there be a loss resulting from the whole or partial non-payment, the amount of that loss must fall upon the legacy settled upon Mrs. Moore.

In conclusion I ought, perhaps, to add that I have not dealt at length with the argument addressed to me founded on the authority of such cases as *Eden* v. *Smyth* (5), *Aston* v. *Pye* (10), *Gilbert* v. *Wetherell* (6), and *Flower* v. *Marten* (7) because, in my opinion, the applicability of those cases to this case is effectively disposed of by the judgment in *Cross* v. *Sprigg* (8). I think, on the whole, the costs of all parties may be taxed as between solicitor and client and paid out of the residue.

His Lordship, therefore, decided that as to Edward H. Rayner's debt the memorandum in the ledger did not operate as a release, and that his liability to pay the debt was not extinguished by his bankruptcy (*Cherry* v. *Boultbee* (2)), and the whole of the indebtedness must be deducted from the wife's settled legacy; that as to Arthur Moore's debt the effect of the entry was not to release him to the extent of £5,000; and, further, that the entry in 1909, coupled with the appointment of Arthur Moore as executor, did not release his debt or show the transaction to be an imperfect gift perfected by the appointment of the donee as executor. From that decision the defendants Arthur Moore and Emily Moore now appealed.

Younger, K.C., and *P. S. Stokes* for these defendants.

P. Ogden Lawrence, K.C., and *J. S. Green* for the infant children of Laura Warland.

Edward Clayton, K.C., and *Owen Thompson* for Caroline Rayner and her children.

C. J. W. Farwell for Sir Thomas Pink.

Bradley Dyne for the trustees of the will.

COZENS-HARDY, M.R.—This is an appeal from a decision of Eve, J., and it raises points of law of considerable difficulty.

A The question is whether Mr. Arthur Moore, who has been made an executor of the testator's will, is or is not liable to pay—according to a direction which is set out in the testator's will, the sum of money which is shown by entries in the testator's ledger to have been due from him. Those sums are really not disputed as having been due to the testator's estate from Mr. Moore. But it is said that, Mr. Moore having been appointed executor and having proved the will of his B father-in-law, any debt which was due from him to the testator in the testator's lifetime is gone at law because at law a man cannot be both a plaintiff and defendant. It is also said that, the debt being gone at law, although that would not exempt the executor from accounting for the money as part of the testator's estate—which, indeed, he would be said to have had in his pocket, namely, his own debt—yet there is sufficient evidence here to satisfy the court that it was never intended by the C testator that he should pay in the event of his death. It amounts, it is said, to what you may call, in one view, an equitable release, or, in the other view, a presumption of accountability negatived by the circumstances of the case. The testator was a man of large fortune. I cannot say that he was a good accountant, because in his private ledger which is before me he states the advances, very numerous and very large, which he made to his son-in-law, Mr. Moore, and when I come to 1903 I D find this: "All interest paid to July 1; after that date interest to be at 4 per cent." Then I come to the critical pages of the ledger, and, strange to say, although he debits Mr. Moore with capital advances, he does not debit him with any interest on these advances, but he credits him with certain small payments for interest on these advances, and nowhere, except in the two points which I have indicated, is anything like a balance struck, and in no point of view can this be considered E an accurate statement of the indebtedness.

The testator made his will on Mar. 12, 1908, and by that will, after appointing Mr. Moore one of the executors, dealing with the residue of his estate, and giving a settled legacy of £20,000 to Mrs. Moore and the children of her marriage and giving also a share of the residue, he makes certain directions with reference to Mr. Moore's indebtedness. He says:

F

> "And I further direct that any sum of money that may at my death be due to me from my son-in-law Arthur Moore shall, if my said daughter Emily Moore shall have predeceased me or shall die within seven years after my death, be absolutely extinguished."

The first event has not happened, and the second event happily has not yet hap- G pened. The will continues thus:

> "And to the intent that should the said Emily Moore survive me my trustees shall have no claim to the amount so owing as aforesaid until the expiration of seven years from the date of my decease and then only in the event of the said Emily Moore being still alive, in which case my trustees may during the eighth and each subsequent year after my decease require payment of the amount H owing by instalments not exceeding £250 a year with interest from time to time at the rate of 4 per cent. per annum. And I declare that any loss that may be sustained in respect of any such indebtedness whether of the said Edward Howard Rayner or of the said Arthur Moore shall be treated as a loss to the trust legacy of £20,000 hereby bequeathed to the wife of the debtor and not as a loss to my residuary estate."

I

In this ledger there are two entries made, one with no date against it, but an entry which, if one may guess, I think was made more probably some time in February, 1907, than at any other date. It is this:

> "£5,000 is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date."

What does that mean? As I read it, that is not a release of the debt. It is inconsistent with a release of the debt. If it is anything, it is a gift of part of the

debt for some definite object the terms and the nature of which are not stated, and which have not been stated by Mrs. Moore in the affidavit which she made. But she says this in her affidavit:

> "My father frequently spoke to me about money matters, and he said he would give me £5,000 which I might apply as I thought proper in certain directions which he indicated. Afterwards he said to me that he had decided not to give me the £5,000, but to write it off my husband's indebtedness. This remark of his refers to the earlier entry under the date of July 5, 1905, in my father's ledger."

I am very anxious to make it quite clear that I am not for a moment suggesting any intentional inaccuracy on the part of either Mr. or Mrs. Moore. But one cannot be too careful in dealing with the estate of a deceased man to remember that an affidavit in support of a claim or a release must be very carefully scrutinised, and I have come to the deliberate conclusion that the only things that we can rely upon here, in the sense of acting upon them, are the entries in the testator's own handwriting in this ledger which I have before me. Mrs. Moore's statement clearly is inconsistent with the entry in the book:

> "£5,000 is given off this debt for a definite object arranged between me and Mrs. Moore."

If that was the intention of the gift, it has failed; it has not been carried out. It is an imperfect gift of the £5,000 in respect of which no claim can be made, and that £5,000 as it seems to me must stand unaffected by the imperfectly carried out intention of the testator which, it may be, he varied thereafter, at some date that we do not know, but which certainly has led to such a state of confusion that I think it is impossible for us to say that the £5,000 was ever released to the debtor in the sense in which it is necessary for the present claimant to establish his title.

The other item is rather different. It turns upon this. The account in the book having been adjusted—I cannot say balanced—in a certain sense by deducting the £5,000 which was intended to be given for a specific purpose, not to be released, but having been reduced according to this book to £1,550, there were further advances which together make up £4,800 up to Mar. 1, 1909. On June 2, 1909, there is this entry in the testator's handwriting: "This debt is absolutely cancelled from this date, viz., £4,800 and interest." It is quite clear, giving Mr. Moore the benefit of that, that we must deal with it fairly. It is not all the debt, whatever it may be that is cancelled, but "£4,800 and interest." I cannot carry that memorandum any further than that. To that extent I think that it is good evidence that the testator did intend then and there to release that debt and absolutely cancel it from that date—viz., "£4,800 and interest."

Is there any reason why effect should not be given to that? In my opinion *Strong* v. *Bird* (1), which is an authority nearly forty years old, and which, so far as I remember, has never been questioned and has certainly been repeatedly followed, seems to me to carry Mr. Moore through as to this item. That case really proceeds upon this footing. A mere declaration in the testator's handwriting: "This debt is absolutely cancelled from this date," is not sufficient standing by itself. There is no consideration for it. It is not a perfect release; it is not a release at law. Therefore, if there is nothing more, it would have no operation or effect whatever on the relation of debtor and creditor between the testator and the debtor. But when you find that the debtor is constituted one of the executors of the testator, and thus acquires at law a title to the money, then the court feels itself at liberty to look at the matter and to say whether there is in the circumstances any ground for saying that the equitable liability of the executor to account ought not to be given effect to because the court is satisfied that it is contrary to the wishes and intentions of the testator. Applying that principle here, I think that this £4,800 and interest were validly released and ought not now to be claimed.

Counsel for the infant children of Laura Warland endeavoured very ingeniously to distinguish *Strong* v. *Bird* (1) on this ground. He says that it is not here a mere case of the appointment of an executor, but there is an appointment of an executor with special directions as to what should be done with this particular debt, and that, therefore, that circumstance ought to make *Strong* v. *Bird* (1) inapplicable. He seeks to say that there is something in *Strong* v. *Bird* (1) which tends to support that argument. I am quite unable to follow that. The clause in the will which I have read only applies to "debts which shall be owing at my death," which I think means, not the moment before my death, but after my death—the moment when the will comes into operation. If the view which I have taken of this entry of June 9 is correct, that was made after the will and before the codicils. In these circumstances, I think that it would be giving an unreasonable effect to the words of the will to say that they have the effect of, shall I say reviving—or perhaps that is not quite the right word—of rendering inoperative the presumption of law which was given effect to by Sir George Jessel, M.R., in *Strong* v. *Bird* (1). On the whole, therefore, with great respect to Eve, J., I think his decision cannot be supported as to the £4,800, but that it is right as to the £5,000 and interest—in fact, as to everything except the £4,800.

FARWELL, L.J.—I am of the same opinion. The appointment by the creditor of his debtor as executor operates as a release at law of the debt. Lord Thurlow, L.C., in *Carey* v. *Goodinge* said (9) (3 Bro. C.C. at p. 111):

> "He thought it had been a settled point in this court, that the appointment of the debtor executor was no more than parting with the action"

that is to say, he cannot sue at law and he is relegated to equity. In equity the appointment of the debtor was not a release. If the estate was insolvent it was simply inoperative and had no effect at all. The debtor was treated as though he had paid himself, and he had to account for the amount of his own debts as part of the assets. When all the estate has been cleared and it becomes a mere question between volunteers, you have on one side the persons taking as beneficiaries by the testator's bounty under his will, and you have on the other side the executors having the legal title in the property in question, or rather having the only means of enforcing the legal title, destroyed for his own benefit, and you have then a question of countervailing equities. Is there anything which will enable the beneficiaries under the will to say to the debtor: "You hold that debt really as a trustee for us." Since *Strong* v. *Bird* (1), it appears to me that one has to regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If you find that you have an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted and no such question arises, but it is a question of these countervailing equities. I venture to think that the illustration given by Sir George Jessel, M.R., in *Strong* v. *Bird* (1) lacks one explanatory sentence to make it work accurately. I think his Lordship was thinking not of a voluntary conveyance by A. to B., because that would be perfectly binding, unless the owner afterwards sold to a purchaser for value, but of the conveyance on purchase by A. to B. by A.'s direction, in which case the resulting trust for A., who finds the money, does arise. I am speaking now apart from any special relationship between A. and B. There was that sort of resulting trust which he had in his mind, and the illustration he gives is that there was evidence to show that A. had given the property to B., and had directed a conveyance in order to effectuate the gift which he so intended to make and had made by the acquisition of the legal title. In the same way here you find in one case, at any rate, a clear release of the debt for the benefit of the debtor. You find him executor and then you find the estate solvent. That is sufficient, in my

opinion, to prevent the residuary legatees from calling on the executor debtor to pay the debt which has been so cancelled. So much for the general law. With reference to the present proposition, I think that as regards the £4,800 it is reasonably plain that that was absolutely cancelled from the date, so that there is an extinguishment in præsenti. On the principles which I have attempted to state it seems to me that that cannot be now claimed by the residuary legatees.

As regards the other sum, the case stands on a different footing, and I think that the appeal must fail as to that. The most satisfactory evidence that one has got is the testator's own ledger. But little reliance, to my mind, can be put on the very inaccurate evidence we have had presented to us which does not condescend to dates at all—dates which are most material or might be most material. Looking at the entries I have before me relating to the £5,000, it appears to me reasonably plain that, considering the amount of the indebtedness and adding it up as you go on, what happened was this. On Feb. 7, 1907, the testator added up the debit side; he then deducted from it £5,000, and he then made a note on the other side to show why he had so deducted it. The ledger, to my mind, seems quite clear in that respect. Then the deduction of £5,000 is not, as the £4,800 is, absolutely cancelled. On the contrary, it is not even released to the debtor at all. It is "given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date." The meaning of that, to my mind, is that the testator did not intend himself to be paid the whole of the £6,500. He meant to transfer £5,000 of it to his daughter, Mrs. Moore, for a purpose which they had arranged. But he does not do so. On what possible ground can the debtor say that there is a present intention to release him (the debtor) when the object is not to release him, but to transfer his indebtedness to somebody else to a certain extent? It is said when we go on to June 2, 1909, we find that the account is carried down on the footing that the £5,000 has been eliminated from it so that the net balance is £4,800, which is cancelled. But the answer to that, to my mind, is this. There is nothing whatever to show when this scheme or intention of transferring £5,000 to Mrs. Moore was abandoned. It certainly was abandoned and never carried out. Mrs. Moore herself says in her affidavit that it was abandoned, and for anything that one can tell it is quite consistent with the facts that the intention continued until after June 2, 1909. The testator did not die until July 19, 1910, so that when he made that entry of cancellation he might still have had in his mind the intention and the anticipation of handing over and transferring to his daughter, Mrs. Moore, that £5,000 part of the debt. If that is so, there is no force in the argument that the £4,800 shows that that was all that was left of any real debt.

In my opinion, it fails on both of those grounds. I think that that is not the true interpretation, and that on no interpretation that I can find at all is it possible to say that there is any cancellation of the £5,000 part of the debt, but only an inchoate intention, not carried out, of transferring the indebtedness to somebody else. On those grounds I think that this appeal fails in that respect, but on the other it should succeed.

KENNEDY, L.J.—With regard to the law of the question which has been stated there seems to be no doubt. We have got the authority of SIR GEORGE JESSEL, M.R., in *Strong* v. *Bird* (1), an authority which has been acted on since, and which was, in fact, acted on by NEVILLE, J., in *Re Stewart*, *Stewart* v. *McLaughlin* (4). After what has been said already in the judgments of the other members of this court, I only desire myself to say that, as I understand it, it is quite clear that what is spoken of both in the headnote to the report in the LAW REPORTS of *Strong* v. *Bird* (1) and also in *Re Stewart*, *Stewart* v. *McLaughlin* (4) as "a continuing intention" on the part of the testator—or the testatrix, as the case may be—means a continuing intention that the gift should have been given at the time when it was given. Of course it cannot apply to an intention to make testamentary benefaction, because in that case it would be bad unless it conformed to the rules

of the law and of the statute with regard to such benefactions by which they are to be held valid. And I rather regret the expression "a continuing intention," which looks as though it was a continuing intention at the date of the death to do something at the testator's death which is certainly not that which would give validity to an imperfect gift. What I understand to be meant and to be intended by the decision in *Strong* v. *Bird* (1) is that, where a testator appoints a debtor as his executor, in equity as well as at law any indebtedness which might otherwise have been held to exist from the debtor to the testator will not be held to exist if there has been a gift which was intended to be a gift before, although that gift per se was not complete according to law, and could not merely as a transaction have been held to give up any portion of the debt to the debtor of the testator had the question arisen in the testator's lifetime. If the law laid down in *Strong* v. *Bird* (1) is to be applied, it has to be applied in this case to two sums. With regard to the £4,800 I do not myself entertain any doubt that this appeal ought to succeed. There is the clearest evidence specifying that particular sum, and I do not think that the words in the will, which were relied upon a good deal, in which the testator speaks of "any indebtedness from the executor," at all affect that which is a definite statement of a release so far as he could by his statement release the £4,800 according to the entry made on June 2, 1909.

I confess myself that I have had considerable doubt whether the same decision ought not to follow with regard to the £5,000. Whatever criticisms may be justly made upon the nature of the ledger and the entries therein taken by themselves, there is, at any rate, this to be said, which has been adverted to—namely, that if there was, as the testator puts in writing, on June 2, 1909, a sum of £4,800 and interest which he desired to treat as a debt cancelled, that can only as a matter of arithmetic be arrived at by treating the account as having been already to the extent of £5,000 at some previous date altered in favour of this executor. It is a balance that can only be arrived at by taking out of the account as against the executor a sum of £5,000. That I confess has pressed upon me, and to some extent does press upon me, because, while it is quite true that on the evidence there is an uncertainty as to the date at which Mrs. Moore in her affidavit has sworn that, whereas the original intention was to give the £5,000 to her for a definite object, it was subsequently, as the testator himself told her, altered to a gift forgiving the debt to the debtor himself, yet it is clear, at any rate, that something of that kind may be fairly argued to have taken place before the statement of the balance given on June 2, 1909. But it is quite true also that one cannot in dealing with questions affecting the estate of a deceased person be too careful in refusing to accept in release of a debtor anything except that which is perfectly satisfactory evidence. As regards the original entry of the 5th July, 1905, as to the £5,000 "given off the debt," as he calls it, for a definite object to the daughter, was that cancelled by a subsequent and quite different disposition of £5,000 of the debt as a gift to the debtor? If that was ever definitely arranged, one would have expected that entry to have been cancelled and an entry explaining the cancellation to have been made. All that we have is that, not at that date, July 5, 1905, but at an uncertain date—probably, if one had to conjecture, Feb. 5, 1907—a sum of £5,000 is placed to the credit of the debtor on the account. Of course, the mere gift to Mrs. Moore for a definite object has not been carried out. The evidence is that it was not intended by the testator to have been carried out. The question is whether what she speaks of as the substituted intention of the testator to give that money to the debtor is proved. I do not think that upon the whole, on the balance of the evidence, that I ought to come definitely to a conclusion differing from that of the other members of the court upon that question of evidence, because undoubtedly the date (if any) to which should be assigned such an intention to give the £5,000 is left quite obscure, and it is complicated by the fact that the original entry in favour of the daughter remains standing, and there is nothing to show when that per contra entry of £5,000 was made. In the absence of something more definite, it seems to me that the burden of proof resting in this

case upon the executor—who is unquestionably a debtor in equity for all such debts as he cannot be proved to have got rid of by the gift of the testator—has not been sufficiently discharged upon the evidence which is before us. I, therefore, concur in the judgments which have already been given.

Order varied.

Solicitors: *Parker, Garrett & Co.*; *Arthur Tyler*; *Beard & Sons*; *Washington, Hicklin & Passmore.*

[*Reported by* E. A. Scratchley, Esq., and W. P. Pain, Esq., *Barristers-at-Law.*]

ATTORNEY-GENERAL *v.* PARISH

[Court of Appeal (Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), June 12, 13, 16, 20, 1913]

[Reported [1913] 2 Ch. 444; 82 L.J.Ch. 562; 109 L.T. 57; 77 J.P. 391; 29 T.L.R. 608; 57 Sol. Jo. 625; 11 L.G.R. 1134]

Street—Building line—Notice to owner of house—No statement of section under which local authority acting—Plan showing building line for adjacent houses also—Need for payment or tender of compensation before or at time of service of notice—Public Health Act, 1875 (38 *& 39 Vict., c.* 55), *s.* 155.

By s. 155 of the Public Health Act, 1875: "When any house or building situated in any street in an urban district, or the front thereof, has been taken down in order to be re-built or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or re-built in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith. The urban authority shall pay or tender compensation to the owner or the other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration provided by this Act."

Where an urban authority, acting under s. 155, has passed a valid resolution prescribing the building line for a house it is not a condition precedent to the validity of the notice of that resolution to the owner of the house that the notice should state that the authority is acting under s. 155, or that the plan showing the building line, which had been signed by the chairman of the urban authority, should specify only the particular house in question and not also the building line for adjacent houses. Nor is it necessary that there should be a payment or tender of compensation previous to or contemporary with the service of the notice. Where the owner of the house, when re-building, ignores the building line and the urban authority seek a mandatory injunction directing him to remove so much of the house as is in advance of the building line, it is not open to the court to consider whether or not the building line as prescribed is reasonable.

Decision of Joyce, J. (1912), 108 L.T. 147, reversed.

Notes. Section 155 of the Public Health Act, 1875, has been replaced by s. 74 (1) and (4) of the Highways Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 497) which are in substantially the same terms.

A As to the power of a local authority to prescribe a building line, see 19 HALSBURY'S LAWS (3rd Edn.) 223–229; and for cases see 26 DIGEST (Repl.) 628 et seq.

Case referred to:

(1) *Lister* v. *Lobley* (1837), 7 Ad. & El. 124; 2 Har. & W. 12; 6 Nev. & M.K.B. 340; 6 L.J.K.B. 200; 1 J.P. 309; 1 Jur. 526; 112 E.R. 417; 11 Digest (Repl.) 290, *1956.*

B

Also referred to in argument:

Masters v. *Pontypool Local Government Board* (1878), 9 Ch.D. 677; 47 L.J.Ch. 797; 26 Digest (Repl.) 633, *2814.*

A.-G. v. *Hatch*, [1893] 3 Ch. 36; 62 L.J.Ch. 857; 69 L.T. 469; 57 J.P. 825; 9 T.L.R. 513; 2 R. 533, C.A.; 26 Digest (Repl.) 633, *2816.*

C *Rayner* v. *Stepney Corpn.*, [1911] 2 Ch. 312; 80 L.J.Ch. 678; 105 L.T. 362; 75 J.P. 468; 27 T.L.R. 512; 10 L.G.R. 307; 26 Digest (Repl.) 688, *51.*

Stourbridge U.D.C. v. *Butler and Grove*, [1909] 1 Ch. 87; 25 T.L.R. 24; sub nom. *Stourbridge U.D.C.* v. *Butler and Grove*, *Stourbridge U.D.C.* v. *Higley*, 78 L.J.Ch. 59; 99 L.T. 912; 73 J.P. 3; 7 L.G.R. 183; 26 Digest (Repl.) 594, *2503.*

D *A.-G.* v. *Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48; 79 L.J.Ch. 137; 101 L.T. 796; 74 J.P. 57; 26 T.L.R. 93; 54 Sol. Jo. 198; 8 L.G.R. 110, C.A.; on appeal, ante p. 926; [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; 11 L.G.R. 194, H.L.; 16 Digest (Repl.) 539, *3791.*

A.-G. v. *Grand Junction Canal Co.*, [1909] 2 Ch. 505; 78 L.J.Ch. 681; 101 L.T. 150; 73 J.P. 421; 25 T.L.R. 720; 7 L.G.R. 1014; 16 Digest (Repl.) 540, *3817.*

E *A.-G. and Godstone R.D.C.* v. *Warren Smith* (1912), 76 J.P. 253; 26 Digest (Repl.) 519, *1959.*

Sutton Local Board v. *Hoare* (1894), 10 T.L.R. 586; 26 Digest (Repl.) 634, *2823.*

Folkstone Corpn. v. *Woodward* (1872), L.R. 15 Eq. 159; 42 L.J.Ch. 782; 27 L.T. 574; 37 J.P. 324; 21 W.R. 97; 26 Digest (Repl.) 634, *2828.*

Newhaven Local Board v. *Newhaven School Board* (1885), 30 Ch.D. 350; 53 L.T. F 571; 34 W.R. 172; 1 T.L.R. 626, C.A.; 26 Digest (Repl.) 633, *2815.*

A.-G. v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 20 T.L.R. 489; 2 L.G.R. 826; 26 Digest (Repl.) 632, *2811.*

Appeal by the plaintiff, the Attorney-General, from a decision of JOYCE, J., G reported 108 L.T. 147.

R. Younger, K.C., and *J. B. Matthews* for the Attorney-General.

T. R. Hughes, K.C., and *W. W. Mackenzie* for the defendant.

Cur. adv. vult.

June 20, 1913. The following judgments were read.

H **COZENS-HARDY, M.R.**—This is an action by the Attorney-General on the relation of the Lye and Wollescote Urban District Council for a mandatory injunction commanding the defendant to remove so much of a certain house belonging to and erected by him as is in advance of a prescribed building line. It is founded upon s. 155 of the Public Health Act, 1875. I will read that section without for the moment commenting upon it:

I

"When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be re-built or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or re-built in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith. The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set

back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act."

It is alleged by the relators that a building line was prescribed. That is challenged by the defendant. The defendant also says that no notice was given him of the section under which action was taken by the urban district council. Further, that no tender or payment of compensation was made, and that that is a condition precedent, and that the relators were not always ready and willing to pay compensation, and he alleges that the case is trivial and unimportant, that no public benefit is involved, and that no relief by mandatory injunction ought to be given. Those are really the points which have been argued before us.

The first point is, was any building line prescribed? If there was not, there is an end of the whole action. [His Lordship discussed the correspondence and certain minutes of the urban district council, and continued:] I come to the conclusion that there was a building line prescribed, in the language of s. 155, which prescribed "the line in which any house or building, or the front thereof, to be built or re-built in the same situation shall be erected."

The next point is that the urban district council did not tell Mr. Parish whether they were proceeding under s. 155 or not. There is no necessity for their so doing. It seems to me that it was quite unnecessary for them to say under which section of the Act they were proceeding. They did not purport to offer to buy under s. 154; they only purported to prescribe the building line, which is the very language used in s. 155, and I can see no ground for saying that in a case of this kind the whole proceedings must be void unless the building owner is informed that they are proceeding under s. 155 and not under s. 154.

Then there is the more serious point that there was no tender or payment of the compensation, which is said to be a condition precedent. The language of the section, after positively imposing an obligation upon the building owner not to build in front of the building line when he is re-building, goes on in the second part of the section to say that the urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation in case of dispute to be settled by arbitration in manner provided by this Act. Now, it is said that that is a condition precedent to the whole operation of the section. You must either tender or pay before you can take any effective action or impose any obligation upon the defendant. But a condition precedent of what? I have asked myself several times before, at what date do you say that compensation must be tendered or paid? It seems to me that that is a question to which no answer has been given, and I can find no necessity in the language, and certainly no overpowering necessity on the ground of convenience, for saying that the compensation must be tendered before some date which I do not understand. I think it is quite sufficient if the urban authority do that which is by this section made an obligation upon them—namely, to pay or tender compensation for any loss which the owner may sustain in consequence of the house being set back or forward, and so on. No doubt the word "tender" does create, at first sight, some difficulty, but I think, remembering that this is a consolidation Act, it is legitimate to observe that this part of s. 155, and, indeed, more or less the whole section, is a relic from s. 35 of the Local Government Act, 1858, which is repealed in Sched. 5 to the Act of 1875. There is one difference, and not an unimportant difference, between s. 35 of the Act of 1858 and the present. In s. 35 compensation was to be paid, to be ascertained in accordance with the Lands Clauses Act. As we all probably remember, under the Lands Clauses Act there is a provision for offering or paying compensation, and when there is a reference under that Act the question whether the authority exercising the powers has tendered enough is of vital importance in considering the question of costs. I am far from saying in the present case that, although there is no obligation on the arbitrator under this Act to say that they would get the costs, although the

amount tendered was held to be sufficient, yet I think it was plainly within the competence of the arbitrator, who had a discretion in the matter, to say: "It is right that, before the matter comes into my hands to decide whether the authority has made a tender which I hold to be sufficient." I, therefore, think that there is nothing in this section which really supports the idea that tender is necessary, or payment is necessary, before the step can be taken by the local authority.

There is another point which I do not know that it is necessary to elaborate. I will only say that I have grave doubt whether the absolutely hostile attitude taken up by the defendant in this case does not amount to a waiver of any objection on this point, but I prefer to say that the payment or tender of compensation are not conditions precedent. Then it is said that the relators cannot always be made to pay compensation. There is no doubt, I think, here that both parties have taken a wrong and altogether unreasonable and almost absurd view. I do not draw any distinction as regards the blame between the parties. So far as it is of any importance, it extends to one as much as the other. Mr. Parish said, "You have no right at all," and took a view which I have not been able to appreciate, and which has not been really attempted to be supported by one word of argument. On the other hand, the urban district council said some very foolish things and made very foolish objections in the course of the correspondence which has been read. But there never was any demand for compensation by Mr. Parish which was refused by the urban district council. When the action was commenced, in the statement of claim they in terms perfectly clearly expressed that they would pay compensation in accordance with the Act. That being so, I think that there has been no evidence for one moment of refusal to pay what may be legally due, and, that offer having been made in the statement of claim, I think that that is quite sufficient. It may not be unimportant to observe that when that offer was made the defendant seems to have thought that he had got the other side in a difficulty, and said: "Do not you think you had better purchase now?" The local authority are not proceeding under the purchasing section at all; they are proceeding under s. 155, which is not a purchasing section, which will not vest any soil or land whatever in the urban district council, but merely imposes a fetter upon the building on a portion of the defendant's property, in respect of which fetter or restriction compensation can be claimed, and, if claimed, must be paid.

The only other point to which I need refer is that it is said that it is a trivial and unimportant case in which there is no public injury, and that no relief by way of mandatory injunction ought to be given. I agree that it is a trivial and unimportant case. It is not very easy to conceive what public benefit is likely to be gained by fixing the building line for these small houses, particularly for the whole length of the street, where there are very few points at which s. 155 can be made operative, because there are only four, or it may be five, other houses which can be pulled down and re-built. But that, after all, is not, I think, for us to determine. It is not suggested that the urban district council have acted in bad faith. It is not suggested that by their conduct they induced the defendant to do that which he did—namely, go on to build, notwithstanding the notice—induced him to go on on the ground that they did not intend to enforce the building line, or anything of that kind. There is—if I may use such a phrase—no personal disability affecting them as regards the defendant. I think it is a case in which the local authority was entitled to prescribe the building line, and it is not for us to say whether, in our view, it was a reasonable thing that they should have prescribed this building line. I disclaim any right whatever to consider that in a case where good faith is not impugned. I think, therefore, that when the defendant does, as he did here, absolutely challenge the authority, denying their right to do what they did, we ought not to allow him, if in the wrong, and I think he was, to escape from the consequences of that wrong.

Now as to the remedy. It is quite plain that no remedy is possible except an injunction. No damages can be claimed, because it is not a case in which the urban district council have any claim; they could not recover one farthing damages.

A declaration would be perfectly idle, because the house has been built up, built up with full notice, after those notices to which reference has been made. There is no laches. There was no mistake induced by the action of the authority. JOYCE, J., dismissed the action. I am not quite sure that I appreciate on what grounds precisely he arrived at that conclusion; I think he thought that the authority had behaved badly. To some extent I share that view. I think it cannot be right to dismiss the action with costs in a case where the plaintiffs are seeking to enforce the duties and rights which are imposed and conferred upon them by s. 155. I think, therefore, that a mandatory injunction must be granted. But, having regard to the conduct of the authority, whose ignorance and blunders to a large extent occasioned the difficulty, I think there should be no costs of the action in the court below. The defendant must pay the costs of the appeal.

KENNEDY, L.J.—I agree that there are some points of difficulty and complication. The difficulty arises on the different constructions for which argument may be adduced as regards s. 155 of the Public Health Act, 1875. Complications arise upon that which, in my view, was certainly a want of the degree of precision and of businesslike conduct on the part of the urban authority which one has a right to expect, and also upon this, that the trouble as it comes before us has arisen from the obstinacy of this gentleman, the owner of the house in question, in persisting in beginning to build and in building the house in question contrary to the express notice which he had received, and not waiting until the question might be settled in the way which, according to my view, both the statute intended and what I may call reasonable conduct would have dictated to him.

The section in question, s. 155, has been read by the Master of the Rolls, and, therefore, I shall not take up time by reading it again. The construction which is insisted upon by the urban authority is that in the event which is mentioned in the early words of the section, when any house or building situated in any street in an urban district, or the front thereof, has been taken down in order to be re-built or altered, then the urban authority may prescribe the line in which any house or building, or the part thereof, to be built or re-built in the same situation shall be erected. When they have so prescribed, that which they have prescribed shall be obeyed, and it is, so say the urban authority, an independent, though equally obligatory, enactment of the section that the urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of obeying the order of the local authority. The defendant says that is not the true meaning. He insists that the urban authority must prescribe in a particular way; it must, with its order or prescription, embody the statement that it is the line of his particular house or building, and must also inform the person to whom the order is addressed that it is an order made under s. 155 of the Public Health Act, 1875, and also in terms inform the person to whom the notice is addressed that the urban authority are willing to pay some sum of money by way of compensation. Alternatively, or cumulatively if you like, the argument for the defendant is that, whatever might be the terms of the order made by the resolution of the local authority, at any rate in the notice which ought to be given of that resolution to the owner, it ought to tell him of the terms of the section in the sense of a reference expressly to s. 155, and that it ought to offer him in terms the payment of compensation. This the relators deny.

As between these two different views, it being admitted that in this case a resolution was passed fixing the building line and that a notice which was a communication of that resolution was sent to the defendant, I think myself that the construction put forward by the Attorney-General is right. I do not think that it was a condition precedent to the validity of the resolution that it should specify the section or specify a building line only for the particular house in terms, provided always that it is made clear that it was in reference to that house that the building line was then sought to be made compulsory, and that it was not necessary

in the notice to say that it is this particular section and no other under which the council is proceeding. Nor do I think it necessary that there should be an offer of compensation in the document conveying the notice. There is nothing in the section and nothing in this Act or any other Act which has been pointed out to us by the counsel for the defendant which makes obligatory any particular form of resolution or any particular form of minutes, and upon the facts I have no doubt that it was sufficiently stated, as it was, to the owner, that it was a case in which the local authority were prescribing the building line for the house or building which he was intending to erect in the situation on which he had previously pulled down the building as it existed before, and no other section can be suggested as one with which the recipient of the notice could possibly confuse the notice that had been sent to him. Section 154 is a section empowering purchase. There was no question of purchase at all ever conveyed in any shape or form, orally or otherwise, to the present defendant, and it is clear on the correspondence that the representative of the owner perfectly well understood that the resolution and the notice of it which had been conveyed were a resolution and a notice which related to the prescription of a building line for the house which the owner was intending to erect. That is plain on the correspondence. There is no shadow of excuse, in fact, to be found, and, as I have already said, I find no prescription form in the Act itself.

The question of stating whether compensation will be paid or not is a different question, and, as to that, as I have said, one has had to consider the argument addressed to us by which it is said, based to a large extent on the strength of the addition of the words "shall pay or tender," that there ought to be a tender of compensation or a payment of compensation as a preliminary to some step, and I am still at a loss to know at what stage it is said the payment or tender ought to be made. But what is it to be preliminary to? The exercise of the right of the local authority? Is it to be embodied in the resolution? Is it to be embodied in the notice of the resolution to the owner, or is it to be a condition precedent to the right to enforce, in the way which the local authority is here seeking to enforce, the law so as to vindicate their exercise of a right? No answer has really been given to any of these questions, and, when I look at the judgment of the learned judge in the court below, I say with sincere respect that I am not sure what view the learned judge intended to take. In more than one passage he has said that in his opinion it was a natural and rational thing to tender compensation at the same time that the notice was given that the building line had been prescribed. But that statement is guarded by the accompanying statement that he did not intend thereby to lay down any general rule. Then, again, with regard to prescription of a building line, whether what was done was sufficient, in other words, to be treated as an act coming within s. 155, the learned judge says it is doubtful whether a building line had been properly prescribed, or, if it had, whether the defendant had received the proper notice before the re-building was commenced. That, again, is guarded by the statement that he does not lay it down as a necessary point of law. Then he says: "I think that no sufficient or explicit notice was given to the defendant as to the prescription in due and proper time as to when his front was to be set back, or with reference to the compensation or anything of the kind." He says, at any rate he certainly thinks, that there ought to be in the notice an offer of compensation before the building is ordered to be pulled down. I am not, therefore, quite sure, and I say no more than that, what the learned judge as a matter of law intended to be stated as his view of the law on the section with regard to the sufficiency of the resolution, the sufficiency of the notice, or the duty to pay or to tender compensation. In my view, although I agree with him that I do not think any reliance can be laid by the plaintiffs upon *Lister* v. *Lobley* (1), it seems to me that the urban authority has got a distinct but an independent duty to pay or to tender compensation. The paragraphs stating what they can do, and the paragraph stating that they must pay, are distinct and separate paragraphs, and there is no doubt that, if the resolution is sufficient and the notice is sufficient, and had been, as it ought to have been, at once accepted by the building owner as a

person intending to obey, as he must obey, s. 155, he could at once have asked for the compensation, and, in default of the grant of compensation, he would have been entitled to claim an arbitration to settle the amount which was in dispute by arbitration.

That being the position of things, what was done? The dates have been summarised by the Master of the Rolls, but I would just say this. It is quite clear, first of all, that on the report of their surveyor a resolution was passed, some time before any building had been begun, by the urban authority, prescribing a building line for the house of the defendant. Of course, in so far as any plan showed an extension of that building line to other houses, it had no effect at all. But it is none the less a building line for his house, as it clearly indicated on the plan, because it may have been of no effect as to the rest except in so far as it would indicate to him what would happen if other houses were pulled down and new houses were re-built on the same site. It was a good and clear notice with regard to his house, and that is a compliance with the statute, I think, in law as well as in common sense. That was communicated by the authority to this gentleman's representative, Mr. Weaver, who was acting for him, as early as Feb. 15, 1912, ten, if not eleven, days before any re-building operations were commenced. It was pointed out to him that, while there were also certain objections on the ground of non-compliance with the byelaws, "the proposed new building is not in accordance with the building line prescribed by the council. The plan showing the building line prescribed by the council may be inspected by you at any time at my office." It further appears from the correspondence, to prevent any mistake apparently, that that plan bore in the colour red the building of the defendant, so that he saw the building line applied to his house and knew that that building line had been prescribed by the council, who are by s. 155 the persons to prescribe.

On Feb. 24—that is, nine days after notice had been effectually give to him—his representative advises the clerk of the local authority in writing, not that "I do not understand your plan," not that "you have not offered me compensation," not that "I claim compensation," but in these terms: "Mr. Parish has instructed me to inform you that the house will be built in conformity with the byelaws, but he cannot agree to the street and building lines shown on the plan that you have recently had prepared." The street line, of course, was immaterial; that was merely showing upon the plan what in the future the council thought would be a good line for their street. The immediate matter was the building line. In reply to that letter the clerk very naturally wrote: "I am surprised that you should intimate that Mr. Parish will not agree to build in accordance with the prescribed building line. From your many years' experience you know the responsibility attaching to a person who builds contrary to a prescribed line, and I therefore think that you should at once see your client and advise him accordingly before the work is commenced and so avoid unpleasantness." On that very date, Feb. 26, I understand Mr. Parish, having had nine days to consider the matter, determined to defy the local authority, and then began his building. A further notice was given later on, but the important thing is that before he began to re-build he had notice of that which was a valid notice and, as it seems to be, a valid resolution, and he determined not to carry it out.

It appears to me that there has been a breach of the duty which was imposed by the statute, and I cannot see that there was any laches on the part of the urban authority—they had to communicate with the Attorney-General before he could sue as plaintiff in this action—nor is there any suggestion of bad faith on their part. It appears to me that we are not a Court of Appeal from the wisdom or unwisdom of the step which, under s. 155, has been taken by the urban authority on its own responsibility as a public body. It is quite immaterial to consider whether it was more or less beneficial to the public that this setting back should take place. The compensation is to be paid, and it would have been claimed, and, I suppose, settled long ago, and it could be settled just as well after the order had been obeyed, for the space which is lost, if I may call it so, by the setting back being left vacant,

as it could be assessed at the time of the notice; indeed, in many ways it is to the advantage of the owner, if he has to go to arbitration, that he should, by considering what he has lost and by putting his case properly, have an opportunity of fully considering what the loss is; he will know all the more if he has obeyed the council, either by leaving the ground unoccupied by any building or by leaving the line as it ought to be if he obeyed the order of the urban council. The decision of the court below seems to have been influenced by the consideration of what appears to the learned judge, possibly rightly, to have been a small matter or a doubtful matter of public advantage. I do not think that that is a question which we have got to consider in deciding this appeal. If, on the one hand, the decision of the court below is that there was some defect in the resolution which was passed and the notice which was given, I, with respect, think there was none. If, on the other hand, it is grounded either wholly or in part upon the absence of an offer of compensation, I see nothing, as I have said, in the section which prescribes the time at which such urban authority is to pay or tender compensation. I do not quite understand the phrase "order the building to be pulled down," because there is no such order, but in so far as it is an application to enforce by injunction the rights of a public body, in this case they have, as my Lord has pointed out, stated in their pleading, in asking the court to make effectual their rights under the statute, that they are willing to pay compensation. That compensation can be assessed now just as well as at any time, and the section, on this construction, is not one which fixes any time for the offer. Whether the words "pay or tender" are to be explained in the way which the Master of the Rolls has stated, as I should agree is probable, or not, or whether perhaps the words came in per incuriam, there is certainly nothing in the form of the sentence to make the validity of the resolution or the notice, in my opinion, dependent upon a contemporary or a previous offer of compensation.

I think, therefore, that the judgment must be for the Attorney-General. I also agree with regard to the question of costs in the way that question should be dealt with as has already been stated by the Master of the Rolls. I do think, as I said at the commencement, this eminently shows the importance of precision and more businesslike treatment of a matter of this kind by the urban authority, while it also, to my mind, illustrates the folly, when he had full notice of a claim, of a man incurring the expense of building deliberately after he knew that rightly or wrongly a claim was made which, if it was right, as his own representative advised him, was a claim which would involve the consequences that are involved in our judgment—namely, his being enjoined from maintaining in its present position the building which he has chosen unwisely to erect.

SWINFEN EADY, L.J.—I am of the same opinion, and I only propose to add a few words on the two main contentions of the defendant. These were, first, that the local authority had exceeded their powers by prescribing the general building line which they had no power to do, and had not proceeded under s. 155 to prescribe a line on which the front of the house had to be built. The second point was that they must pay or tender compensation when the building owner has notice of the prescribed building line, or, at the latest, before he begins to re-build. When the facts are looked into, it is quite clear that the council proceeded under s. 155, and did prescribe under that section the line on which the building owner's house was to be erected. The matter began, not with the consideration of the general building line, but with the submission of plans by him for the new house, and it was with reference to the plans presented by Mr. Parish for the erection of the house that it was resolved that "a subcommittee be appointed to prescribe the building line in Perrin's Lane and to confer thereon with Mr. H. E. Folkes," Mr. Folkes being the surveyor who was temporarily acting for the council. [HIS LORDSHIP referred to the facts.] To my mind, it is clear that the council considered the building line with reference to the defendant's house, and the plan signed by the chairman prescribed the line on which the front of the defendant's new house was to be built.

True it is that this plan also gave additional information. It showed the line which the council apparently hoped the widened street would eventually take, and it also showed a building line along Perrin's Lane which might ultimately, as houses were re-built, be secured. The council only purports to affect the defendant by fixing a building line for the new house for which he had already submitted the new plans. This they had power to do under s. 155. That section imposed on the council the obligation of paying or tendering compensation for any loss or damage sustained, but there is nothing in the section requiring such payment or tender as a condition precedent to the council enforcing the building line. It was contended that payment or tender must be made when notice of the building line prescribed is given to the building owner, or, at latest, before the building owner has commenced re-building. But there is nothing in the section to justify this contention. The building owner is under a positive obligation to erect his building in accordance with the building line, and the local authority is under a positive obligation to pay or tender compensation, which obligation may be enforced by proper legal proceedings.

In my opinion, neither the convenience of the case nor the fair meaning of the words require such construction as the defendant contended for. It was further insisted that the local authority had not made it sufficiently clear to the defendant under what power they were acting. I think the correspondence shows that the defendant quite clearly understood the power under which they were acting. No particular form of notice is prescribed for use under s. 155, and the defendant on appeal expressly stated that he did not claim in equity to prevent the council from exercising their power under s. 155 on the ground that they had misled him. In my opinion, the correspondence shows that the defendant intended to build in defiance of the building line for his house, which he knew had been settled, and by his letter of Mar. 12 he made it quite clear. He said: "There is a clear issue to fight." That issue was the building line, and on that issue he has failed. For the reasons which my Lord has given I concur in the form of order which has been proposed.

Appeal allowed.

Solicitors: *Lees & Co.*, for *W. S. Mobberley*, Stourbridge; *Church, Rendell, Bird & Co.*, for *C. H. Collis*, Stourbridge.

[*Reported by* R. C. Carrington, Esq., *Barrister-at-Law.*]

LANSBURY *v.* RILEY

[KING'S BENCH DIVISION (Bray, Avory and Lush, JJ.), July 28, 1913]

[Reported [1914] 3 K.B. 229; 83 L.J.K.B. 1226; 109 L.T. 546; 77 J.P. 440; 29 T.L.R. 733; 23 Cox, C.C. 582]

Magistrates—Binding over to be of good behaviour—Power to order offender to find sureties—No complaint by any person that he has been put in fear of bodily harm.

Justices of the peace **held** to have jurisdiction either under the statute 34 Edw. 3, c. 1 [repealed by the Statute Law Revision Act, 1948], or under the common law, or by virtue of the commission of the peace, upon proper evidence before them that a person is guilty of conduct calculated to incite others to commit offences in violation of the law and in disturbance of the peace, to bind over such person to keep the peace in his own recognisances and to require him to find sureties for his good behaviour, and in default of finding such sureties to be imprisoned; and they have this power to bind over, although no complainant comes forward to testify that he has been threatened, or that he is actually under fear of bodily harm from the person sought to be bound over.

Notes. Section 91 of the Magistrates' Courts Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 493), provides for the exercise, by an order made on a complaint, of the power of magistrates to order a person to enter into a recognisance, with or without sureties, to keep the peace or be of good behaviour towards the specific complainant.

Followed: *R.* v. *Sandbach, Ex parte Williams*, [1935] All E.R.Rep. 680. Applied: *Thomas* v. *Sawkins*, [1935] All E.R.Rep. 655; *R.* v. *Sharp*, [1957] 1 All E.R. 577. Referred to: *R.* v. *County of London Quarter Sessions, Ex parte Metropolitan Police Comrs.*, [1948] 1 All E.R. 72.

As to recognisance to keep the peace, see 25 HALSBURY'S LAWS (3rd Edn.) 231–235; and for cases see DIGEST 365–369.

Cases referred to:

(1) *Willes* v. *Bridger* (1819), 2 B. & Ald. 278; 106 E.R. 368; 33 Digest 365, *746*.

(2) *R.* (*Reynolds*) v. *County Cork Justices* (1882), 10 L.R.Ir. 1; 15 Cox, C.C. 78; 33 Digest 367, *b*.

(3) *Ex parte Seymour* v. *Davitt, Ex parte Bearns* v. *Healy, Ex parte Seymour* v. *Quinn* (1883), 15 Cox, C.C. 242; 14 Digest (Repl.) 573, **3890*.

(4) *Ex parte Tanner* (1889), Crimes (Ireland) Act Cases 343; 16 Digest (Repl.) 18, **73*.

(5) *R.* v. *Wilkins*, [1907] 2 K.B. 380; sub nom. *R.* v. *Wilkins, Ex parte John*, 76 L.J.K.B. 722; 96 L.T. 721; 71 J.P. 327; 21 Cox, C.C. 443, D.C.; 33 Digest 367, *758*.

(6) *Haylock* v. *Sparke* (1853), 1 E. & B. 471; 22 L.J.M.C. 67; 20 L.T.O.S. 276; 17 J.P. 262; 17 Jur. 731; 118 E.R. 512; 33 Digest 367, *764*.

(7) *R.* (*Feehan*) v. *Queens County Justices* (1882), 10 L.R.Ir. 294; 33 Digest 367, *c*.

(8) *Wise* v. *Dunning*, [1902] 1 K.B. 167; 71 L.J.K.B. 165; 85 L.T. 721; 66 J.P. 212; 50 W.R. 317; 18 T.L.R. 85; 46 Sol. Jo. 152; 20 Cox, C.C. 121, D.C.; 33 Digest 366, *756*.

(9) *Butt* v. *Conant* (1820), 1 Brod. & Bing. 548; 4 Moore, C.P. 195; 129 E.R. 834; 33 Digest 367, *763*.

Also referred to in argument:

R. v. *Little and Dunning, Ex parte Wise* (1909), 101 L.T. 859; 74 J.P. 7; 26 T.L.R. 8; 22 Cox, C.C. 225, D.C.; 33 Digest 409, *1187*.

Case Stated by the Chief Metropolitan Magistrate.

At a court of summary jurisdiction held at Bow Street Magistrates' Court an information was preferred by the respondent, George Riley, an inspector of Metropolitan Police, against the appellant, George Lansbury, which information charged the appellant with being

> "a disturber of the peace of our Lord the King, and an inciter of others to commit divers crimes and misdemeanours against the peace of our Lord the King,"

a course of unlawful conduct in which, the respondent stated, he believed that the appellant was likely to persevere. The appellant then specified a number of offences which he alleged had been

> "recently committed in the Metropolitan Police District against the provisions of the Malicious Damage Act, 1861, and other penal statutes in respect of the property of the liege subjects of His Majesty the King. The said crimes and misdemeanours . . . of several distinct descriptions, to wit: (a) Damage, destruction, and defacement of letters posted in various metropolitan post office letter boxes of the property of the Postmaster-General, by introduction into such boxes of various fluids and other substances calculated to damage the contents of such boxes. (b) Of the breaking by hammers and stones of numerous plate-glass windows in shops. (c) Of damage to grass on various golf links in the neighbourhood of London. (d) Malicious destruction by burning and explosives of buildings in and in the neighbourhood of London. The said crimes and misdemeanours have been committed by women members of or connected with a certain organisation called the Women's Social and Political Union, of Lincoln's Inn House, Kingsway, of which union the [appellant] is a supporter."

On the hearing of the information it was proved before the magistrate that the appellant was a supporter, though not a member, of the Women's Social and Political Union, an organisation having for its object the securing of votes for women by means including that called "militancy," which, from the evidence, appeared to the magistrate to consist in the commission of crimes by women against property so as to coerce men possessing the franchise to put political pressure upon His Majesty's government to introduce legislation extending the franchise to women; that the appellant, in a speech addressed to a meeting of the Women's Freedom League at the Caxton Hall, Westminster, on Feb. 5, 1913, used words to this effect:

> "I am still a believer in militancy. I think myself that women, who are outlaws, ought in every kind to break the law, on every possible occasion, short of taking human life, in the way which suggests itself to them";

that on Feb. 23, 1913, in a speech addressed to a meeting of sympathisers with the objects of the Women's Social and Political Union, held at the Bow Baths, Bow, E., the appellant had said:

> "You women go on and use all the means you can to show men that you want the vote, and use the same means as men used to get it. They chucked a policeman into the river at Bristol, we have only blown up an empty house; we have only broken windows. Well, friends, these women are going on with their fight and they are going to win. Believe me, the government may send us to gaol, but in the long run the prisoners will win as they have always won. If you have the spirit—Bow and Bromley will be the pioneers, not only of winning votes for women, but for freedom in the land";

and that in a speech which he made on April 10, 1913, at the Albert Hall, London, he said:

> "I ask all of us here to stand shoulder to shoulder with the militant women, hold them up in the fight they are waging; let them burn and destroy property

A and do anything they will, and for every leader that is taken away, let a dozen step forward in her place; let us teach this make-believe Liberal government that this is a holy war, and is a war for women's and men's rights the world over; that it is a war that shall not end until our end is accomplished, and that it is a war in which we will do our best to preserve human life, but it is a war that will have no regard for property of any kind whatever. . . ."

B The magistrate was of opinion that, in view of the serious menace to the public peace of the metropolis caused by the series of crimes against property committed therein by women members of or sympathisers with the objects of the Women's Social and Political Union, the speeches of the appellant as proved before the magistrate were of a nature directly calculated to incite and to encourage persons to continue to commit offences in violation of the law and in disturbance of the C peace, and that, as he was, in the magistrate's opinion, likely to continue to make similar speeches and persevere in his conduct, it was necessary to provide for the public security by requiring him to find sureties for his future good behaviour. The magistrate was further of opinion that both under his commission and under the statute 1 Edw. 3, c. 16, relating to justices of the peace [repealed by Statute Law Revision Act, 1948] and at common law and as a justice of the peace he had D jurisdiction to order the appellant to enter into his own recognisances and find sureties for his good behaviour. Having so decided, he made an order that the appellant should enter into his own recognisances in the sum of £1,000 and further find two sureties for his good behaviour each to be bound in the sum of £500, or that in default of his finding such sureties, and being himself so bound, he be E imprisoned for a period of three months.

Shearman, K.C. (*Theobald Mathew* and *Atherley Jones* with him), for the appellant.

The Attorney-General (*Sir Rufus Isaacs*, K.C.), *Bodkin* and *Branson*, for the respondent, were not called on to argue.

F **BRAY, J.**—This is a Special Case stated by the magistrate, and the question that he leaves to us is whether he had jurisdiction to make a particular order. The order that he made was

> "that the appellant should enter into his own recognisances in the sum of £1,000, and further find two sureties for his good behaviour each to be bound in the sum of £500, or that in default of his finding such sureties and being G himself so bound he be imprisoned for a period of three months."

The question is whether he had jurisdiction to make that order.

The argument of counsel for the appellant is put upon two grounds. First, that a magistrate has no jurisdiction to make such an order, and, secondly, that, at all events in this case, he has no jurisdiction because there is no evidence of appre- H hended injury to any particular person, that nobody has been put in bodily fear. Those are two separate points, and I will deal with them in their order, but before I deal with the first point I ought to state shortly the facts which the magistrate has found, on which he bases his jurisdiction. It appears that the appellant made certain speeches, and the magistrate has found this in the Special Case:

> "I was of opinion that in view of the serious menace to the public peace of I the metropolis caused by the series of crimes against property committed therein by women members of or sympathisers with the objects of the said Women's Social and Political Union the speeches of the said [appellant] as proved before me were of a nature directly calculated to incite and to encourage the said persons to continue to commit such and similar offences in violation of the law and in disturbance of the peace, and that as he was, in my opinion, likely to continue to make similar speeches and persevere in his conduct it was necessary to provide for the public security by requiring him to find sureties for his future good behaviour, which I did."

If there was no evidence on which those findings could be supported, it is quite clear that the magistrate had no jurisdiction to say whether those facts were rightly found or not, but it is not seriously disputed that there was such evidence, and there are one or two passages which ought to be read. The appellant said:

> "I am still a believer in militancy. I think myself that women, who are outlaws, ought in every kind to break the law on every possible occasion, short of taking human life, in the way which suggests itself to them. . . . I hope that women in this hall will . . . go on conspiring, and use any and every means in their power to win the vote for their sex. You women go and use all the means you can to show men that you want the vote, and use the same means as men used to get it. They chucked a policeman into the river at Bristol; we have only blown up an empty house; we have only broken windows. . . . If you have the spirit, Bow and Bromley will be the pioneers, not only of winning votes for women, but for freedom in the land. . . . Therefore I ask all of us here to stand shoulder to shoulder with the militant women, hold them up in the fight they are waging; let them burn and destroy property and do anything they will, and for every leader that is taken away, let a dozen step forward in her place, let us teach this make-believe Liberal government that this . . . is a war in which we will do our best to preserve human life, but it is a war that will have no regard for property of any kind whatever."

Those extracts seem to me to show that there was abundant evidence on which the magistrate could find the facts which he has found.

The question, therefore, arises whether, having found those facts, he had jurisdiction. There have been a series of cases and a number of statements of the law in the text-books, and, in my opinion, it is now much too late to go behind those decisions and the law there laid down. Counsel for the appellant put his argument in this way. He says that those decisions are founded and profess to be founded on two grounds, first, that a conservator of the peace and a magistrate had before the statute 34 Edw. 3, c. 1, this jurisdiction, and, secondly, that, if he had not, the statute gave the power; that both those points may have been decided against his argument; but that the statute of Edward 3 has been misconstrued, and he desires to go back and to ask the court to construe this statute as he says it should be construed. In my opinion, it is too late to do that. That there is an argument to be founded upon the somewhat obscure words of the statute I can see. There are arguments both ways, and I do not think it is necessary now for me to express any opinion as to what is the true construction of the statute, or whether the courts have been right in inserting the word "not" before the words "of good fame." It seems to me that there are arguments which may fairly be addressed to the court both ways if the matter were new, but, it not being new, I do not propose to go into that question. Nor do I propose to go into the historical question whether a conservator of the peace or a justice of the peace had, before the statute, jurisdiction apart from that statute altogether, because many able authorities have laid it down that a conservator of the peace had that authority, and it is too late now, when it cannot be demonstrated one way or the other whether he had or not, to look at a particular writ which was issued, say, in 1233, and see whether that gave power or not. That may be some evidence to show that there was no such power then, but it is not conclusive, and at this date when the law has been laid down for so many years it is, in my opinion, too late to inquire into that.

I must shortly review the authorities that exist upon the point, which I say precludes this court from really re-considering the question. One of the earliest authorities is DALTON'S COUNTRY JUSTICE, and where he is dealing with the first assignavimus, he says ((1697 Edn.), chap. 5, at p. 20):

> "By this first clause in the commission, the justices of peace have as well all the ancient power touching the peace which the conservators of the peace had by the common law, as also that whole authority which the statutes have since added thereto. The means which the justices of peace must use for the

keeping of the peace, and for the execution of these statutes, are as followeth. For to prevent the breach of the peace, the justice of peace may send his warrant for the party and may take sufficient sureties of him (by recognisance) for keeping the peace, or for the good behaviour (as the case shall require) and may send the party to the gaol for not finding such sureties."

The passage which has been read to us in LAMBARD'S EIRENARCHA (1619 Edn.) is, I understand, in practically similar language.

There have been decisions on the question, and one of the earliest decisions in these courts was *Willes* v. *Bridger* (1) in 1819. In that case the defendant, a justice of the peace, had made an order requiring the plaintiff to find sureties for keeping the peace for two years, and as the plaintiff had failed to find the sureties as required, he was committed to prison by the justice, and he brought an action for trespass against the justice who made the order. The justice's answer claimed that he had authority to make the order. The question which the court had to decide was, aye, or no, had he such authority? The considered decision of the court was given by ABBOTT, C.J., who said (2 B. & Ald. at p. 286):

"The present action is an action of trespass, in which the plaintiff complains simply of the fact of his arrest and imprisonment. He does not complain of any harsh, undue, or oppressive exercise of a legal authority, for which, if any such had existed, though none at present appears, the remedy would have been of a different nature; but he complains of the act alone and rests his case upon the supposed illegality of the warrant under which he was committed. The authority of a justice of the peace to require, upon due complaint made to him in his judicial character, sureties for the keeping of the peace, and to commit a person to prison for want of such sureties, is not nor could be denied; but it is contended on the part of the plaintiff, that the surety can only be required for appearance at the next sessions, and for keeping the peace in the meantime, and consequently that the commitment for want of surety can only be until such surety be given as the justice might in the first instance require and take, that is, for appearance at the next sessions, and for keeping the peace in the meantime."

When we look back to the argument in that case we see that all the old authorities were cited, HAWKINS' PLEAS OF THE CROWN and other authorities, and that no doubt is why the Chief Justice said: "is not nor could be denied." In that case the very question arose, because, if the argument for the appellant in this case is right, that warrant was wrong, and, subject to any question whether as a justice of the peace, he might be protected, the action for trespass failed.

Then there are several decisions in the Irish courts. The first of these is *R.* v. *County Cork Justices* (2). In that case there was an execution of an habere to enforce payment of rent, and a woman who was present said to a number of people:

"Pay no rent to the landlord; we will make you right about the land; we will build you a house at any expense, and make you comfortable during the winter."

A summons was issued against the woman calling on her to show cause why she should not be bound over to be of good behaviour, and on the hearing of the summons she was ordered to find bail to be of good behaviour for six months, and in default to be imprisoned for one month. She refused to give bail, and was, accordingly, imprisoned for one month. Then it was held, on motion to show cause against a conditional order for a writ of certiorari, that the justices had jurisdiction to make the order. There, again, the question arose directly, and MAY, C.J., in giving the considered judgment of the court, said (10 L.R.Ir. at p. 8):

"Now, with respect to the legal aspect of the case, and the jurisdiction of magistrates to make orders to give security for good behaviour, I do not think it necessary to refer at length to the comments of HAWKINS, DALTON, BACON'S ABRIDGMENT, BURN'S JUSTICE OF THE PEACE, and other books on the subject.

Upon an elementary matter of this nature it is, I think, abundantly sufficient to refer to BLACKSTONE, who discusses the subject in the 4th book and chap. 18 of the old editions. 'Preventive justice,' he there tells us, 'consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment unless perhaps for a man's imprudence in giving just ground for apprehension. By the statute of Edw. 3 justices are empowered to bind over to good behaviour all that be 'not of good fame,' and the legal authorities show that a very wide and liberal interpretation has been given to this language, various instances of which are given in the books, many of them comparatively innocent when contrasted with the conduct of the respondent brought under our notice. Having regard to all the circumstances of the case, to what was established in evidence before the magistrate, and which evidence that gentleman having been an eye-witness of the transactions was well able to appreciate, I think the justice had ample grounds for concluding that Miss Reynolds was engaged in an illegal course of conduct, and that he was well warranted in restraining, or endeavouring to restrain, a continuance or recurrence of such acts on her part."

That was followed by *Ex parte Seymour* v. *Davitt* (3), and, in addition, there was the judgment of PALLES, C.B., in *Ex parte Tanner* (4), and the recent case of *R.* v. *Wilkins* (5). I do not think it necessary to refer in detail to these cases. It has been laid down in these courts as well as in the Irish courts, that a magistrate has the jurisdiction which the magistrate exercised in this case. That disposes of the first point.

The second point is that in the present case it is not alleged that anyone was put in bodily fear; that all that is alleged is that this was an incitement to the members of the Women's Social and Political Union to commit acts generally, not to commit acts against any particular person. In my opinion, that equally has been decided by authority. In *Haylock* v. *Sparke* (6) LORD CAMPBELL, C.J., in giving the considered judgment of the court, said (1 E. & B. at pp. 485, 486, 487):

"We do not refer to the cases relating to articles of the peace exhibited by a complainant, as these are subject to regulations different from those which prevail in respect of sureties for good behaviour required by a magistrate for the sake of the public. The latter is, in our opinion, the jurisdiction which the defendant intended to exercise, although sureties for the peace are mentioned. The law upon this subject begins with statute 34 Edw. 3, c. 1, by which justices of the peace were first appointed. This statute, entrusting these magistrates with a wide discretion, authorises them 'to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people.' . . . It appears, from these and other cases turning upon similar words, that aggravated defamation was a ground for requiring sureties for good behaviour, although rash words of anger were not sufficient."

Then he quotes HAWKINS' PLEAS OF THE CROWN where he says:

"It seems the better opinion, that no one ought to be bound to the good behaviour for any rash, quarrelsome, or unmannerly words, unless they either directly tend to a breach of the peace, or to scandalise the government."

It is clear, it seems to me, that if the statute of Edward 3 has been rightly construed as giving jurisdiction, it equally gives jurisdiction whether a particular

person is threatened or whether there is only the general threat, because the words are

> "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people."

The words of the statute are not confined to the case where a particular person is threatened. It seems to me equally, therefore, that the authorities show that the second point also fails. On these grounds, in my opinion, we ought to affirm the decision of the magistrate, and say that he had "power and jurisdiction in law to make the said order."

AVORY, J.—I am of the same opinion. It would be sufficient to say that we are bound by the authorities in this case, but I wish to add that, if there were no previous authority on the subject at all, I should be prepared to decide the question in the same way as I believe it was decided 220 years ago.

First of all, the argument which has been presented to us depends upon whether the statute 34 Edw. 3, c. 1, which contains a power to bind over persons to be of good behaviour, is limited to those who are in that statute called pillors and robbers. I am clearly of opinion that that statute is not limited in that way. The first part of it gives jursdiction to the justices to restrain "the offenders, rioters, and all other barators." It gives them further powers to deal with all such persons, and it concludes with the words:

> "and to take of all them that be" [or "be not"] "of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour . . . to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished. . . ."

Those last words clearly include and embrace all the persons who are mentioned in the first part of the section. I think, therefore, that the power to bind over applies to all persons who are mentioned as being "offenders, rioters, and all other barators." If that be the right construction of this statute, then it avails the appellant nothing to say that the statute ought to be read "those of good fame," and not as it has been read, "persons not of good fame," because it would give the magistrate power to bind over a person who is an offender if he is a person of good fame, which may mean, of course, that he is not a person who has been frequently convicted before. Whichever way the statute is read, therefore, I am of opinion that of itself it would give jurisdiction to bind over in this case. I wish to add, however, that in my opinion the statute is not exhaustive of the jurisdiction of the justices under such circumstances, but that they had long before that statute the power, whether they were called conservators of the peace or justices of the peace, to bind over persons to be of good behaviour. I should be content for this purpose to rely on the judgment of FITZGERALD, J., in *R.* v. *Queen's County Justices* (7). There he says (10 L.R.Ir. at p. 301):

> "The jurisdiction of justices in this particular [that is, the jurisdiction to require security to be given for good behaviour] has been twice recently before this Division, and we are not disposed to depart from the judgments then delivered. The foundation of the jurisdiction is very remote, and probably existed prior to the statute of 1360; but whatever its foundation may be, or by whatever language conveyed, we are bound to regard and expound it by the light of immemorial practice and of decision, and especially of direct modern decisions. It may be described as a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers for the maintenance of order and the preservation of the public peace. Whether it existed at common law, or flows from the commission, or has been conferred by statute, it rests on the maxim or principle, salus populi suprema lex, in pursuance of which it sometimes happens that individual liberty may

be sacrificed or abridged for the public good. The powers of a justice of the peace may now be said to embrace the powers of a conservator of the peace at common law."

That judgment and that reasoning, even if it be said not to be binding upon this court, has been made binding upon it by the express approval and adoption of it which was given in this court by LORD ALVERSTONE, C.J., in *Wise* v. *Dunning* (8). In that judgment of LORD ALVERSTONE, C.J., both the judgment of MAY, C.J., and that of FITZGERALD, J., were adopted and acted upon as being the law of England.

I will add a few more words upon a more ancient authority. My Lord has already referred to one passage in DALTON'S COUNTRY JUSTICE, adopted since any of us can remember as an authority on such questions as these. DALTON has a separate chapter, Chapter 124, dealing with this power of justices to bind over for the good behaviour as distinct from the surety for the peace, and in that chapter, dealing with the surety for the good behaviour, he says, among others, after giving a long list of them:

"Libellers (it seemeth) also may be bound to their good behaviour, as disturbers of the peace, whether they be the contrivers, the procurers, or the publishers of the libel; for such libelling and defamation tendeth to the raising of quarrels and effusion of blood, and are especial means and occasions tending, and inciting greatly to the breach of the peace."

He goes on to say that this libelling may be done either by scandalous writings or by scandalous words maliciously repeated or sung in the presence of others. Upon that very passage in DALTON was founded, among other authorities, a decision of this court in 1820, nearly one hundred years ago, in *Butt* v. *Conant* (9), where the question arose whether a person who had published a libel could be bound over and, in default of sureties, be committed by the magistrate to prison. I read it because we have been pressed with the argument that this is a mere custom or usage which has been improperly and illegally enforced for a number of years past, and that no one has either thought it worth while or been wise enough during all these years to correct it. DALLAS, C.J., in giving judgment in that case, after all the authorities had been examined on both sides, said (1 Brod. & Bing. at pp. 563–4):

"How, then, is it in point of law; and, first, what has been the usage?—Not that I mean to say, that mere usage in every case will constitute law; but, it is a primary and fundamental principle, that usage is of great weight in showing what the law is, or in expounding the law, if it be doubtful; and, therefore, in every case, in the natural and simple order and progress of inquiry, we first turn to the books or the precedents to see, whether, in point of fact, the power which is in controversy, has been exercised or not. Now, upon this, we have a bulk of evidence, such as I will venture to state was never produced in a court of justice upon any occasion before, for the purpose of being applied to cases of this description, or of any description whatever; a series of instances brought forward in consequence of a solemn inquiry (the result of a search of the files of the records of the courts of justice in this country), presenting no fewer than 128 cases of persons actually bailed on a commitment similar to that in question, extending from time to time, and scattered over a period of nearly 120 years, as far back as the inquiry has gone, from the first year of the reign of Queen Anne, down to the 57th of His late Majesty."

So that in that case the learned Chief Justice satisfied himself that for 120 years prior to 1820 this power had been exercised which has now been called in question. It was for that reason that I said it was a power and authority which had been exercised for over 200 years from the present time. Even if we were, any of us, disposed to take a different view, I think it is obvious on all the authorities that it would not be open to the court to take a different view. In my opinion, the

magistrate was quite right in the conclusion to which he came, assuming, as we do, that he had materials before him, as he said he had, upon which to found his conclusion.

LUSH, J.—I agree. I think, speaking only for myself, that there was great force in the contention of counsel for the appellant as to what is the true scope of this somewhat obscure statute, 34 Edw. 3, c. 1. We have not heard the Attorney-General, and I have not formed any definite opinion as to what the true construction of it is, nor indeed as to what its true phraseology is. But when we find that there have been authoritative decisions both in England and in Ireland, as to what the scope of the Act is, and that for the greater part of 100 years, certainly, justice has been administered all over the country upon the basis that justices had jurisdiction to make orders of this kind in cases like the present, it seems to me quite impossible to ask us to disturb the law as it has been laid down and to re-consider a question because there may be new arguments that might be addressed to the court as to what the construction of the statute is. I think, as I say, it is much too late to reconsider the question, and, therefore, I am of opinion that the magistrate had ample jurisdiction to make this order upon the materials before him. With regard to the second point as to whether it is necessary that there should be a statement by an individual that he went in fear, I think that point also was conclusively determined in *Haylock* v. *Sparke* (6). Therefore, on both these grounds I think the contention of counsel for the appellant fails, and that we must come to the conclusion that the magistrate was acting within his jurisdiction in making the order that he made.

Appeal dismissed.

Solicitors: *E. C. Rawlings & Butt*; *Director of Public Prosecutions.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re PEARCE. ALLIANCE ASSURANCE CO., LTD. *v.* FRANCIS

[COURT OF APPEAL (Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), December 17, 18, 1913]

[Reported [1914] 1 Ch. 254; 83 L.J.Ch. 266; 110 L.T. 168; 58 Sol. Jo. 197, C.A.]

Will—Children—Inclusion of illegitimate child—Belief of testatrix that illegitimate children legitimate.

A testatrix gave the residue of her property on trust for her brother W.W.F. for life, and after his death in trust "for all or any the children or child of" W.W.F. living at the death of the survivor of herself and W.W.F., and the children or child then living of any deceased child of his. W.W.F. had for many years cohabited with a woman by whom he had children, six of whom survived him. After the death of that woman he married, and two children of the marriage survived him. The testatrix knew the six children of the earlier union, but believed them to be legitimate.

Held: on the face of the will it was unarguable but that the word "children" meant "legitimate children," and the belief of the testatrix that the illegitimate

children were legitimate was no reason for extending the meaning of the word "children" so as to include them.

Dorin v. *Dorin* (1) (1875), L.R. 7 H.L. 568, and *Hill* v. *Crook* (2) (1873), L.R. 6 H.L. 265, applied.

Re Du Bochet, Mansell v. *Allen* (3), [1901] 2 Ch. 441, disapproved.

Re Brown, Penrose v. *Manning* (4) (1891), 63 L.T. 159, approved.

Notes. Applied: *Re Taylor, Hockley* v. *O'Neal*, [1925] All E.R.Rep. 662. Considered: *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529; *Re Dicker, Crallan* v. *Tomlinson*, [1947] 1 All E.R. 317. Referred to: *Re Bleckly, Sidebotham* v. *Bleckly*, [1920] 1 Ch. 450; *Re Wohlgemuth, Public Trustee* v. *Wohlgemuth*, [1948] 2 All E.R. 882.

As to inclusion of illegitimate children as objects of a gift to children, see 34 Halsbury's Laws (2nd Edn.) 292 et seq.; and for cases see 44 Digest 807 et seq.

Cases referred to:

(1) *Dorin* v. *Dorin* (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570, H.L.; 44 Digest 809, *6616*.

(2) *Hill* v. *Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137, H.L.; affirming sub nom. *Crook* v. *Hill* (1871), 6 Ch. App. 311, L.JJ.; subsequent proceedings (1876), 3 Ch.D. 773; 44 Digest 223, *476*.

(3) *Re Du Bochet, Mansell* v. *Allen*, [1901] 2 Ch. 441; 70 L.J.Ch. 647; 84 L.T. 710; 49 W.R. 588; 44 Digest 813, *6658*.

(4) *Re Brown, Penrose* v. *Manning* (1890), 63 L.T. 159; 44 Digest 810, *6624*.

(5) *Re Eve, Edwards* v. *Burns*, [1909] 1 Ch. 796; 78 L.J.Ch. 388; 100 L.T. 874; 44 Digest 812, *6646*.

Appeal from an order of Sargant, J., reported [1913] 2 Ch. 674.

By her will, dated Jan. 3, 1911, Laura Theresa Pearce appointed the Alliance Assurance Co., Ltd., to be her sole executor and trustee, and gave the residue of her real and personal estate to the company on trust to pay the income to her brother Walter William Francis during his life and after his death to stand possessed of the corpus and income

> "in trust for all or any of the children or child of my said brother Walter William Francis living at the death of the survivor of myself and my said brother, and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years, or being female attain that age or marry, if more than one as tenants in common in equal shares, but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said brother and attained a vested interest."

The testatrix died on Oct. 16, 1911, and her brother W. W. Francis died on Oct. 26, 1911. W. W. Francis was a commercial traveller who down to 1884 or 1885 lived in England, but some time before September, 1885, he went to Glasgow, and resided there until after his marriage with Rachel Penden Simpson below mentioned. In Glasgow he lived with and was reputed to be married to one Harriet King, to whom he was not in fact married, and by her he had seven children, six of whom survived him, the first being born in 1875. Harriet King died on Aug. 26, 1900. On Jan. 13, 1904, W. W. Francis married Rachel Penden Simpson, who survived him, and by whom he had two children born on June 15, 1905, and July 28, 1906, respectively.

A summons was taken out by the Alliance Assurance Co., Ltd., against the eldest of the children of Harriet King and the two children of the marriage with R. P. Simpson for the determination of the question whether the children of W. W. Francis by Harriet King living at the date of the death of the testatrix and the children then living of any such child or children as were then dead were entitled to share in the residuary estate of the testatrix along with the children of

the marriage of W. W. Francis and Rachel Simpson. On June 28, 1912, an inquiry was directed as to what children of W. W. Francis were living at the death of the survivor of the testatrix and W. W. Francis, and the master by his certificate found that the children of Harriet King were illegitimate and that the only legitimate children of W. W. Francis were the children of his marriage with Rachel Simpson. There was evidence before the court that Harriet King was throughout the time that she lived with W. W. Francis accepted as his wife in the society in which they moved, and that her six children were received as their legitimate children, and that the testatrix knew the children, was on good terms with them, and was informed by her brother that they were, and always believed them to be, legitimate. The summons was adjourned into court, and the point argued was whether the testatrix had expressed in her will an intention to benefit the six illegitimate children of her brother W. W. Francis. It was held by SARGANT, J., on careful consideration of the authorities that the legitimate children alone could take under the gift. The defendant, one of the illegitimate children, appealed.

R. Younger, *K.C.*, *Martelli*, *K.C.*, and *E. F. Ball* for the defendant.

M. Romer, *K.C.*, and *Wright Taylor*, for the legitimate children, were not called on to argue.

G. M. Hildyard for the Alliance Assurance Co., Ltd.

COZENS-HARDY, M.R.—This is an appeal from a judgment of SARGANT, J., who has held that six illegitimate children of the testatrix's brother do not take shares under a gift to children, with two legitimate children. The language of the will is perfectly clear; there is no difficulty of construction about it. The testatrix was a lady of considerably property, and she gave her residue in trust to pay the income to her brother Walter during his life (and he in fact died about ten days after the testatrix), and, after the death of the said Walter, in trust for all or any the children or child of the said brother Walter living at his death, and the children or child then living of any deceased child of his who, whether children or grandchildren being male, should attain the age of twenty-one years, or being female attain that age or marry, if more than one as tenants in common in equal shares, but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived the testatrix and her brother and attained a vested interest.

There is nothing in the will to justify any interpretation of the language there used other than that which by settled undisputed usage the words bear. It is not arguable, reading the will alone, but that this was a gift for "the legitimate children of my brother Walter." There were legitimate children of the brother Walter, and on the construction of that will I feel no doubt, unless there is some other circumstance which we ought to look at, that the legitimate children are the only persons who can take. Questions of this sort have arisen which have been dealt with and decided by the House of Lords in judgments which are of the highest possible authority. One may find on the face of the will indications that the word "child" or "children" was used in a wider sense: one may find a reference to an illegitimate child, known to be a child of, say, Walter Francis, so-called as a child in the will itself. In that case, to use the language of LORD CAIRNS, who is often cited, the will itself finds us a dictionary, and if one can find in the will itself a dictionary which tells one for the purpose of that document and that document alone, whether it is to have a wider meaning than its ordinary meaning, one gives that meaning to it. There is another rule, that if one finds that in the surrounding circumstances it is impossible to give any effect to the will except by reading and giving the word a wider sense, one is driven in that case to give it a wider sense. As LORD CAIRNS said in *Hill* v. *Crook* (2) (L.R. 6 H.L. at p. 282):

> "There are two classes of cases in which that primâ facie interpretation is departed from. One class of case is where it is impossible, from the circum-

stances of the parties that any legitimate children could take under the bequest."

He instances one case of a bequest to children "of my daughter Jane" who was dead and had died a spinster, and who had illegitimate children. Knowing the state of the family, the court is driven to say that is an extrinsic fact which one is justified in looking at, and saying that it is impossible that this bequest could have any effect given to it, or any meaning attached to it except on the footing that those children really take as personæ designatæ. But it is now sought to carry the matter further, and to say that in interpreting the will one is to consider it differently, according as it is or is not proved by extrinsic evidence that the testatrix believed that the illegitimate children were legitimate. I think there is no principle which can support that, and I am clearly of opinion that it is inconsistent with authority which is binding on us.

It is said here, and I will mention the material facts to raise the point, that the testatrix was induced to believe that these six illegitimate children were legitimate, because she wrote to her brother shortly before the will was made for the names of his children, and he sent a list of names of these six illegitimate children, some of whom were in Canada, some in the United States, and others in various parts of the world. I admit that, by reason of the statement made, made wrongly, by the brother, Walter Francis, to the testatrix, she was led to believe that these children were legitimate. On principle, how can one say that one is to take extrinsic evidence of what was the testatrix's intention. One can only gather the intention from the language used in the will, and when I find that under the language of the will itself, there are people who equitably and fully answer the description "children of my brother Walter," I have no justification for speculating as to what was the intention she had of benefiting these illegitimate children.

However that may be, I think the authorities in the House of Lords of *Hill* v. *Crook* (2) and *Dorin* v. *Dorin* (1) leave us really no discretion in the matter. The language of Lord Cairns in the leading judgment in *Hill* v. *Crook* (2) where he lays down the two rules, I think amounts to this, that these two rules are not only some of the rules which we have to apply, but are the rules and the only rules applicable to a case of this kind. The first is where we find it impossible that there should be legitimate children to take, and he gives an example of that. Another example, which seems to me clearly and plainly to fall under the first rule and not under the second, was the case before Swinfen Eady, J., of *Re Eve*, *Edward* v. *Burns* (5) which, having regard to the facts that were so found by the learned judge, came within the first rule and not within the second. Lord Cairns says (L.R. 6 H.L. at p. 283):

> "The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its primâ facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children."

He then gives various instances of that, but I need not go through them, because there is here nothing which in any way assists the argument. He gives various instances, and says (ibid. at p. 284) that even if the testator had known the state of the family,

> "if your Lordships had nothing more than this admitted statement of the state of the family and the habit of the testator with regard to the treatment of his grandchildren, that would, in my opinion, not have been sufficient. If, even with that statement, you found in the will merely a reference to the children of his daughter Mary, it would not, in my opinion, have been sufficient to refer to this statement of the fact with regard to the family, to entitle you to enlarge the term 'children' so as to include illegitimate children."

A Throughout that judgment LORD CAIRNS seems to me to be quite clear on this point, on the second rule, on the construction of the will itself: Does the will find as a dictionary that which enables you to go beyond the proper and ordinary meaning of the word? If there was any doubt about that, it seems to me to be made, if possible, clearer by the subsequent case of *Dorin* v. *Dorin* (1), which was certainly an extraordinarily hard case, because I cannot bring myself to doubt that B the intention of the testator there had not effect given to it, but nevertheless it is none the less an important decision, because I am quite sure the learned Lords would have, if they had felt themselves justified in so doing, have come to a different conclusion. In that case a man who had two illegitimate children by a woman before marriage, but who married her, the day after marriage made a will by which he bequeathed his property to his wife for life with power to her to C dispose of it between "my children by her." He died soon afterwards, and, there having been no legitimate children born, it was held by the House of Lords that those illegitimate children could not take under the will, because at the date of the will there was a possibility of legitimate children—children in the true sense of the word, offspring of the marriage, coming into existence, and, that being so, one could not have regarded the word "children" as meaning anything else. LORD D CAIRNS adhered to what he said before, and proceeds to say in that case (L.R. 7 H.L. at p. 573):

> "According to these conclusions, I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the E will which enables me to say that those who were in the eye of the law not his children were intended by him to take under the general expressions in his will."

There was not a doubt, and there could not be a doubt, that the testator there knew that these children were illegitimate; they were living with him and had been acknowledged by him. There is no doubt about that, but nevertheless LORD F CAIRNS said he could not go into that. He says (ibid.):

> "I ventured to put to the learned counsel who argued the case at the Bar this question: supposing that it had been in the mind of the testator, and we do not know and cannot know his mind except by his own expressions—supposing it had been in his mind not to take any notice of these children in his will, or to make any provision for them by his will, but to make provision G for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly every word would be satisfied. Therefore, if that is so, you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and primâ facie legal meaning of the word 'children.' "

H LORD HATHERLEY reaffirms in language substantially identical the rules laid down by LORD CAIRNS, and I only refer to the passage in that judgment because some sort of doubt has been cast on the meaning of the first rule. LORD HATHERLEY says (ibid. at p. 575):

> "The only mode in which the word 'children' can be made to bear a I different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense."

As to the other judges, there is a passage in LORD SELBORNE'S judgment in which he says (ibid. at p. 577):

> "I find no ground upon which it can be held that any repugnancy or

inconsistency would result from giving to the word 'children' as used in the present will its ordinary legal sense, and I therefore am compelled to concur in the judgment proposed by my noble and learned friend on the Woolsack."

It has been sought by counsel for the defendant in his very ingenious argument to say: "There were cases in which the testator knew and believed that the children were illegitimate, and he did not use language sufficient to include them in the gift," and it has been said that that can have no application to a case where the testatrix believed, although she did not know, contrary to the fact, that these children were legitimate. I can find no foundation whatever for that. I think it is dangerous to the last degree to say that. When language is used which is satisfied by the existing state of facts—viz., that there are legitimate children—it would be dangerous to the last degree to hold, the testatrix having been misled as to the facts, that it must be taken to be able to be proved that the language she has used she used in an unnatural sense. In my opinion it would be very wrong for us to lend any colour to that suggestion. I pause for a moment to consider whether it tells in favour of or against the defendant that the lady believed these children to be legitimate. I am rather disposed to think it tells against them, but, however that may be, I can see no ground for allowing that circumstance to vary our decision in this case.

Is there any authority for it? There is in support of the appellants, no doubt, the judgment of JOYCE, J., in *Re Du Bochet, Mansell* v. *Allen* (3), and, as authorities have been cited, I will only refer to the way in which that has been treated by MR. THEOBALD in his book on WILLS (7th Edn.) at p. 290, where he puts the point more clearly:

> "Suppose the gift is to the children of A, a living person, and that there is nothing on the face of the will to show that existing or illegitimate children are intended to be included—for instance, from the fact that the testator believed A to be married, and was on terms of familiarity with his illegitimate children, whom he believed to be legitimate."

That states the proposition with perfect fairness. Then the author continues:

> "In *Re Du Bochet, Mansell* v. *Allen* (3) it was held that, in such circumstances, there was so strong a probability of it being the intention of the testatrix to use in her will the words 'children, being daughters of my nephew Richard' as including two illegitimate daughters living at the date of the will, that a contrary intention could not be supposed. The case goes beyond any previous authority and appears to be inconsistent with many leading authorities. Strong probability is not enough."

There is a prior decision of NORTH, J., which was not cited before JOYCE, J., the case of *Re Brown, Penrose* v. *Manning* (4), in which, the facts being substantially the same, the learned judge laid down a rule which seems to be preferable in every way to that adopted by JOYCE, J. I shall not read in full either of the judgments, but of the two I think I am bound to say that *Re Du Bochet* (3) is wrong, and that NORTH, J.'s judgment in *Re Brown, Penrose* v. *Manning* (4) is right. SARGANT, J., has in this case given an extremely careful and elaborate judgment, and I am entirely satisfied that this appeal should be dismissed.

SWINFEN EADY, L.J.—I am of the same opinion. The testatrix made a will in January, 1911, and died in October the same year. She gave her residuary estate on trust to pay the income to her brother for life and after his death in trust for his children living at his death, and the children or child then living of any deceased child of his, and so on. It is in evidence that before the will was made there had been a communication from the brother to the testatrix with regard to the family, and he sent her a memorandum as to his family, and this memorandum is headed: "First wife," and then there is a column giving the names of the six children, and then in a separate column there are the names of the two

children by the second marriage. It appears to me that the testatrix was under the impression that the first union was a marriage and that her brother was married to the lady who passed as his wife. She is described in this document as his first wife, so that the brother represented to the sister that she was his wife. Of the six children who are mentioned there, we have the registration certificates of two who were registered in Scotland, and they were registered as illegitimate children, and it is now beyond dispute that there was no marriage with the first lady, and that all the six children were illegitimate although the testatrix believed them to be legitimate.

After the death of Harriet King, who was the mother of the six children and who died in August, 1900, in January, 1904, the brother married Rachel Simpson. That was the first and only valid marriage that he contracted, and there were two children of that marriage, Cecil and Laura, so that there were living at the death of the testatrix six illegitimate children and two legitimate children, making eight children in all. Applying that state of facts to the gift in the will, the gift being "in trust for all the or any the children or child of my said brother," and there being legitimate children to take under the will, primâ facie there is no doubt that the rule is that "children" means legitimate children, and, as has been pointed out in *Dorin* v. *Dorin* (1), "children" as much means legitimate children as if the word "legitimate" were placed in front of the word "children." That is the rule. The two exceptions to the rule are the two mentioned by LORD CAIRNS in *Hill* v. *Crook* (2). The Master of the Rolls has already gone through those cases, and I do not propose to do it again; but there are two classes of exceptions, one being where it is impossible from the circumstances of the parties that any legitimate children should take under the bequest. That does not apply here, because there are legitimate children to take. The other class is where a testator has used a nomenclature on which the will is clear. These are the two classes of case. There was a suggestion that having regard to the reference to the grandchildren part of the rule could be prayed in aid here; but really it comes to nothing, and I do not propose to enter into it. Therefore there is nothing in my judgment, on the face of the will, to indicate that the testatrix used the word "children" in any other than its natural sense, and it is admitted that there are legitimate children to take under the will.

That being the general rule of the two classes of cases, it was strongly urged that there may be other exceptions to the rule. The effect of *Hill* v. *Crook* (2) is that there is a general rule and there are two classes of exceptions, but it does not go on to say there may not be a third exception. *Dorin* v. *Dorin* (1) in terms says that that cannot be so, and that the only two classes are the classes mentioned. It will be observed in a passage in LORD HATHERLEY'S judgment in *Dorin* v. *Dorin* (1) (L.R. 7 H.L. at p. 575), which the Master of the Rolls has already commented on, that

> "the only mode in which the word 'children' can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense."

LORD HATHERLEY gives a similar illustration to the one LORD CAIRNS had given with regard to the daughter Jane, who was dead. It seems to me that that makes it quite clear that the two exceptions to the general rule which are found in LORD CAIRNS' speech in *Hill* v. *Crook* (2) are the only two exceptions, and, in my opinion, the present case cannot possibly be brought within either of those two exceptions.

It was urged by counsel for the defendant forcibly that it is perfectly obvious here that the testatrix meant to benefit these six children. The case was put on that footing in this way. It was said, believing them to be legitimate, as she did,

she must have intended to include them, otherwise, if not, she would have excluded them by name, and would not have intended them to take, or she would have limited the gift to the children of the second wife, and therefore it is obvious that she meant to benefit those six children. That, in my opinion, would be mere conjecture. I believe it might very accurately be said that she thought they would take under the description of legitimate "children of my brother"; she then believing them to be legitimate thought they would take, because she thought they were legitimate children, and believed that all legitimate children would take. But that is a wholly different thing from intending that they should take as personæ designatæ. It seems to me that the fact that the testatrix did not know of the illegitimacy is against the contention of the appellants, it excludes the idea that she meant to include them as personæ designatæ. Supposing, for instance, that she merely intended to benefit lawful children. What other language could she have used, or would not every word of the will be satisfied and full effect given to the meaning on the hypothesis that all she would do was to benefit lawful children? The law as laid down in *Hill* v. *Crook* (2) and *Dorin* v. *Dorin* (1) has not been extended, and has not been altered. The case which was heard before myself, *Re Eve*, *Edwards* v. *Burns* (5), was simply an application of the first rule of Lord Cairns. With regard to the conflict between North, J., in *Re Brown* (4) and Joyce, J., in *Re Du Bochet* (3), in my opinion the case of *Re Brown* (4) is the case that was rightly decided and is to be preferred.

For these reasons I agree with the judgment which the Master of the Rolls has pronounced, and I see no way, consistent with that judgment, in holding that these six children or any of them can share with the two legitimate children. Sometimes it has been said that you cannot have a class in which the illegitimate shares with the legitimate, but that really is not well founded. You can have such a class. It may well be that a testator, knowing of the illegitimacy, might by apt words treat the illegitimate children as members of the class for the purposes of the will, and direct them to be so treated as if they formed part of the class. It is quite easy to do that by properly drawing the will. Supposing the true facts of this case had been properly stated to the testatrix, it would have been quite easy for the draughtsman to have said that she gave her residue between the six children—naming them—and all other the children of her brother. That would have been sufficient to include them in a class gift, and to make them for the purposes of the class members of the class.

The unfortunate part of this case is that the brother of the testatrix did not state the facts to his sister so that the draughtsman of her will might have made the proper provisions. In these circumstances one regrets the conclusion at which the court is bound to arrive, but I see no way out. In my opinion the judgment of Sargant, J., was perfectly right. It would really be, as he said, mere conjecture if one were to say that these six children were intended to take. I think the appeal must be dismissed.

PHILLIMORE, L.J.—I am of the same opinion. This is a gift to a class, and there are objects to satisfy it without including these six persons. The word "children" has a well-established meaning in wills. The rule that it has that well-established meaning is not a special rule as to children. It is, I conceive, a branch of the rule which says that there is a primary meaning, or as Lord Cairns calls it a primâ facie interpretation of the words denoting descent or relationship, and that primâ facie intention holds the field unless it is displaced. The burden is on those who seek either to extend it or modify it. Now, the two instances in which it can be extended or modified are the two rules given by Lord Cairns. As to the second rule, we get no help from this. If there had been a mention of one of these children in the will as the son or daughter of the brother, or if there had been a mention of the brother's first wife by name, and it could be proved that these children were to the knowledge of the testatrix only illegitimate sons or daughters, it would of course give us some help, but there is nothing in this will

A to indicate to us that the lady meant other than the ordinary legal meaning of the word "children."

The first rule is this. Where it is impossible in the circumstances of the parties that any legitimate children should take under the bequest, the meaning of the word can be extended or modified. It is anything but impossible here; there are two children who will take under the bequest. I go on to see what does LORD B CAIRNS take into account as to the circumstances of the parties. The testator must be taken to have known the state of his family. I am not at all sure that that rule applies where the testator or testatrix has an incorrect belief as to the state of the family. That will some day have to be considered. At any rate, I do not think this case is any better for the defendant because the testatrix did not know. It seems to my mind purely conjecture whether she intended or did not intend to C benefit these six children if they had not the status of legitimate children. She may have had no benevolent intention towards individuals at all. She may simply have had a general desire to benefit her brother's children. If we get as far as that, it is quite as likely as not that her desire would be limited to legitimate children. Rightly or wrongly, wisely or unwisely, many people draw a very distinct line between the two classes, and we cannot tell whether, if this testatrix had D known the truth, she would or would not have still left her money to any one of these six children. We cannot tell, even taking her mind as we suppose it to have been, that she believed what her brother told her; and as to that we cannot be quite certain. If she believed these six children were legitimate, we cannot tell whether she meant to benefit any one of the six as such as a persona, and if she did, whether she meant to benefit one only or all the six or some of the six, and E if so which of the six. We cannot tell whether she had any intention to benefit any of them irrespective of that which she supposed to be their status. Therefore, in my opinion, it would be pure conjecture to decide in favour of the defendant.

I agree that the appeal should be dismissed, and I think I ought to add this, that all the cases with regard to the admission of illegitimate children to the position of legitimate children under wills are all of them more difficult when the child is F not the child of the woman, and therefore obviously the natural child, but where the child is described as being the reputed child of the man. I think it is desirable that I should say that I entirely agree with the rest of the court that the judgment of JOYCE, J., in *Re Du Bochet* (3) is not to be considered as an authority.

Appeal dismissed.

G Solicitors: *T. H. Barber & Son*; *Peacock & Goddard*, for *Mooring, Aldridge & Haydon*, Bournemouth; *Crawley, Arnold & Co.*

[*Reported by* R. C. CARRINGTON, ESQ., *Barrister-at-Law.*]

BRISTOL CORPORATION *v.* JOHN AIRD & CO.

[House of Lords (Lord Atkinson, Lord Shaw, Lord Moulton and Lord Parker of Waddington), March 12, 13, 1913]

[Reported [1913] A.C. 241; 82 L.J.K.B. 684; 108 L.T. 434; 77 J.P. 209; 29 T.L.R. 360]

Arbitration—Stay of legal proceedings—Arbitrator not independent person—View on matters in dispute already expressed—Arbitrator required to give evidence on one side—Arbitration Act, 1889 (52 & 53 *Vict.*, *c.* 49), *s.* 4.

By s. 4 of the Arbitration Act, 1889: "If any party to a submission . . . commences any legal proceedings against any other party to the submission . . . in respect of any matter agreed to be referred . . . any party to such legal proceedings . . . may apply to the court to stay the proceedings . . . and the court or a judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . may make an order staying the proceedings."

It is no reason for refusing to stay the proceedings in an action that the arbitrator agreed on by the parties is not an independent person, as, e.g., the engineer of contractors who have been employed to do certain work for the other party to the contract. The court will, however, be justified, in the exercise of its discretion, in refusing to stay proceedings (a) where the arbitrator has, by some action of his own, committed himself irrevocably to a particular view of the matter in dispute, or (b) if there will probably be a conflict of evidence as to matters of fact, as to which the arbitrator himself would, in ordinary course, be a principal witness on one side, so that it is not fitting or proper that he should act as arbitrator.

Notes. The Arbitration Act, 1889, s. 4, has been replaced by the Arbitration Act, 1950, s. 4(1): 29 Halsbury's Statutes (2nd Edn.) 93.

Considered: *Metropolitan Tunnel and Public Works, Ltd.* v. *London Electric Rail. Co.*, [1926] Ch. 371. Referred to: *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; *Miles Martin Pen Co. and Martin* v. *Selsdon Fountain Pen Co.* (1950), 67 R.P.C. 64.

As to stay of legal proceedings by a party to an arbitration agreement, see 2 Halsbury's Laws (3rd Edn.) 21 et seq., and for cases see 2 Digest (Repl.) 477 et seq.

Cases referred to:

(1) *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478; 63 L.J.Ch. 521; 70 L.T. 674; 42 W.R. 483; 10 T.L.R. 439; 38 Sol. Jo. 417; 7 R. 243, C.A.; 2 Digest (Repl.) 488, *408*.

(2) *Walmsley* v. *White* (1892), 67 L.T. 433; 40 W.R. 675; 36 Sol. Jo. 646, C.A.; 36 Digest (Repl.) 613, *1732*.

(3) *Joplin* v. *Postlethwaite* (1889), 61 L.T. 629, C.A.; 36 Digest (Repl.) 614, *1738*.

Appeal by the defendants in the action from a decision of the Court of Appeal (28 T.L.R. 278) affirming an order of Scrutton, J., made at chambers, affirming an order of a master refusing to stay the action and to order all matters in dispute to be referred to an arbitrator.

Sir R. Finlay, K.C., *Gore-Browne, K.C.*, and *Inskip* for the appellants.

Sir A. Cripps, K.C., *Upjohn, K.C.*, *Lynden Macassey, K.C.*, and *C. H. G. Campbell* for the respondents.

LORD ATKINSON.—This is an appeal from an order of the Court of Appeal which affirmed an order made by Scrutton, J., sitting at chambers, which affirmed an order of a master sitting at chambers. The effect of that order was that he refused to stay the action instituted by the respondents. That action was brought to recover a sum of £171,000 odd for work and labour done. The work was done

A under an agreement entered into between the appellants and the respondents to construct docks at Avonmouth. It was a very heavy contract, the contract price as stated amounting to £1,500,000, and the actual operation amounting to £1,750,000. The work has been completed, and it is alleged that this balance remains due. The contract contained a stipulation that all matters in dispute should be referred to Mr. Squire, the engineer of the appellants, and an application B was made to stay the proceedings and to compel the respondents to go to arbitration under that clause.

There is no dispute between the parties as to the law applicable to such a state of things. If a contractor chooses to enter into a contract binding him to submit any disputes which arise between him and the engineer of the persons with whom he contracts to that engineer to arbitrate on, then he must be held to his contract; C whether it be wise or unwise, prudent or the contrary, he stipulated that a person who is the servant of the persons with whom he contracted shall be the judge to decide upon matters upon which, necessarily, that engineer or arbitrator has himself formed an opinion. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman should listen to argument, and should determine the D matters submitted to him as fairly as he can, as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain, and to have the matters in dispute tried by one of the ordinary tribunals of the land. But he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting, or decorous, E or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right of appealing to a court of law to exercise the discretion which s. 4 of the Arbitration Act vests in them, and to say, "We are not satisfied that there is not some reason for not submitting this question to the arbitrator." In the present case the question is, Has that taken place? I have listened with great attention to the arguments, but I am unable to get rid of the notion F that in two of the most important matters in dispute—namely, the filling of the rubble in the embankments and slopes of the dock, and the excavations between the monoliths at the entrance piers—Mr. Squire will necessarily be in a position of judge and witness. No position is more untenable or unpleasant for any gentleman acting as arbitrator, than to be a witness in the cause; that he must be examined, so to speak, before himself and cross-examined by himself; that he must G decide on his own veracity or trustworthiness; and there can be no stronger ground to induce a court of law to exercise their discretion and refuse to stay the action than that any gentleman who has taken upon himself the duties of arbitrator should be placed in such an anomalous position.

As to the first of these two matters, the contract provides that the filling in is to be with certain rubble filling measured by cubic measurement. It is not contested H that an agreement was entered into between the parties that some scale should be adopted whereby they could change cubic measurement into weight. The question which is controverted is, to what stuff that agreement applied. Four kinds of stuff have been used in this filling. The contention of the respondents is that that measure is to be applied to all these kinds of stuff; the contention of the appellants, on the other hand, is that that measure is only to apply to three kinds I of filling, and not to the fourth. That is the point of controversy between the parties, and it is a point on which Mr. Squire must be in such a position that he would be giving evidence—he would be a witness on that important point at all events.

The next question is with regard to the excavation between the monoliths. I do not know which side is right, and as this case must go before some tribunal for decision, it is most desirable that nothing should be said on the merits of the case which can properly be avoided. But with regard to that matter, just as with regard to the first, it seems to me impossible to say that Mr. Squire would

not be a most important witness to determine whether in fact what was promised was a gratuity, or whether his principals took upon themselves a legal obligation, the measure and amount of which was a matter for further consideration. For these reasons it is not right that this gentleman should arbitrate upon these matters, and that full and sufficient reason has been given for saying: "We will exercise the discretion intrusted to us, and we will retain this action in the courts." It has been suggested that those are matters of dispute spread over an enormous area, and embracing a great many different items, and I am fully conscious of the great objection to referring these matters to the ordinary tribunal of a judge and jury, or a judge sitting alone, to decide. It would be expensive, and it cannot be supposed that a judge, or a judge and jury, would bring to the decision of such questions the trained experience and knowledge of a gentleman in the position of Mr. Squire. It has been pressed upon us that it would be such a great evil to take away from a decision by the arbitrator all these matters, that we should not stay the action as to the two matters to which I have referred, but should allow the rest to be referred to arbitration. No authority has been cited to the House to justify any position such as that. *Ives and Barker* v. *Willans* (1), which came before LINDLEY, LOPES, and KAY, L.JJ., was a case of an entirely different character. In that case the plaintiffs chose to join in the same action claims which could be referred to arbitration, and claims which could not be so referred, and LINDLEY, L.J.'s observations, which have been so much relied on, dealt entirely with that state of things. He said that where the claims which could not be referred were trifling in amount, it would be a sad thing if arbitration were altogether prevented, and, on the other hand, if the claims which could be referred to arbitration were vast in amount, and material portions of the claim, it would be very irrational that they should not go to arbitration by reason of this adjunct which could not be referred. But that is not this case. Here the claims which are objected to are claims which could be referred; and what the appellants have pressed on your Lordships is that you should take out a number of claims, all of which could be referred, certain of them because the arbitrator is not in a position to decide them properly, and allow the rest to be adjudicated upon in the arbitration. That is a new departure in this system of law so far as I have been able to ascertain.

There is also another objection to it, and that is that this point was not raised below, so that we have not the advantage of the decision of the Court of Appeal in regard to it. It is quite possible that if it had been raised below it would have been found that there are several other items of the claim in which exactly the same question arises, and we were informed that it was so. There is this also to be borne in mind, that the two claims which are matters of controversy in this argument are themselves very wide, and cover over £41,000 between them, which is a very substantial part of the entire claim. Therefore it is not possible to yield to the application which has been so much pressed upon us.

Another matter was dwelt upon at some length. It is said that it must have been contemplated by the parties that questions of this character would be raised, and that, therefore, they must be assumed to have contracted that they would go to arbitration, notwithstanding the fact that in that arbitration the arbitrator would be put in the position of judge and witness. I cannot read anything in the contract to that effect. The parties must be held to have contemplated that they would have to go before a man with views already formed; but to say that they contemplated that he would have put himself in the position of becoming a witness, and that they would submit to his adjudication under those circumstances, is pushing matters to an extreme which is unwarranted. All charges against this gentleman have been withdrawn, and it appears that he has unfitted himself, not because he is dishonest, not because he is prejudiced, not because there is any reason to think that he would not decide the question fairly, but because he has placed himself in this anomalous and embarrassing position, in which it is not fitting that the duty of arbitrating in these matters should be upon him. For

A these reasons I think that the order appealed from is right, and that it should be affirmed, and this appeal dismissed, and I move accordingly.

LORD SHAW.—Where parties have agreed that the undertakers' engineer, whose judgment on details such as additions, alterations, measurements, etc., may, of course, have to be indicated in the course, or at the conclusion, of a contract, is, B nevertheless, to be arbitrator, then by that contract the parties stand bound; for the arbitrator is thus accepted by them as one who will be so guided by the dictates of justice and professional honour as to put aside the bias which is natural in favour of all his preconceived opinions, and to act judicially. As I am following in the steps of those very eminent judges LORD BOWEN and LORD DAVEY, I view such a position as one invoking, and possibly involving on occasions, considerable C trouble. Primâ facie a judge ought to be entirely apart from the subject-matter upon which he adjudicates; primâ facie in a contract of the kind which I have sketched, he is the very opposite of what he ought to be. But the law is now settled in the sense which I have mentioned, and I turn to the action of the legislature. By s. 4 of the Arbitration Act, 1889, where proceedings are taken on a contract containing an arbitration clause, the court, if satisfied that there is no sufficient D reason why the matter should not be referred, may make an order staying the proceedings. Upon that it is always open to the court to affirm that upon the whole there does appear to be sufficient reason why the matter should not be referred. That was the situation of affairs when these proceedings were brought before the master, and he exercised his judgment soundly and wisely in declaring that this was a case in which sufficient reason appeared why the matter should E not be referred.

This contract, which was a large one, for the construction of works at the Avonmouth Docks, was made on March 17, 1902, and it contained the ordinary arbitration clause. The works began on April 3, 1902. It was then discovered that the bottom in which the filling was to be lodged for the construction of the breakwater was very soft. In those circumstances an arrangement was come to, in June, 1902, F between the engineer on the one hand and the contractor on the other that there should be an ascertainment of cubing, not in the soft soil, or in situ, but on ascertainment of weight at the quarry, or on delivery, and factors for the conversion of weight into cubing were fixed. The contract was thus changed to that extent, and by that change the parties continued to be bound during the whole of the proceedings under the contract. It is not unimportant to observe what was G the specified nature of the stone which was to be supplied for the job. The specification is contained in the contract. The material to be supplied at so much per cubic yard was "approved stone filling." Who was the person to judge and approve of that stone filling? It was the engineer, Mr. Squire, who is the arbitrator under the contract. We have the admission that in point of fact every yard of the stone filling was approved by the engineer. Now, six years after some of that stone H filling was made, the argument of the appellants is that this stone filling was not according to contract, but was to some extent composed of stone inferior in size to what was expected. The parties are at arm's length on that problem. Throughout these six years of supply the measurements were all furnished on the footing that the material supplied was the "approved stone" which had been contracted for, and the engineer's certificates were given periodically, and his final certificate I was given, upon that footing. The engineer's position is that a new contract, other than that which has been printed, binds the parties—namely, that there was to be a special exclusion of small rubble. The answer is, "Where is that contract?" and the reply which the engineer makes is that it is nowhere in writing, but was really made by word of mouth. There are cross-averments on that subject which are fundamental. This is not a case in which what is being done is to interpret, or construe, or apply a contract: it is a question whether in point of fact the new contract to which I have referred did or did not come into existence. The engineer says that it did; the contractors say that nothing of the kind happened, and that

they are not to be bound by such a suggestion ex post facto. Who can settle that in fact? It can only be settled by one side and the other being put into the box. But one side is the engineer himself, who must give testimony that a new contract, to the effect which I have stated, did in point of fact come into existence. It appears to me that a clearer case could not arise for relief being granted under s. 4 of the Act of 1889; for this is more than a mere embarrassment of proceedure; it is a contradiction in terms to say that a judge can appear as his own witness, be examined and cross-examined, and pronounce judgment upon his own memory, credibility, or evidence. Such a thing is a travesty of all ideas of judicial decorum.

The second part of the case on which a similar contradiction arises has reference to the pumping spaces. It was feared that under the original plans danger and loss might be caused by the jolting, kissing, or collision of the monoliths as they were being sunk into position. Accordingly, as the contractor contends, a new plan had to be made under which a distance of 5 ft. between each monolith had to be kept. We were informed that that distance has been kept throughout. The engineer, however, maintains that there was no change of plan; the contractors say that there was a change specially ordered and arranged by the engineer. As in the former case, so now it is not a question of construing the agreement; it is a question whether, in point of fact, an agreement on that subject was or was not in existence. The engineer and the contractors are at arm's length on that fundamental issue, and it can only be cleared up by the testimony of the engineer being crossed by the testimony of the contractors. That again supplies those elements of great embarrassment, amounting almost to a denial of justice, if justice is to be secured by proceedings attended by the ordinary means.

But while I thus concur in the decision to be pronounced, I desire to say that I am not prepared, without further argument, to bind myself to the proposition that in a contract of large dimensions an objection to the arbitration of the engineer upon one item is to be considered as affording ground for his entire disqualification as arbitrator under the contract. Cases may be figured in which some items are completely separable from the rest of the contract, and in which the arbitrator might proceed to decide upon the main body of the case, leaving only for determination by someone else the small remaining items. I do not bind myself one way or the other upon that subject, except to say that when the proper time comes, and it is argued, no doubt this House will have to express an opinion upon it.

LORD MOULTON.—I have come to the same conclusion. It has long been a recognised principle of the common law of this country that no man can effectively withdraw himself from the protection of the courts of law, any more than he can effectively deprive himself of his personal freedom; but for many years it has been recognised that there are cases in which a well-selected domestic tribunal, in which the judge is one with a special acquaintance either with the facts of the case, or with the subjects to which the litigation mainly relates, may give more complete and speedier justice than the more elaborate proceedure of the courts of law, based, as they are, upon the principle of complete independence of the tribuanl from the parties and the facts of the case itself, are ever in a condition to render, and, therefore, submissions to arbitration have been more and more respected by the legislature and by the courts which administer that legislation during the last half-century. The great step which gave the present status to arbitration proceedings was taken in the Common Law Procedure Act, 1854. Up to that time a man could repudiate submission to arbitration, no matter how plainly he had contracted to submit, the only remedy against him being an action for damages, which might be utterly ineffective because no damages could be proved. Since the Act of 1854 matters have been in a very different position, when the legislature permitted submission to arbitration subject to the indirect decree of the court and to specific performance. That is that the court has a discretion to refuse its assistance

A to a person who has bound himself to go to a domestic tribunal if nothing has happened which would make it unjust for him to keep his bargain. In that way the right of the court was preserved, and at the same time a contractor was bound to keep the bargain which he had made as to the settlement of disputes. No well-advised corporation would accept the offer of a contractor to carry out important works which it desired to execute, without having an arbitration clause in the B contract, and probably without insisting that the engineer who was employed to superintend the works should be the arbitrator over disputes. I look on this arbitration clause as a substantial portion of the contract, and I think that the courts have acted rightly in requiring that good reasons should be shown why that part of the contract should not be fulfilled.

It must, however, be remembered that these arbitration clauses have been C inserted with due regard to the existing law of the land, and they do not prevent the parties from coming to the courts, but they only give to the courts the power of refusing their assistance in proper cases. Therefore, when it is said that if we refuse to stay an action we are not carrying out the bargain between the parties, that does not describe the position fairly. We are carrying out the bargain between the parties because that bargain, to substitute for the courts of the land D a domestic tribunal, was a bargain into which it was written, by reason of the existing legislation, the condition that it should only be enforced if the courts thought it a proper case for so enforcing it. Therefore, the task which is before the court on an application of this kind appears to me to be this: Here is a portion of the contract which has influenced the conduct of the parties throughout the whole of the execution of the works. Were it not expected that the engineer E would be the tribunal to decide on points arising in the execution of the works much more elaborate precautions would be taken in the way of recording what happened, the whole conduct of the parties would then be changed, and things would be done in a strictly legal form. But so long as the parties have full confidence in the engineer, and are satisfied that he makes himself cognisant of all that happens in the construction of the works, much of that is unnecessary. F Therefore, the courts should start with an earnest desire to keep the parties to the domestic tribunal which was contemplated both in the contract and throughout the execution of the works. But, on the other hand, the legislature has never made it incumbent on a court to drive a man to a tribunal which would presumably be unfair, however much he may have bound himself to accept it; and, therefore, they must ask themselves whether it is fair for this man to be refused the assistance G of the court in settling his dispute. But they must take into consideration that the parties themselves are estopped from saying that the tribunal is unfair in its constitution, because it is the one which they accepted as the basis of the contract.

I admit no secondary rules beyond the two considerations to which I have referred. The court is bound to consider all the circumstances of the case. There may be something in the arbitrator which makes him an unfit person. It may be his H personal conduct and character; it may be the position in which his actions have placed him; they are bound to consider it; but, in considering it, they are bound to say that nothing known at the time of the contract, nothing to be fairly expected from the position of the engineer as arbitrator, nothing of that kind can be alleged as a ground why they should not keep the parties to their bargain, because those things must be supposed to have been in their contemplation at the time when I they entered into the contract. Or, again, there may be questions which, although included in the arbitration clause, were clearly not in the contemplation of the parties, and are not suitable from their nature to come before this domestic tribunal. But that does not exhaust the considerations to which it is legitimate for a court to pay attention in a case like this. They must consider all the circumstances of the case. It may be that they will have to consider the magnitude of the questions, the way in which they have been raised, the circumstances with regard to the claims made, and everything else; they ought to consider them, with a strong bias in favour of maintaining the special bargain between the parties, and, at the same

time, with vigilance to see that they are not driving either of the parties to a tribunal where they will not get substantial justice. In the present case I am not prepared to say that either of the two cases is such that a court would necessarily be bound to refuse to stay the action. In the progress of a long contract many questions would be raised in which matters were settled directly between the engineer and the parties; whether as to the payment for a particular kind of work, or as to the plan to be pursued in its execution, or perhaps as to the setting off of one piece of work against another, all these things being small details which are arranged in the course of the execution of works; and I should turn a deaf ear to the assertion that in the arbitration the engineer would be, with regard to such things, to some extent in the position of a witness. I think that one of the reasons why he is chosen is because he has a personal knowledge of the circumstances of the work. Of course there may be differences of memory with regard to things which have occurred in the course of the execution, and, therefore, I should not be prepared to say that either of these two items as a matter of course drives us to refuse to stay the action. But I look at the type, and to a certain extent I look at the importance of it, not so much because I think that a different law is to be applied to a small item, but from the fact of the way in which the importance of the whole item must weave its history into the whole of the matters which have gone on during the execution of the works, raising questions of the effect of the conduct of the engineer upon what I might call the reasonable understanding of the contractors, and in many other ways making an item of this importance one which it is not suitable to have tried before this particular tribunal; whereas, if it was a mere detail, I should say that it might well be so tried, and it might have been within the intention of the parties that it should be so tried. But there are other things besides the magnitude of the questions, to which, after all, I only attribute a secondary importance. The way in which the disputes arose, and what has happened in connection with them, make me feel that a court may well take the view that there is good reason why this matter should not be referred to arbitration. I agree with cases like *Walmesley* v. *White* (2) and *Joplin* v. *Postlethwaite* (3) that this is a matter of judicial discretion in the courts. I find that the Court of Appeal has, after a very long hearing, unanimously come to the conclusion that there are reasons why this matter should not be referred to arbitration, and the able arguments which your Lordships have heard have not convinced me that the Court of Appeal was wrong in coming to that conclusion; and therefore, not only from my own opinion, but also from a feeling that on a question of judicial discretion one ought not to grant an appeal lightly from a court which has not proceeded on wrong judicial lines, I have come to the conclusion that the appellants have not made out their case, and I concur in the motion which has been made.

LORD PARKER OF WADDINGTON.—I agree. The application in the present case was an application to stay proceedings under s. 4 of the Arbitration Act, 1889, which confers on the court a discretionary power in that behalf, but before exercising this power the court has to be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. In making up its mind on this point the court must, of course, give due consideration to the contract between the parties; but it should always be remembered that the parties may have agreed to the submission precisely because of the discretionary power vested in the court under the Act. They may very well, for instance, have said to themselves: "If in any particular instance it would be unfair to allow the arbitration to which we are agreeing to proceed, we shall have the protection of the court." It is impossible to define, and certainly undesirable to attempt to define with any precision, what circumstances will prevent the court from exercising its discretionary power. It will certainly not be enough to allege that the arbitrator is not an independent person, if the parties, with knowledge that it is so, have nevertheless agreed to accept him as arbitrator. But it may be a different

matter altogether if, by some action of his own, the arbitrator has already committed himself irrevocably to some particular view; and it is certainly a different matter altogether if there be a bona fide dispute involving substantial sums, and a probable conflict of evidence on matters as to which the arbitrator himself will, in the normal course, be the principal witness on one side. In such a case it might lead to a miscarriage of justice if the arbitration were allowed to proceed, and one of the parties were, in consequence, deprived of the chance of testing the truth by means of cross-examination, or if the arbitrator had to determine whether he had himself done anything by which one of the parties might be estopped from raising any particular point.

In the present case, after what has been said, I need not go into the particular circumstances, but the matters at issue are of substance, and the arbitrator is not unlikely to be a proper and necessary witness, and questions of estoppel are not unlikely to be raised. Not only, therefore, am I not satisfied that there is no reason why the matters at issue should not be referred, but I think, on the whole, that such reference might be very unfair to the respondents. With regard to the contention of the appellants that the action should be allowed to proceed only with regard to the two points which were dealt with by the Court of Appeal, that contention was not put forward in the court below, and the appellants have not given us any details of the other matters in dispute, so as to enable us to judge whether or not they can, in fairness, be left to the arbitrator. Therefore, we ought not to accede to that contention, more especially as it would involve a multitude of proceedings, in one of which the arbitrator would be judge, and in others of which he would probably be subject to cross-examination by one of the litigants.

I should like to add one thing more, and that is that, without expressing any definite opinion, I do not think it advisable than any doubt should be thrown upon the practice of the courts below with regard to exercising their discretion under the Arbitration Act. It is, I know, a common thing to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both points are within the reference; and it is obviously a desirable course in many cases for this reason, that very often the matters subject to the reference include both the true construction of the instrument containing the submission, and also various matters of detail, and it may be of account. With regard to the construction of an agreement it is useless to stay the action, because it will only come back to the court upon a case stated; therefore it is more convenient, on a question of construction, to allow the action to proceed; and at the same time, with regard to accounts and matters of detail, to allow the arbitration to proceed. I say this because, not having considered the point definitely, I do not wish to determine any question definitely, but at the same time it is inadvisable to throw doubt, at present, upon what I know personally to be the existing practice of the courts.

Appeal dismissed.

Solicitors: *Robins, Hay, Waters & Hay*, for *E. J. Taylor*, Town Clerk, Bristol; *Beale & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

BELSIZE MOTOR SUPPLY CO. *v.* COX

[KING'S BENCH DIVISION (Channell, J.), November 4, 1913]

[Reported [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151]

Hire-Purchase—Prohibition against hirer parting with possession of article hired —Option to buy for specified sum—Pledge of article by hirer to third person —Action by owner to recover article—Measure of damages.

By the Sale of Goods Act, 1893, s. 25 (2): "Where a person having . . . agreed to buy goods obtains, with the consent of the seller, possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . under any . . . pledge . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner."

The owners of a motor taxi-cab agreed to let and the B. company agreed to hire the cab for twenty-four months at the rate of £15 12s. 2d. per month. The hirers were on the signing of the agreement to pay £50 on account of hire in advance and each subsequent payment in advance, and were not to re-let, sell, or part with the possession of the cab without the previous consent of the owners, and if the hirers should on or before the expiration of the twenty-four months desire to purchase the cab they should be at liberty to do so by "making the amount of the hire paid equal to the sum of £424 11s. 6d." The agreement provided that if the hirers were to make default in payment for one month or were to re-let, sell, or part with the possession of the cab without the consent of the owners, the owners should be authorised to take possession of it. The hirers in breach of the agreement pledged the cab with the defendant, who took the same in good faith and without notice of the agreement. The defendant subsequently refused to return the cab to the owners, and at the time of such refusal there was owing to the owners £58 9s. in respect of the hire. In an action by the owners to recover the cab or its value from the defendant,

Held: the hirers were not persons "having agreed to buy" the cab within s. 25 (2) of the Sale of Goods Act, 1893, and were under no obligation to purchase it: *Helby* v. *Matthews* (1), [1895] A.C. 471, applied; *Lee* v. *Butler* (2), [1893] 2 Q.B. 318, distinguished; they had an option either to purchase the cab by paying the difference between the instalments paid and the agreed sum of £424 11s. 6d., or to return it to the owners and re-claim the £50 paid in advance; the defendant had the same rights as the hirers would have had, and the owners, who had been paid a substantial amount, could not recover the full value of the cab, but only the sum remaining unpaid.

Notes. Distinguished: *Whiteley* v. *Hilt*, [1918] 2 K.B. 115. Considered: *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.*, [1955] 2 All E.R. 557; *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1957] 3 All E.R. 641.

As to hire-purchase agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 510 et seq.; and for cases see 26 DIGEST (Repl.) 658 et seq. For the Sale of Goods Act, 1893, s. 25, see 22 HALSBURY'S STATUTES (2nd Edn.) 1002.

Cases referred to:

(1) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 26 Digest (Repl.) 660, *14*.

(2) *Lee* v. *Butler*, [1893] 2 Q.B. 318; 62 L.J.Q.B. 591; 69 L.T. 370; 42 W.R. 88; 9 T.L.R. 631; 4 R. 563, C.A.; 26 Digest (Repl.) 659, *5*.

(3) *Hull Ropes Co., Ltd.* v. *Adams* (1895), 65 L.J.Q.B. 114; 73 L.T. 446; 44 W.R. 108; 40 Sol. Jo. 69, D.C.; 26 Digest (Repl.) 659, *6*.

(4) *Thompson and Shackell, Ltd.* v. *Veale* (1896), 74 L.T. 130, C.A.; 26 Digest (Repl.) 659, *7*.

(5) *Brierly* v. *Kendall* (1852), 17 Q.B. 937; 21 L.J.Q.B. 161; 18 L.T.O.S. 254; 16 Jur. 449; 117 E.R. 1540; 7 Digest (Repl.) 138, *786*.

(6) *Chinery* v. *Viall* (1860), 5 H. & N. 288; 29 L.J.Ex. 180; 2 L.T. 466; 8 W.R. 629; 157 E.R. 1192; 3 Digest (Repl.) 120, *398*.

(7) *Johnson* v. *Stear* (1863), 15 C.B.N.S. 330; 3 New Rep. 425; 33 L.J.C.P. 130; 9 L.T. 538; 10 Jur.N.S. 99; 12 W.R. 347; 143 E.R. 812; 43 Digest 510, *490*.

Also referred to in argument:

Wylde v. *Legge* (1901), 84 L.T. 121, D.C.; 26 Digest (Repl.) 659, *8*.

Action tried before CHANNELL, J., without a jury.

The plaintiffs in their statement of claim alleged that the defendant had detained and was detaining the plaintiffs' Belsize taxi-cab; and, alternatively, that the defendant had converted to his own use and had wrongly deprived the plaintiffs of their taxi-cab by refusing on June 9, 1913, to deliver up the taxi-cab to the plaintiffs on demand made verbally on that day. The plaintiffs claimed the return of the taxi-cab or £300 its value, and damages for its detention at the rate of £15 12s. 2d. per calendar month from June 9, 1913, until judgment.

By an agreement made on Dec. 10, 1910, between the Belsize Motor Supply Co. of Clayton, Manchester (thereinafter called "the owners") of the one part and the Motor Manufacturing Co. and Alfred Burgess, Ltd., of Church End, Finchley, in the county of Middlesex (thereinafter called "the hirer") of the other part it was provided:

"1. The owners agree to let and the hirer agrees to hire a Belsize motor taxi-cab for the term of twenty-four calendar months from the date hereof at the rate of fifteen pounds twelve shillings and twopence per calendar month. 2. The hirer shall on the signing hereof pay £50 on account of hire in advance and each subsequent payment in advance on the first day of each month during the currency of this agreement, the first of such subsequent payments to become due on the tenth day of January next, and each monthly payment shall be paid to the owners or their agents, the Belsize Motors, Ltd., within seven days after it becomes due without any previous application being made to the hirer for it. 3. If any accident should happen or any repairs be required to the said motor taxi-cab the same shall be made good by the hirer at his own cost and to the satisfaction of the owners or their agents, the Belsize Motors, Ltd., and the hirer agrees to keep such motor taxi-cab fully insured against fire and accident and to apply for and take out and pay for all licences that may be requisite during the time the motor taxi-cab is in his possession, and to produce the policy and the last premium receipt and licence and all renewals thereof to the owners or their said agents on request. 4. The hirer shall not re-let, sell, or part with the possession of the said motor taxi-cab or remove it from No. 3, The Mall, Church End, Finchley, N., without the previous consent in writing of the owners or their said agents. 5. If the hirer should on or before the expiration of the aforesaid period of twenty-four calendar months be desirous of purchasing the said motor taxi-cab he shall be at liberty so to do by making the amount of hire paid on this account equal to the sum of four hundred and twenty-four pounds eleven shillings and sixpence without any deduction whatsoever, and if the hirer shall be desirous of purchasing the said taxi-cab at the end of twelve months he shall be at liberty to do so by making the amount of hire paid on this account equal to the sum of £424 11s. 6d. (four hundred and twenty-four pounds eleven shillings and sixpence) without any deduction whatsoever. 6. Should the hirer make default

in payment of the hire for one calendar month after it becomes due or should he become bankrupt or insolvent or execute any deed of assignment of his property for the benefit of his creditors or make any composition with his creditors or allow judgment to be obtained against him or distraint for rent be levied which is not immediately satisfied or sell or dispose of his business or commit any breach of cll. 3 or 4 hereof, it shall be lawful for the owners or their said agents and they are hereby authorised to take possession (forcible if necessary and for this purpose to break open doors) of the said motor taxi-cab and terminate this agreement, and the moneys then in the hands of the owners or their said agents by virtue hereof, whether by way of hire of otherwise, shall be forfeited by the hirer and become the absolute property of the owners."

Notwithstanding the provision in cl. 4 of the agreement that the hirers should not re-let, sell, or part with the possession of the taxi-cab without the previous consent in writing of the owners of the taxi-cab, the hirers pledged the taxi-cab with the defendant by an agreement in writing made on Aug. 29, 1911, between the hirers (thereinafter called "the company"), of the one part, and Thomas Cox (the defendant), of the other part. This agreement recited that the company had on Aug. 28, 1911, deposited at the Cadogan Garage, Sidney Street, Chelsea, at their risk with the said Thomas Cox the goods comprised in the schedule to the agreement (which included the taxi-cab in question) as security for the payment of the sum of £300 paid by Thomas Cox to the company on the date of the agreement and for the payment of the sum of £60 for interest, and the agreement provided that the company

"Doth hereby agree to pay to the said Thomas Cox the sum of £300 and £60, that is, £360 altogether, on the 28th day of September next. And it is hereby agreed that in case of default in payment the said Thomas Cox after three days' notice in writing, delivered at the last known address of the company, may sell the said goods by auction or otherwise and apply the proceeds of sale in or towards the payment of any money which may be due under this agreement and of the expenses of and consequent on such sale, but until such default is made no such sale is to take place nor is any action or suit to be brought to enforce payment of the said sum of three hundred pounds and interest. And the said company hereby agrees that if the goods be sold and do not realise sufficient to pay the amount then due under this agreement and the costs and expenses they will forthwith pay to the said Thomas Cox whatever sum may remain owing on this agreement with interest thereon until such payment at the rate of twenty per centum per month. And if payment shall not be made of the said sums of three hundred pounds and sixty pounds, that is, three hundred and sixty pounds altogether, on the day hereinbefore appointed the said company agrees to pay interest thereon until payment at the rate of twenty per centum per month. And the said company hereby agrees forthwith to pay to the said Thomas Cox such sum or sums as he may pay for any insurance he may and is hereby empowered to effect on the goods comprised in the said schedule and for warehousing or storage charges on or for the said goods and all other charges or expenses (if any) necessary for the preservation or maintenance of the said security with interest on all such sums expended at the rate hereinbefore mentioned. In witness whereof the said Thomas Cox has hereto set his hand and the said Motor Manufacturing Co. and Alfred Burgess, Ltd., have hereunto caused their common seal to be affixed the day and year first above written."

When this agreement was made in 1911 the hirers owed the plaintiffs a sum in respect of the hire of the taxi-cab, after giving credit for the £50 paid on account on hire in advance, as provided by cl. 2 of the agreement; and in May, 1913, there was due from the company to the plaintiffs a sum of £58 9s. The plaintiffs then

A discovered that the company had pledged the cab to the defendant under the agreement of Aug. 28, 1911. They then wrote to the defendant and the representative of the plaintiffs called upon the defendant and demanded the return of the cab, but the defendant refused to return it. The plaintiffs then on June 13, 1913, served the writ in this action, claiming the return of the taxi-cab or its value and damages for its detention. The defendant in his defence said inter alia that the taxi-cab B was not the property of the plaintiffs and in the alternative he said that he received the taxi-cab from the Motor Manufacturing Co. and Alfred Burgess, Ltd., in good faith and without notice of any claim, lien, or right on the part of the plaintiffs, and that the said company having bought or agreed to buy the taxi-cab from the plaintiffs, he (the defendant) relied upon s. 9 of the Factors Act, 1889, and s. 25 of the Sale of Goods Act, 1893.

C *J. B. Matthews*, *K.C.*, and *G. F. Spear* for the plaintiffs.
Ivor Bowen, *K.C.*, and *Samuel Duncan* for the defendant.

CHANNELL, J.—For the purposes of my judgment I will assume—though it has not been proved and, in the view I take of the matter, it is unnecessary to prove it—that the defendant could prove that he took the taxi-cab in good faith D and without any knowledge of this hire-purchase agreement. There appears to be no doubt about that; he would not be likely to advance money on the taxi-cab without communication with the plaintiffs if he knew of the agreement, as he would be running too much risk. That, however, has not been proved, but in my opinion it would not help him if it had been.

That being so, the first question is whether this case comes within the principle E of *Helby* v. *Matthews* (1), or that of *Lee* v. *Butler* (2), and the subsequent cases which, in reference to the particular agreements before the court in those cases, have followed *Lee* v. *Butler* (2) and not *Helby* v. *Matthews* (1). I do not mean to say that those cases have differed the one from the other, but the courts have said that those particular cases came within the principle of *Lee* v. *Butler* (2), and not within that of *Helby* v. *Matthews* (1). For the decision of the case we have F to see whether in this agreement the Burgess company, the original hirers, have bound themselves to purchase this motor taxi-cab. *Lee* v. *Butler* (2), which was not dissented from in *Helby* v. *Matthews* (1), decided that where the hirer had agreed to pay all the purchase money and had thereby bound himself to pay all the purchase money, that amounted to an agreement to buy, and, therefore, came within the two sections which are in identical terms in the two Acts—namely, G s. 9 of the Factors Act, 1889, and s. 25 (2) of the Sale of Goods Act, 1893. *Helby* v. *Matthews* (1) decided that as in that case the hirer was under no legal obligation to buy, but had an option to return the goods, therefore the case did not come within s. 9 of the Factors Act, 1889, and that having an option to return the goods and not to buy them, he had not "agreed to buy" them.

After those two cases had been decided there came, first, *Hull Ropes Co., Ltd.* H v. *Adams* (3), which came before a Divisional Court, and in which the court reserved their judgment in order to see if the judgment of the House of Lords in *Helby* v. *Matthews* (1) (which either had not been given or, at any rate, had not been reported) would affect the case, and, on considering the report of *Helby* v. *Matthews* (1), came to the conclusion that the facts of the case then before them did not come within *Helby* v. *Matthews* (1), but came within *Lee* v. *Butler* (2). I Then there came *Thompson and Shackell, Ltd.* v. *Veale* (4), which went to the Court of Appeal. There, again, there was, as in *Lee* v. *Butler* (2), an obligation to do something in the way of payment, which amounted to an obligation to purchase. There is no material distinction between these two cases of *Hull Ropes Co., Ltd.* v. *Adams* (3) and *Thompson and Shackell, Ltd.* v. *Veale* (4).

In the present case the facts are peculiar. There was a positive obligation on the hirers, the Burgess company, to pay twenty-four instalments of £15 12s. 2d. each; that amounted to £374 12s. There was also an obligation to pay on the signing of the agreement £50 on account of hire in advance. Leaving out for the

present the obligation to pay that deposit, if the £374 12s. had been the entire sum that would have been necessary to enable the hirers to say that the taxi-cab was their own—that is to say, the whole purchase price—then, according to *Lee* v. *Butler* (2), it would have been an agreement to purchase, but it was not so. The amount of those instalments which the hirers were bound to pay was short of the amount which they would have had to pay in order to buy the taxi-cab, by the exact sum of £50. Then, that being so, if they both made the deposit and paid all the twenty-four instalments, they would have paid up the full amount required to purchase the goods, but they would specifically have paid £50 out of that as a deposit on account of hire in advance. On the face of it, the document gives the hirers at that time, and at any previous time also, the option of purchasing the article by paying up the difference. If they had paid both the whole instalments and the £50 there would have been no difference; and therefore it was an option which, unless the thing was absolutely valueless, the hirers would exercise, unless there was no real option at all. When, however, we recollect that the £50 had only been paid on account of hire, it seems to me that the plaintiffs are right in contending that the hirers did have an option—that they had the option of saying, "Return me my £50; I do not want the article; I do not care to buy it, and I would rather have my £50." Therefore they really had, even in that event, an option. They would have had that option if they had made any default or had made no default, and it appears to me that by reason of the £50 being stated to be specifically on account of hire in advance they would, if they had gone on paying down to the end, still have had that option. Then I think, further, that when the hirers got to their last three instalments—the last three instalments making together rather less than the £50—they would be entitled to say that they did not propose to pay any more, that the plaintiffs had £50 in hand, and that they might take the amount of the last three instalments out of that £50, and then they would have about £4 to pay to the hirers if they did not exercise the option to purchase. It seems to me, therefore, that the hirers really had an option; they never were bound to pay to the owners of the article £424 11s. 6d.; they were only bound to pay £374 12s. if they did not choose to pay any more. That being so, they have not bound themselves to purchase. I think on the whole, though it is rather a fine distinction, that the case comes within *Helby* v. *Matthews* (1), and not within *Lee* v. *Butler* (2), and the subsequent cases following it.

That raises another point, which I think is somewhat more doubtful, as to the measure of damages. That point is whether, as the plaintiff has brought his action in trover, this case comes within the exception to the general rule as to damages in trover, which is that the measure of damages is the value of the goods; but there is an exception to that in cases where the defendant, who has converted the goods, has some interest in them, and then the measure of damages is not the value of the goods, but is the value of the plaintiff's interest in the goods as between himself, the plaintiff, and the defendant. It is in effect giving the defendant credit off the value of the goods for the value of his interest in them. That is what I think the damages are in such a case. There are three leading cases which are authorities for that proposition—namely, *Brierly* v. *Kendall* (5), *Chinery* v. *Viall* (6), and *Johnson* v. *Stear* (7). Those cases have no doubt been acted on many times at Nisi Prius, and I am fairly well satisfied that I myself have acted upon the principle in several cases arising under these hire-purchase agreements. Those cases do not seem to have gone to the Court of Appeal, and I am not aware that there is any really binding decision as to whether or not that doctrine does apply in these cases of hire-purchase agreements. I do not myself know of any, but possibly there may be such cases, and I am disposed to think that I have decided it before.

In my view, the present case comes within the principle of those cases. It is quite true that the defendant, the pledgee under this agreement with the Burgess company, is not in fact the Burgess company, but he has got the taxi-cab from

the Burgess company. It was part of the contract under which the Burgess company held the article that they should not assign it away without the consent of the owners, and it was wrong for them to do so; but, whether that was right or wrong, I think that it gave the present defendant such rights as the Burgess company would have had, and that it did not enable the plaintiffs, who were the owners of the taxi-cab, and who had been paid to a substantial amount, to recover the full amount as against the person who had a right to say that he would keep it by paying the owners a certain sum, some sum less than the value of the goods. I think when a person has bought in fact from another who has such rights, he practically gets those rights, as it has the effect of what is sometimes called a subrogation. Counsel for the plaintiffs answers that by saying that here there has been a forfeiture under the last clause of the agreement for breach of the conditions. Taking the agreement as a whole, I think that the hirers do not lose their rights under cl. 5; that is, their right to purchase at any time before the expiration of the period, merely by making default. If they did, the result would be that if they were late in making any of their payments they would not be able to say to the owners that they would tender the rest. In my view cl. 6 does not take away the rights under cl. 5; cl. 5 and cl. 6 must be construed together to make the whole agreement consistent, and cl. 6 only gives to the owners an option to take possession and to forfeit the goods; but that option to take possession, forcibly if necessary, has to be exercised, and until it is exercised the goods remain with the hirers as they were. I think, therefore, although I agree that there is more doubt about this point than the other, that the right judgment is to give judgment for the plaintiffs, but to give that judgment for the amount of their real loss, and their real loss was the sum which the defendant would have had to pay to get the taxi-cab. As I have said, I feel a good deal of doubt about the matter, but it seems to me to work out substantial justice between the parties.

Judgment for the plaintiffs.

Solicitors: *Richard Furber & Son*; *Humphreys, Phillips & Co.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

HUISH *v.* LIVERPOOL JUSTICES

[KING'S BENCH DIVISION (Ridley, Scrutton and Bailhache, JJ.), October 21, 1913]

[Reported [1914] 1 K.B. 109; 83 L.J.K.B. 133; 110 L.T. 38; 78 J.P. 45; 30 T.L.R. 25; 58 Sol. Jo. 83; 12 L.G.R. 15]

Cinematograph—Licence—Grant—Delegation of powers to justices—Justices' power to state a Case—Summary Jurisdiction Act, 1857 (20 *& 21 Vict., c.* 43), *s.* 2—*Summary Jurisdiction Act*, 1879 (42 *& 43 Vict., c.* 49), *s.* 33 (1)—*Interpretation Act*, 1889 (52 *& 53 Vict., c.* 63), *s.* 13 (11)—*Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2, *s.* 5, *s.* 6.

"Justices sitting in petty sessions" to whom the power of granting cinematograph licences have been delegated by a county council or county borough council under s. 5 of the Cinematograph Act, 1909, have no power to state a Case for the opinion of the High Court under the Summary Jurisdiction Acts [now the Magistrates' Courts Act, 1952].

Boulter v. *Kent Justices* (1), [1897] A.C. 556, applied.

Notes. The Summary Jurisdiction Acts have been repealed and replaced by the Magistrates' Courts Act, 1952. The power of the magistrates to state a Case is contained in s. 87 of the 1952 Act.

Considered: *Stott* v. *Gamble*, [1916–17] All E.R.Rep. 724. Applied: *Newman* v. *Foster* (1916), 86 L.J.K.B. 360.

As to the licensing of premises for cinematograph entertainments, see 32 HALSBURY'S LAWS (2nd Edn.) 72; and for cases see 42 DIGEST 920. For the Magistrates' Courts Act, 1952, s. 87, see 32 HALSBURY'S STATUTES (2nd Edn.) 488.

Cases referred to:

(1) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 16 Digest (Repl.) 114, *6*.

(2) *Hagmaier* v. *Willesden Overseers*, [1904] 2 K.B. 316; 73 L.J.K.B. 638; 90 L.T. 683; 68 J.P. 343; 20 T.L.R. 494; 2 L.G.R. 965; sub nom. *Hogmaier* v. *Willesden Overseers*, 52 W.R. 654; 48 Sol. Jo. 494, D.C.; 33 Digest 311, *298*.

(3) *R.* v. *Bird* (1898), 79 L.T. 359; 62 J.P. 760; 47 W.R. 112; 5 T.L.R. 26; 43 Sol. Jo. 30; 19 Cox, C.C. 180, C.C.R.; 14 Digest (Repl.) 462, *4465*.

Also referred to in argument:

R. v. *Rawlins* (1838), 8 C. & P. 439; 33 Digest 322, *363*.

R. v. *Bell, etc., Justices, Ex parte Flinn & Sons* (1899), 15 T.L.R. 487, D.C.; 33 Digest 410, *1204*.

Case Stated by justices for the city of Liverpool on an application by the appellant for a cinematograph licence.

From the coming into force at the beginning of 1910 of the Cinematograph Act, 1909, which prohibited the exhibition of pictures or other optical effects in which inflammable films were used on public premises which were not licensed for the purpose, the justices for the city of Liverpool had administered the Act in Liverpool, under powers delegated by Liverpool City Council to the justices sitting in petty sessions in accordance with the provisions of the Act. In 1913 the appellant applied to the justices for a cinematograph licence in respect of certain premises, and the licence was granted subject to certain conditions. The appellant objected to the conditions and contended that they were ultra vires, and when the justices overruled his objection he applied to them to state a Case. The justices accordingly stated a Case for the opinion of the High Court, although of opinion that they had no power or jurisdiction to do so under the Summary Jurisdiction Acts. On the hearing of the appeal they took the preliminary point that they had no power to state a Case.

By s. 2 of the Summary Jurisdiction Act, 1857:

"After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a Case setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior courts of law to be named by the party applying; and such party, hereinafter called 'the appellant,' shall, within three days after receiving such Case, transmit the same to the court named in his application, first giving notice in writing of such appeal with a copy of the Case so stated and signed to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent.' "

By s. 33 of the Summary Jurisdiction Act, 1879:

"(1) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a Special Case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the Case, may apply to the High Court of Justice for an order requiring the Case to be stated."

By s. 13 of the Interpretation Act, 1889:

"(11) The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission or under the common law. (12) The expression 'petty sessional court' shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the City of London and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate when sitting in a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace."

By the Cinematograph Act, 1909:

"2 (1). A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid (i.e., the exhibition of pictures or other optical effects by means of a cinematograph, for the purposes of which inflammable films are used) on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine. . . .

5. Without prejudice to any other powers of delegation, whether to committees of the council or to district councils, a county council may, with or without any restrictions or conditions as they may think fit, delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act.

6. The provisions of this Act shall apply in the case of a county borough as if the borough council were a county council, and the expenses of the borough council shall be defrayed out of the borough fund or borough rate."

Humphrey Williams (*Macmorran, K.C.*, and *Doughty* with him) for the appellant. *Bodkin*, for the respondents, took a preliminary objection that the justices had no power to state a Case.

RIDLEY, J.—Everything possible has been said by counsel for the appellant as to the power of the justices to state a Case in the circumstances of this application for a cinematograph licence, but we are all of opinion that the justices had no such power. The whole question arises out of the Cinematograph Act, 1909, which was passed for the purpose of safeguarding the public at cinematograph exhibitions. It is now unlawful to give such exhibitions, if inflammable films are used, in any public place unless a licence has been obtained from the authority constituted by the Secretary of State. The county council is the recognised authority, and by s. 6 of the Act, if it is the case of a county borough, "the provisions of this Act shall apply . . . as if the borough council were a county council." In Liverpool, therefore, which is a county borough, the licensing authority is the borough council, and this is the body which is empowered to grant the necessary licences under s. 2 of the Act. But by s. 5 of the Act the

> "council may, with or without any restrictions as they may think fit, delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act."

A great point has been made, in the course of the argument, of these words "justices sitting in petty sessions." There is, however, no magic in the words. Justices may act in petty sessions in court or out of court, and, when powers are delegated to them as "sitting in petty sessions," they may exercise them not in court and not as a court, but out of court. If the words used had been "justices in a petty sessional court," or "sitting as a court of summary jurisdiction," there might have been a difference. But in my opinion the words here used simply mean that the applicant for a cinematograph licence has no need to go to any special tribunal to obtain what he wants, but he can go and make his application informally to the justices who happen to be sitting in petty sessions. The justices when sitting in petty sessions are not necessarily sitting as a court of summary jurisdiction. They may at one period be sitting as a court of summary jurisdiction and at another as a licensing court. The test to be applied in every case is the business on which they are engaged.

Two cases in particular have been cited, *Hagmaier* v. *Willesden Overseers* (2) and *Boulter* v. *Kent Justices* (1). In the former the justices had been sitting in special petty sessions to review the jury lists, and the question was there raised whether they could state a Case for the opinion of the court. Reliance was there placed on the expression "court of summary jurisdiction" as defined in s. 13 (11) of the Interpretation Act, 1889. This case was subsequent to *Boulter* v. *Kent Justices* (1), where it was held that parties were necessary to the proceedings before the justices could be a court of summary jurisdiction, but it was argued that the Interpretation Act, 1889, took the case out of the decision in *Boulter's Case* (1) and that the appellant was entitled to have a Case stated in spite of it. This is how LORD ALVERSTONE, C.J., dealt with this contention ([1904] 2 K.B. at p. 319):

> "But in order to bring this case within s. 33 of the Act of 1879, it is necessary that the justices should be acting as a 'court of summary jurisdiction.' In order to make that out, counsel for the appellant relies on s. 13 (11) of the Interpretation Act, 1889, which provides that 'the expression "court of summary jurisdiction" shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law.' I think that the meaning of that section is that justices are acting as a court of summary jurisdiction when they are exercising a jurisdiction similar to that conferred by the Summary Jurisdiction Acts, although in fact their jurisdiction in the particular case is derived, not from these Acts, but from some other Act or from the common law. The question we have to consider is whether justices sitting in special petty sessions

under s. 10 of the Juries Act, 1825, are a court of summary jurisdiction within s. 13 (11) of the Interpretation Act, 1889. That question cannot be answered by saying that they are a court of petty sessions. I agree that courts of petty sessions may have powers under the Summary Jurisdiction Acts and may act under those Acts; but courts of petty sessions were perfectly well known at the time of the passing of the Interpretation Act, and, indeed, s. 13 (12) deals with the petty sessional courts and refers to them as being courts of summary jurisdiction consisting of two or more justices sitting in a petty sessional court-house. If it had been intended to provide by the Summary Jurisdiction Act, 1879, that all justices sitting in petty sessions should have power to state a Case, one would have expected to find very different language from that used in s. 33."

The Lord Chief Justice made it quite clear that the peculiar character of the justices sitting in petty sessions depends entirely on the character of the jurisdiction which they are exercising, and not on the source from which the jurisdiction has been derived. And after noticing the object and purview of s. 10 of the Juries Act, 1825, and showing that the justices acting under the provisions of that section were not sitting as a court of summary jurisdiction, he added (ibid. at p. 320):

> "It seems to me that that is a class of jurisdiction which cannot aptly be described as the proceedings of a court of summary jurisdiction. I think it more nearly resembles the proceedings of a public authority, who are allowed to act on their own knowledge without being bound and fettered by the ordinary rules of evidence."

In the present case there is less reason for contending that the justices were sitting as a court of summary jurisdiction than there was in *Hagmaier* v. *Willesden Overseers* (2), because in this case the words used are merely "justices in petty sessions." But, quite apart from that consideration, it seems to me that *Boulter* v. *Kent Justices* (1) decided that, when justices are sitting in this way, and dealing with a matter which is not between parties, i.e., in a matter that raises a question of licensing, or a question of granting or of refusing power to do any particular thing in the interests of the public, then they are not acting as a court of summary jurisdiction. This is made quite clear by the speeches of LORD HALSBURY and LORD HERSCHELL in that case, and their language is of general application. Reference was also made in the same case to the provisions of the Summary Jurisdiction Act, 1879, and it was pointed out that a notice of appeal has to be given by the appellant to the other party to the proceedings. LORD HERSCHELL laid considerable stress on this point. And since it was held that the justices in *Boulter* v. *Kent Justices* (1) were not sitting as a court of summary jurisdiction, I cannot see how the justices in the present case are to be held to be so. For the reasons which I have given I am of opinion that the preliminary objection prevails.

SCRUTTON, J.—I am of the same opinion, but I desire to state my own reasons for my decision, as the case affects a large number of licensing authorities. The question raised is whether the licensing authority for cinematograph shows in the county borough of Liverpool has power to state a Special Case under the provisions of the Summary Jurisdiction Act. The argument put forward, as I understand it, is this: By s. 33 of the Summary Jurisdiction Act, 1879, any person aggrieved who desires to question a determination of a court of summary jurisdiction may ask for a Special Case to be stated, and the justices sitting in petty sessions, to whom the powers of granting licences had been delegated by the borough council of Liverpool, although deriving their powers from the Cinematograph Act, 1909, and not from the Summary Jurisdiction Acts, were nevertheless a court of summary jurisdiction, and had power to state a Case. It is admitted that the borough council of Liverpool would have had no power to state a Case, since if the council had exercised the right of granting licences that would have been simply the carrying out of an administrative function; but it has been argued that a body

which has no power to state a Case can delegate its powers to another body which can state a Case. That would be a remarkable thing. It has been held on many occasions that the powers of licensing are administrative functions, as distinguished from judicial functions, and *Boulter* v. *Kent Justices* (1) is an authority of the House of Lords showing that licensing justices have no power to state a Case, as they are not a court of summary jurisdiction within the Summary Jurisdiction Act, 1879, as governed by the Interpretation Act, 1889. It is to be borne in mind that the fact that a number of justices are sitting at some time as a court of summary jurisdiction does not constitute them a court of summary jurisdiction on all occasions. A court of summary jurisdiction must be one which exercises a judicial, as distinguished from an administrative, function, and the House of Lords held that the licensing authority for public-houses exercises only an administrative function, that it does not constitute a court of summary jurisdiction, and, therefore, that it has no power to state a Case.

The case, as far as licensing is concerned, has been carried further by the decisions in *R.* v. *Bird* (3) and *Hagmaier* v. *Willesden Overseers* (2). The former was a case as to the powers of justices sitting for the purpose of granting licences under the Game Act, 1831, and it was there held that the justices were exercising administrative and not judicial functions, and consequently that they did not constitute a court of summary jurisdiction. The latter was a case as to the powers of justices sitting in a special petty session for the purpose of reviewing the jury lists under the Juries Act, 1825. In the judgments in *Hagmaier* v. *Willesden Overseers* (2) it was made quite clear that there was no special meaning to be attached to the use of the words "special petty sessions." Everything depended on what the justices were doing. If they were exercising judicial functions, they were a court of summary jurisdiction; if they were exercising administrative functions, they were not a court of summary jurisdiction and consequently had no power to state a Case.

Applying these decisions to the present case, how do matters stand? Certain administrative functions have been conferred on a local authority under a special Act, and these administrative functions have been delegated, also under the Act, by the local authority to "justices sitting in petty sessions." What one has to consider is the nature of the powers thus delegated. As the powers would have been administrative if exercised by the council, so they are still administrative when exercised by the justices; and, since there is no power to state a Case by a body which is simply exercising administrative functions, likewise no such power is conferred on "justices sitting in petty sessions" who are acting instead of that body. It seems to me, therefore, in the state of the authorities, that the argument to the effect that, because the borough council of Liverpool delegated their powers under the Cinematograph Act, 1909, to "justices sitting in petty sessions," that fact constitutes the justices a court of summary jurisdiction must fail, and the preliminary objection must be upheld. Whether the power of stating a Case should be conferred in such circumstances as the present is a matter for the consideration of Parliament and not for this court.

BAILHACHE, J.—I am of the same opinion.

Preliminary objection upheld. Appeal dismissed.

Solicitors: *Alfred Harris & Co.*; *Collyer-Bristow & Co.*, for *Edgar C. Sanders*, Liverpool.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

PHILLIPS *v.* BATHO

[KING'S BENCH DIVISION (Scrutton, J.), June 10, 11, 17, 1913]

[Reported [1913] 3 K.B. 25; 82 L.J.K.B. 882; 109 L.T. 315; 29 T.L.R. 600]

B

Conflict of Laws—Foreign judgment—Enforcement—Divorce suit—Judgment for damages by Indian court against co-respondent domiciled in England.

On a petition for the dissolution of a marriage solemnized in India, the parties to which were domiciled in India, the court in India, acting within its jurisdiction, granted a decree for the dissolution of the marriage on the ground of the wife's adultery with the co-respondent in India, and awarded damages against the co-respondent.

The co-respondent was domiciled in England, had left India before the petition was filed, did not return to India, was served with the petition by post in England, and did not appear thereto. In an action by the petitioner in England to recover from the co-respondent the damages awarded by the Indian court,

Held: the judgment for damages, even though it was a judgment in personam, was accessory or ancillary to the judgment dissolving the marriage, which was a judgment in rem within the jurisdiction of the Indian, but not of the English, court, and as the English court would grant similar relief in a suit for dissolution of marriage, the English would recognise and enforce the Indian judgment for damages.

Emanuel v. *Symon* (1), [1908] 1 K.B. 302, distinguished.

Bater v. *Bater* (2), [1906] P. 209, applied.

Notes. The dicta of SCRUTTON, J., in this case as to the lack of jurisdiction of the English court to award damages for adultery where it had no jurisdiction to dissolve the marriage because the parties thereto were not domiciled in England have not been followed: the English court has awarded damages in such cases in *Cope* v. *Doherty* (1858), 2 De G. & J. 614, *Bell* v. *Bell and Cooke* (1932) Times, Jun. 10, and *Jacobs* v. *Jacobs and Ceen*, [1950] 1 All E.R. 96.

Approved: *Gavin Gibson & Co., Ltd.* v. *Gibson*, [1913] 3 K.B. 379. Referred to: *Harris* v. *Taylor*, [1914–15] All E.R.Rep. 366; *Jacobs* v. *Jacobs and Ceen*, [1950] 1 All E.R. 96.

As to enforcement apart from statute of foreign judgments in England, see 7 HALSBURY'S LAWS (3rd Edn.) 140–153, and for cases see 11 DIGEST (Repl.) 502–519.

Cases referred to:

(1) *Emanuel* v. *Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 24 T.L.R. 85, C.A.; 11 Digest (Repl.) 503, *1211*.

(2) *Bater* v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

(3) *Rayment* v. *Rayment and Stuart*, *Chapman* v. *Chapman and Buist*, [1910] P. 271; 79 L.J.P. 115; 103 L.T. 430; 26 T.L.R. 634; 53 Sol. Jo. 721; 11 Digest (Repl.) 473, *1041*.

(4) *Ashbury* v. *Ellis*, [1893] A.C. 339; 62 L.J.P.C. 107; 69 L.T. 159; 9 T.L.R. 517; 1 R. 388, P.C.; 11 Digest (Repl.) 531, *1423*.

(5) *Turnbull* v. *Walker* (1892), 67 L.T. 767; 9 T.L.R. 99; 37 Sol. Jo. 81; 5 R. 132; 11 Digest (Repl.) 506, *1232*.

(6) *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670; 10 T.L.R. 62; 11 R. 340, P.C.; 42 Digest 688, *1032*.

Also referred to in argument: A

Le Mesurier v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

Wilson v. *Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, *1010*.

Jopp v. *Wood* (1865), 4 De G.J. & Sm. 616; 5 New Rep. 422; 34 L.J.Ch. 212; 12 L.T. 41; 11 Jur.N.S. 212; 13 W.R. 481; 46 E.R. 1057, L.JJ.; 11 Digest B (Repl.) 326, *21*.

Re Henderson, Nouvion v. *Freeman* (1887), 37 Ch.D. 244; 57 L.J.Ch. 367; 58 L.T. 242, C.A.; affirmed sub nom. *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189; 38 W.R. 581, H.L.; 11 Digest (Repl.) 513, *1282*.

Raulin v. *Fischer*, [1911] 2 K.B. 93; 80 L.J.K.B. 811; 104 L.T. 849; 27 T.L.R. C 220; 11 Digest (Repl.) 515, *1295*.

Cox v. *Cox and Warde*, [1906] P. 267; 75 L.J.P. 75; 95 L.T. 546; 22 T.L.R. 557; 27 Digest (Repl.) 331, *2745*.

Russell v. *Smyth* (1842), 9 M. & W. 810; 11 L.J.Ex. 308; 152 E.R. 343; 11 Digest (Repl.) 512, *1277*.

Yelverton v. *Yelverton* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L.J.P. & M. D 34; 1 L.T. 194; 6 Jur.N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, *1025*.

Firebrace v. *Firebrace* (1878), 4 P.D. 63; 47 L.J.P.C. 41; 39 L.T. 94; 26 W.R. 617; 11 Digest (Repl.) 342, *127*.

Pemberton v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 47 W.R. 354; 15 T.L.R. 211; 43 Sol. Jo. 365, C.A.; 11 Digest (Repl.) 487, *1115*. E

The Parlement Belge (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516*.

Action tried by SCRUTTON, J., without a jury.

The facts are set out in the judgment.

The Indian Divorce Act, 1869 (Act No. IV), after reciting that it is expedient F to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain courts jurisdiction in matters matrimonial, provided:

"Section 2. This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty. Nothing hereinafter contained shall authorise any court to grant any relief under G this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition; or to make decrees of dissolution of marriage except in the following cases: (a) Where the marriage shall have been solemnised in India; or (b) where the adultery . . . shall have been committed in India; or (c) . . .

"Section 7. Subject to the provisions contained in this Act, the High Courts H and the district courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said courts, are as nearly as may be conformable to the principles and rules on which the court for divorce and matrimonial causes in England for the time being acts and gives relief.

"Section 11. Upon any such petition presented by a husband, the petitioner I shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the court: . . .

"Section 34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner. Such petition shall be served on the alleged adulterer and the wife, unless the

court dispenses with such service, or directs some other service to be substituted. The damages to be recovered on any such petition shall be ascertained by the said court although the respondents or either of them may not appear. . . .

"Section 50. Every petition under this Act shall be served on the party to be affected thereby, either within or without British India in such manner as the High Court by general or special order from time to time directs."

The rules of the High Court provided for the service by post of a summons on a defendant resident out of British India.

A. M. Latter for the plaintiff.

T. C. P. Gibbons for the defendant.

Cur. adv. vult.

June 17, 1913. **SCRUTTON, J.**, read the following judgment.—The plaintiff claims £7,200 against the defendant, being damages awarded to be paid by the defendant to the plaintiff by a judgment of the Bengal High Court in divorce proceedings in which the plaintiff was petitioner and the defendant co-respondent. The defendant replies that before the date when those proceedings commenced he had left India, and the court pronouncing the judgment had, therefore, no jurisdiction over him, and he was not bound by their judgment.

The plaintiff was an Armenian Christian, born in Persia, who for thirty-three years has lived in British India, and who, I find, is domiciled there. He was married to his wife in British India. The defendant is a British subject domiciled in England, who resided in India for nineteen years before Mar. 22, 1910, when he left India for England. On April 20, 1910 the plaintiff caused to be issued in the Bengal High Court a divorce petition against his wife, alleging her adultery with the defendant in India in 1909. The defendant was joined as co-respondent, and served with process by registered post in England. He did not appear; the wife defended. After a lengthy trial adultery was proved, and the defendant was condemned in £7,200 damages. The Indian Divorce Act, 1869, which appears to be clearly within the legislative authority of the Governor-General in Council, authorises the Indian courts, where (a) the petitioner professes the Christian religion and resides in India at the time of presenting the petition; and (b) where the marriage shall have been solemnised in India (both which conditions are fulfilled in the present case), to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce Court in England gives relief. By s. 11 the petitioner is required to make the alleged adulterer a co-respondent, unless in certain excepted cases which do not apply here. By s. 34 the husband may claim damages from the co-respondent. By s. 50 the petition is to be served on any party to be affected thereby, either within or without British India, in such manner as the High Court shall direct. Rule 25 of Ord. V of the High Court rules provides for the service by post of a summons on a defendant resident out of British India. The effect of similar provisions in England has been considered by the President of the Probate Division in *Rayment* v. *Rayment and Stuart* (3), and it appears to follow from that judgment that in British India the judgment in question would be valid, though the defendant, the co-respondent, was not resident there at the time of issuing the petition. The President does not decide what effect the judgment would have in the country where the co-respondent was in fact residing, though he suggests ([1910] P. at p. 291) that as regards Scotland, the country of the co-respondent in *Rayment* v. *Rayment and Stuart* (3), an English judgment could be enforced under the Judgments Extension Act, 1868.

I have now to consider, what the President had not to consider, the effect of such a judgment pronounced in respect of adultery in India against a co-respondent who was not in India at the time of the issue of the petition, when sued on in the

United Kingdom, where he is domiciled, both India and the United Kingdom being under the same Sovereign. In *Emanuel* v. *Symon* (1) the Court of Western Australia had given judgment against Symon, who had been a partner in a mine in Western Australia, for a balance due on a partnership account. The defendant had been in Western Australia, but had left before the issue of the writ. He was served in England apparently under procedure similar to our Ord. XI. The court held that he was not bound by the judgment, which was not that of a court of competent jurisdiction over the defendant, who was not a subject of, or domiciled in, or resident at the issue of the writ, in Western Australia. BUCKLEY, L.J., begins his judgment thus ([1908] 1 K.B. at p. 309):

> "In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (i) where the defendant is a subject of the foreign country in which the judgment has been obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (iv) where he has voluntarily appeared; and (v) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case,"

and then he quotes FRY, L.J.:

> "Where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction."

The judgment in this case cannot be brought within any of the five classes mentioned by BUCKLEY, L.J. It was suggested that it came within the first class, for the defendant was a subject of the Sovereign of India and England, but so was the defendant Symon a subject of the Sovereign of Western Australia and England, and it never occurred to anyone to argue that this brought the case within the first class, nor, though the fact was obvious, did the Court of Appeal treat it as supporting the judgment that they declined to enforce.

Emanuel v. *Symon* (1) clearly binds me to decide this point against the plaintiff. I think it also binds me to hold that the fact that the procedure of service out of the Indian jurisdiction is authorised by the Indian statute does not of itself avail the plaintiff. It is difficult to explain the position and practice of the English courts. Under our Ord. XI. we constantly serve out of the jurisdiction, give judgment against absent foreigners and enforce that judgment against their property within the jurisdiction; but when we are asked to enforce the judgment of a foreign court against an Englishman served in the same way, we decline to do so on the ground that such procedure is contrary to the principles of international law. The reason may be that our English procedure is imposed on us by statute, the justice of which it is useless to question, while the foreign procedure is not so imposed, and is open to question. If the matter were open for consideration, it is clear to anyone who compares our English procedure and the judgment of the Privy Council in *Ashbury* v. *Ellis* (4) with the judgment of WRIGHT, J., in *Turnbull* v. *Walker* (5) and of the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (6) that there is abundant room for argument. But in my view the decision of the Court of Appeal in *Emanuel* v. *Symon* (1) prevents me from considering whether the authorisation of service out of the jurisdiction by the local legislation of the Sovereign of the court pronouncing the judgment makes this judgment binding on the defendant. I have, therefore, only to consider whether there is anything in the peculiar character of divorce procedure which provides a sort of sixth case where foreign judgments may be enforced. I clearly am not bound by the enumeration of the possible cases by the Court of Appeal in *Emanuel* v. *Symon* (1) on points which were not argued before them or involved in their decision.

A One peculiar point at once strikes the inquirer. The judgment of LORD SELBORNE in the *Faridkote Case* (6) is based on the general rule ([1894] A.C. at p. 683),

> "that the plaintiff must sue in the court to which the defendant is subject at the time of suit (actio sequitur forum rei),"

and (ibid. at p. 684),

B

> "when the action is personal, the courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice."

In other words, the English courts will not enforce a German judgment against an Englishman for damages for breach of a contract to be performed in Germany when the Englishman was not in Germany at the issue of the process and has not C submitted to the German jurisdiction, for the Englishman can be sued on the contract in his own courts, which will do justice. But this is not the position here. The English courts will not give damages against this co-respondent, for their jurisdiction is limited to dealing with marriages of persons domiciled in England and the consequences following from the infringement of such marriage ties. The courts of the country where the defendant resides will not do justice. Why? D Because their Sovereign and his legislatures have entrusted marriages made in India between Christian persons domiciled there and the consequences of interference with such marriages to the courts in India. I do not know that the fact that there is no remedy against the defendant in England is conclusive in favour of enforcing a foreign judgment—that is, a judgment of a court not deriving authority from the British Sovereign. One can sue in England for a tort committed E abroad, if it is unlawful both by the law of England and the law of the foreign country where the act was done; not if it is only unlawful by the law of the foreign country but in the case of a foreign judgment for the latter class of tort in proceedings commenced by service out of the foreign jurisdiction regular by the law of the foreign country, I do not think it would be sufficient to say "This must be enforced, for there is no remedy against the defendant for this tort in the forum rei." F The answer would be, "The forum rei does not think such a remedy is required by justice, and therefore does not give a remedy itself or enforce your judgment."

But the case is different here. Judgments as to status, such as marriage and its dissolution, are in rem and binding against all the world. The Sovereign assigns to the courts in the various parts of his dominions the duty of dealing with the validity and dissolution of marriages of persons domiciled within their jurisdiction. G As incidental and accessory to decisions on such status the Sovereign gives to his courts the power of inflicting damages and costs on persons who infringe the status of marriage and cause dissolutions of marriage to be granted. The English court deals with the marriages of English domiciled persons, and inflicts damages on the co-respondent who violates them. The Indian court deals with marriages solemnised in India, or of persons domiciled in India, and inflicts damages on the H co-respondent who violates them. What court has the Sovereign empowered to deal with a co-respondent who violates an English or Indian marriage and leaves the country for another part of the Sovereign's dominions before process is issued against him? According to the defendant here no court can effectively reach him if he has left no property in India. The English court, the forum rei, cannot touch him, for though it gives damages against adulterous co-respondents, it only I deals with marriages of persons domiciled in England and co-respondents who violate such marriages. The Indian court cannot touch him, for though it deals with Indian marriages and dissolves them, it can only touch the co-respondent who violated the marriage if he was in the country when process was issued. The Sovereign, according to the defendant, has failed to do justice here, and the reason for the judgment of the Privy Council in the *Faridkote Case* (6) (that the forum rei which can do justice should be resorted to) does not apply. I do not think the Sovereign has failed to do justice here. Judgments as to status in matters within the jurisdiction of the court are in rem and bind all the world. Marriage and the

dissolution of marriage are matters of status, and the judgments of the Indian court in this matter are in rem and bind the world: (*Bater* v. *Bater* (2)). Ancillary and accessory to the judgment as to status is the power to give damages against the person causing the marriage to be dissolved. This power is recognised both by the English courts and the Indian courts. The English courts will recognise and enforce the judgments as to status of the Indian courts in matters within their jurisdiction, and I think they will also recognise and enforce the ancillary orders as to damages, such as they themselves make in similar cases.

For these reasons I think that, in the case at any rate of courts within the British Empire, a sixth case must be added to the list in *Emanuel* v. *Symon* (1). It is not necessary for the purposes of this case to do more than say that the new class at least includes judgments in proceeding in personam ancillary or accessory to the dissolution of a marriage of persons domiciled or otherwise by command of the Sovereign within the jurisdiction of the court pronouncing the decree, where both the court pronouncing the judgment and the court enforcing it are courts of the same Sovereign, and where the court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary, though it can grant similar ancillary relief in the case of dissolution of marriages which are assigned to its jurisdiction by the Sovereign. It is perhaps dangerous to lay down wider rules than are required by the case before the judge, especially if he suggests his rules are exhaustive; but I am disposed to think that the class may be expressed more widely, at any rate where the court pronouncing and the court enforcing judgment are courts of the same Sovereign, as a class where the judgment is one in rem affecting status or a judgment in personam ancillary or accessory to such judgment in rem, and regularly pronounced by the law of the courts which have given it. The effect of "foreign" judgments on movables within their jurisdiction, as against the title of persons who have no notice of the proceedings and who have by the law of the court enforcing a good title to the movables, may come within this class. For the above reasons I give judgment for the plaintiff for the amount claimed, with costs.

Judgment for the plaintiff.

Solicitors: *Loughborough, Gedge, Nisbet & Drew*; *R. B. Wheatly, Son & Daniel*, for *Cobbett, Wheeler & Cobbett*, Manchester.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re WILSON. TWENTYMAN *v.* SIMPSON

[CHANCERY DIVISION (Parker, J.), January 15, 16, 1913]

[Reported [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 57 Sol. Jo. 245]

Charity—Cy-près doctrine—Gift for particular purpose, defined by directions of great particularity—No general charitable intention.

A testator by his will, dated Dec. 4, 1870, made certain gifts to his three daughters and then to their issue. All three daughters died leaving no issue, for which contingency the will provided as follows: "But if all die without issue I give and bequeath the whole principal of their fortunes, the interest to be given to a schoolmaster as a part of his salary. The school and the house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampool's Common (now inclosed). The master to teach five days in a week and six hours each day, Saturday and Sunday excepted; to be able to instruct the pupils in Latin and Greek, and all the elementary parts of mathematics both pure and mixed; the Wampool scholars to go free, the rest to pay the master 2s. 6d. each at Midsummer and Christmas as quarter money. . . ." The testator died on Dec. 7, 1870, and his last surviving daughter died on May 6, 1912, at which date the circumstances were such that a scheme giving effect to any of the directions set out above was impracticable.

Held: the directions as to the application of the gift were of such particularity that a general charitable intention for the promotion of higher education in the particular district could not be inferred, and so the gift could not be applied cy-près, and it, therefore, failed.

Biscoe v. *Jackson* (1) (1887), 35 Ch.D. 460, distinguished.

Notes. Considered: *Re Packe, Sanders* v. *A.-G.*, [1918] 1 Ch. 437; *Re Royce, Turner* v. *Wormald*, [1940] 2 All E.R. 291. Applied: *Re Good's Will Trusts, Oliver* v. *Batten*, [1950] 2 All E.R. 653. Considered: *Re North Devon and West Somerset Relief Fund Trusts, Hylton* v. *Wright*, [1953] 2 All E.R. 1032; *Re Ulverston and District New Hospital Building Fund*, [1956] 3 All E.R. 164. Referred to: *Re Monk, Giffen* v. *Wedd*, [1927] All E.R.Rep. 157; *Re Lucas, Sheard* v. *Mellor*, [1947] 2 All E.R. 773; *Re Pochin, Midland Bank Executor and Trustee Co.* v. *Godkin*, [1948] Ch. 182, n.; *Re Hillier, Hillier* v. *A.-G.*, [1954] 2 All E.R. 59; *Re Sanders' Will Trusts, Public Trustee* v. *McLaren*, [1954] 1 All E.R. 667; *Re Cooper's Conveyance Trusts, Crewson* v. *Bagot*, [1956] 3 All E.R. 28.

As to failure of the specified charitable object, see 4 HALSBURY'S LAWS (3rd Edn.) 285; as to consequent application cy-près, see ibid. 319–322; and for cases see 8 DIGEST (Repl.) 459–469.

Case referred to:

(1) *Biscoe* v. *Jackson* (1887), 35 Ch.D. 460; 56 L.J.Ch. 540; 56 L.T. 753; 35 W.R. 554; 3 T.L.R. 577, C.A.; 8 Digest (Repl.) 461, *1621*.

Also referred to in argument:

Corbyn v. *French* (1799), 4 Ves. 418; 31 E.R. 213; 8 Digest (Repl.) 421, *1112*.

Cherry v. *Mott* (1836), 1 My. & Cr. 123; 5 L.J.Ch. 65; 40 E.R. 323; 8 Digest (Repl.) 431, *1221*.

Re White's Trusts (1886), 33 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 34 W.R. 771; 2 T.L.R. 830; 8 Digest (Repl.) 447, *1399*.

Re University of London Medical Sciences Institute Fund, Fowler v. *A.-G.*, [1909] 2 Ch. 1; 78 L.J.Ch. 562; 100 L.T. 423; 25 T.L.R. 358; 53 Sol. Jo. 302, C.A.; 8 Digest (Repl.) 388, *811*.

Re Rymer, Rymer v. *Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22, C.A.; 8 Digest (Repl.) 420, *1108*.

Re Davis, Hannen v. *Hillyer*, [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317; 8 Digest (Repl.) 417, *1086*.

A.-G. v. *Guise* (1692), 2 Vern. 266; 23 E.R. 772; 8 Digest (Repl.) 461, *1613*.

Mills v. *Farmer* (1815), 1 Mer. 55; 19 Ves. 483; 35 E.R. 597, L.C.; 8 Digest (Repl.) 466, *1659*.

Bunting v. *Marriott* (1854), 19 Beav. 163; 52 E.R. 311; 8 Digest (Repl.) 421, *1114*.

A.-G. v. *Price*, [1912] 1 Ch. 667; 81 L.J.Ch. 317; 106 L.T. 694; 76 J.P. 209; 28 T.L.R. 283; 10 L.G.R. 416, C.A.; order of C.A. discharged by consent sub nom. *Price* v. *A.-G.*, [1914] A.C. 20; 83 L.J.Ch. 415; 109 L.T. 757; 78 J.P. 153; 12 L.G.R. 85, H.L.; 8 Digest (Repl.) 463, *1639*.

Summons.

The testator, Daniel Wilson, by his will, dated Dec. 4, 1870, directed all the money he possessed at his death, together with his life assurance moneys, to be invested in specified shares, and bequeathed it, in the event, which happened, of all his three daughters dying without issue, after the death of the survivor, as follows:

"But if all die without issue, I give and bequeath the whole principal of their fortunes, the interest to be given to a schoolmaster as a part of his salary. The school and the house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampool's Common (now inclosed). The master to teach five days in a week and six hours each day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek, and all the elementary parts of mathematics, both pure and mixed, the Wampool scholars to go free, the rest to pay the master 2s. 6d. each at Midsummer and at Christmas as quarter money. And I appoint the rector of Aikton and rector of Kirkbride for the time being and their successors for ever. All my library books, maps, &c., after the death of my three daughters to the school for the benefit of the pupils. The master to have two weeks' holiday at Midsummer and three at Christmas, and be allowed to take boarders, the rooms of the house to be over the school."

By a further clause he appointed trustees and executors.

The testator died on Dec. 7, 1870, leaving his three daughters surviving him. All died spinsters, without issue, the last of them on May 6, 1912. The whole estate of the testator amounted to under £1,000. Aikton was a small rural parish containing some four villages and a few hamlets. At the date of the testator's will there were only two schools in the parish, but in 1900 a third school was built by voluntary subscription, and was about a mile and a quarter from the site suggested in the testator's will, the master of which school was able to teach the necessary Latin, Greek and mathematics required in the testator's will.

This summons was taken out by the trustees of the will to determine whether on the true construction of the will, and in the events which had happened, the bequest was a good, charitable, and valid gift. If it was, how the gift should be dealt with; if it was not, whether the testator died intestate in respect of the property comprised in the bequest.

Lavington for the trustees of the will.

A. Grant, K.C., and *Heckscher* for the next-of-kin.

A. R. Reeve for the trustees of the gift.

C. H. Sargant for the Attorney-General.

PARKER, J.—For the purposes of this case I think the authorities must be divided into two classes. First of all we have a class of cases where in form the

A gift is given for a particular charitable purpose, but it is possible taking the will as a whole to say that, notwithstanding the form of the gift, the paramount intention according to the true construction of the will is to give the property in the first instance for a general charitable purpose rather than a particular purpose and to graft on to the general gift a direction as to the desire or intention of the testator or to the manner in which the general gift is to be carried into effect. In that B case, though it is impossible to carry out the precise directions on ordinary principles, the gift for the general charitable purpose will remain and be perfectly good, and the court by virtue of its administrative jurisdiction can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but simply a general direction as to the application of the fund for the charitable purposes in question. Then there is the C second class of cases where, on the true construction of the will, no such paramount general intention can be inferred, and where, the gift being in form a particular gift, a gift for a particular purpose, and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion it is simply a question of the construction of a particular instrument whether a particular case D falls within one of those classes of cases or within the other. I have to determine whether the gift which is in form a particular gift in this will is a gift really for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the money shall be in any event applied for some more general charitable purpose even if the particular form which is prescribed, and the particular mode of application which is prescribed, E cannot be carried into effect. One of the peculiarities of this case is that there is nothing, as far as I can gather, in any other part of the will which will throw any light upon the question; and I simply have to consider what is the construction of the gift.

As I have said in the course of the argument, if I am to take a certain view as to the decisions in *Biscoe* v. *Jackson* (1) it almost necessarily follows that any F particular gift may, at any rate, if particularity is not very great, be construed as a general gift for the purposes of deciding whether it falls within one class or whether it falls within the other class. Of course, where there is a particular gift for charitable purposes, if you come to analyse the intentions of the testator, the intentions of the testator must have been to benefit those persons, who will, if the particular direction is carried out, take the benefit of that particular direction, G and if from that you draw an inference that the general and paramount intention was to benefit that class, it enables you to reject the particularity of the gift, and to give effect to that general intention as opposed to the particular intention. While I do not think that that can be the effect of *Biscoe* v. *Jackson* (1), it seems to me that there the court was able to gather—whether I should have come to the same conclusion myself I do not know, because there are different cases where H different minds may very well take different views—that there was a general paramount interest for the benefit of the poor of a certain parish, although the particular directions were to establish a soup kitchen and a cottage hospital for the parish. That being the case, though a soup kitchen and cottage hospital appeared to be, or might have been, impossible, they held there was a good charitable gift for the benefit of the poor of the parish. Of course, as was pointed out in the judgments, I there the particularity of the directions which were to establish a soup kitchen and hospital for the parish, and not necessarily in the parish, was not very great, and it was rather intimated in the judgments that the more particular the directions which are given, the less is it possible to construe the will as indicating a paramount intention, or exhibiting a paramount intention to benefit a particular class of persons.

In this case, after the death of these ladies, and in the event of their dying without issue, the testator gives and bequeaths the whole of the principal of their

fortunes upon trusts which he declares in these words: A

> "The interest to be given to a schoolmaster as a part of his salary. The school and his house to be erected by voluntary subscription from the land-owner and proprietors of the period of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampools commons (now inclosed). The master to teach five days in a week and six hours each B day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek and all the elementary parts of mathematics both pure and mixed, the Wampool scholars to go free, the rest to pay the master 2s. 6d. each at Midsummer and Christmas as quarter money."

It appears to me that those directions are of great particularity. In the first place, the interest has to be paid to a schoolmaster; in the second place, the schoolmaster C must be the schoolmaster of the school and have a house which is to be erected by voluntary subscriptions; in the third place, the house was to be placed at a particular spot; in the fourth place, directions are given as to the nature of the instruction which the schoolmaster is to give to his pupils; in the fifth place, certain classes of pupils are to be admitted free and others are to pay certain fees. It appears to be the fact that there is no reasonable chance of any such school being D established at or in the neighbourhood of the place where the testator directs the school to be built, and it is in substance admitted on behalf of the Attorney-General that no scheme giving effect to any of these directions is practicable, and that unless I can construe the gift as a gift for the promotion of higher education in the district, the gift must necessarily be incapable of taking effect.

The question I have to decide is whether I can reject these particular directions E as not forming part of the essence of the gift, and, in the words of the cases, hold that there is a general charitable intention for the promotion of higher education in the particular district. I have nothing to help me in the will, and I have only to construe these particular directions. In my opinion I am not justified in holding that I can disregard all the particular directions and construe the gift as a general gift for the purposes of promoting higher education. It appears to me that what F the testator had in mind is that he is dissatisfied with the provisions for education in the district in certain respects, and he desires that subscriptions shall be collected for the building of a school to teach certain other subjects which have not hitherto been taught, and if those subscriptions are made and a school house and a school are built, then he desires to endow or provide a salary for the schoolmaster, subject to certain conditions as to certain scholars being admitted free and otherwise. G I think that the whole gift is really in the testator's mind dependent on it being feasible and possible to carry out these particular directions, and that I am not justified in reading into the will from this gift any such general intention of promoting higher education in the district or neighbourhood of the district as is suggested.

That being the case, it appears to me that this particular will falls under the H class of cases where the gift given for a particular purpose (without there being any paramount intention to benefit any particular class of charitable objects) fails if the particular directions fail, and not within the other class of cases where one can direct a scheme because of a paramount intention to benefit a particular class of objects. It is just possible that it might be practicable to carry out some of the directions or perhaps to frame a scheme which I might consider as in substance I giving effect to the particular direction. At present the parties are most of them agreed that it will not be possible to do so, but the Attorney-General must have an opportunity of considering whether on the judgment I have given he would like to have an inquiry whether and how far it will be possible to carry out the directions contained in the will with regard to the contents of cl. 6 of the will relating to the fortunes of the ladies. The drawing up of the order must be postponed for a month, and if the Attorney-General desires in the meantime to have that inquiry, and signifies his desire, I will direct the inquiry to be made. If he does not ask

for the inquiry I will declare that, in the events which have happened, according to the true construction of the will the gift has failed. The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitors: *Gray, Mownsey & Fuller*, for *Mownsey, Bowman & Graham*, Carlisle; *Arthur Toovey*, for *Rigg & Strong*, Wigton; *Treasury Solicitor.*

[*Reported by* T. D. LA P. BERESFORD, ESQ., *Barrister-at-Law.*]

DUNNE *v.* BYRNE

[PRIVY COUNCIL (Lord Macnaghten, Lord Shaw, Lord Mersey and Lord Robson), January 18, 19, February 22, 1912]

[Reported [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324]

Charity—Religion—Gift "to the Roman Catholic Archbishop of Brisbane to be used and expended as such archbishop may judge most conducive to the good of religion in his diocese."

A testator by his will left the residue of his estate to the "Archbishop of B. and his successors to be used and expended, wholly or in part, as such archbishop may judge most conducive to the good of religion in this diocese."

Held: purposes might be "most conducive to the good of religion" in a particular diocese without being charitable or religious, and, therefore, the gift was not limited to religious purposes and was not a good charitable gift, and was void.

Notes. Considered: *Re Rees, Jones* v. *Evans*, [1920] All E.R.Rep. 138; *Re Williams, Public Trustee* v. *Williams*, [1927] 2 Ch. 283; *Re Bain, Public Trustee* v. *Ross*, [1929] All E.R.Rep. 387. Followed: *Re Jackson, Midland Bank Executor and Trustee Co.* v. *Archbishop of Wales*, [1930] 2 Ch. 389. Considered: *Re Schoales, Schoales* v. *Schoales*, [1930] 2 Ch. 75. Applied: *Re Stratton, Stratton* v. *A.-G.*, [1930] 2 Ch. 151. Considered: *Re Ward, Public Trustee* v. *Ward*, [1941] Ch. 308; *Williams' Trusts Trustees* v. *I.R.Comrs.*, [1947] 1 All E.R. 513. Distinguished: *Baddeley* v. *I.R.Comrs.*, [1953] 2 All E.R. 233. Considered: *Re Spensley's Will Trusts, Barclays Bank, Ltd.* v. *Staughton*, [1954] 1 All E.R. 178; *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525. Distinguished: *Re Rumball, Sherlock* v. *Allan*, [1955] 3 All E.R. 71. Considered: *Re McDougall's Trust Fund, Thompson* v. *Fitzgerald*, [1956] 3 All E.R. 867; *Re Smith's Will Trusts*, [1961] 3 All E.R. 824. Referred to: *Re Stratton, Knapman* v. *A.-G.*, [1930] All E.R.Rep. 255; *Farley* v. *Westminster Bank, Ltd.*, [1939] 3 All E.R. 391; *Re Norman, Andrew* v. *Vine*, [1947] 1 All E.R. 400; *Ellis* v. *I.R.Comrs.* (1949), 93 Sol. Jo. 678; *Gilmour* v. *Coats*, [1949] 1 All E.R. 848; *Oxford Group* v. *I.R.Comrs.*, [1949] 2 All E.R. 537; *Associated Artists, Ltd.* v. *I.R.Comrs.*, [1956] 2 All E.R. 583.

As to gifts for religious purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 221, 222; as to non-charitable public objects, see ibid. 241; as to manifesting a clear charitable intention, see ibid. 267–269; and for cases see 8 DIGEST (Repl.) 331–342, 387–399.

Cases referred to:

(1) *Re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 24 T.L.R. 760; 52 Sol. Jo. 622, C.A.; 8 Digest (Repl.) 396, *883*.

(2) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, *86*.

(3) *Baker* v. *Sutton* (1836), 1 Keen, 224; 5 L.J.Ch. 264; 48 E.R. 292; 8 Digest (Repl.) 399, *901*.

(4) *James* v. *Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, *839*.

(5) *Re White, White* v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, 150.

Also referred to in argument:

Thornber v. *Wilson* (1855), 3 Drew. 245; 24 L.J.Ch. 667; 25 L.T.O.S. 309; 19 J.P. 675; 3 W.R. 388; 61 E.R. 897; subsequent proceedings (1858), 4 Drew. 350; 28 L.J.Ch. 145; 32 L.T.O.S. 115; 22 J.P. 769; 4 Jur.N.S. 1268; 7 W.R. 24; 62 E.R. 135; 8 Digest (Repl.) 428, *1180*.

Re Delany, Conoley v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 326, *89*.

Re Garrard, Gordon v. *Craigie*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 23 T.L.R. 256; 51 Sol. Jo. 209; 8 Digest (Repl.) 391, *847*.

Grimond v. *Grimond*, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882*.

Townsend v. *Carus* (1844), 3 Hare, 257; 13 L.J.Ch. 169; 8 Jur. 104; 67 E.R. 378; 8 Digest (Repl.) 331, *127*.

Wilkinson v. *Lindgren* (1870), 5 Ch. App. 570; 39 L.J.Ch. 722; 23 L.T. 375; 18 W.R. 961, L.C.; 8 Digest (Repl.) 395, *880*.

Hunter v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 387, *805*.

Re Freeman, Shilton v. *Freeman*, [1908] 1 Ch. 720; 77 L.J.Ch. 401; 98 L.T. 429; 24 T.L.R. 300; 52 Sol. Jo. 262, C.A.; 8 Digest (Repl.) 388, *813*.

Re MacDuff, MacDuff v. *MacDuff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

Appeal from a judgment of the High Court of Australia (Griffith, C.J., Barton and Isaacs, JJ., O'Connor and Higgins, JJ., dissenting), reported 11 C.L.R. 637, reversing in part a judgment of the Supreme Court of Queensland (Cooper, C.J., Real, Chubb, Power and Shand, JJ.), on a Special Case.

The appellants, the Roman Catholic Archbishop of Brisbane (Dr. Dunne) and the Rev. Father Fouhy, were the executors under the will of the Rev. Denis Joseph Byrne, a Roman Catholic priest, of Dalby, Queensland, who died in November, 1907, leaving considerable property. The respondent was one of the next-of-kin of the testator. The questions for decision in the suit arose on the construction of two clauses in the will of Father Byrne. They were: (i) Is the bequest of the testator's furniture, library, horse, buggy, and harness to his successor in charge of the Roman Catholic Mission at Dalby, and on his death or removal to his successor, and so on, for their use, void as being contrary to the rule against perpetuities? and (ii) Is the bequest that the residue of the testator's estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors, to be used and expended wholly or in part as the archbishop may judge most conducive to the good of religion in this diocese, void as not being a good charitable gift or for uncertainty or otherwise? The Supreme Court of Queensland decided that neither of the bequests was void. The respondent then withdrew his opposition to the first of the contested bequests, but appealed to the High Court of Australia as to the application of the residue. The High Court, by a majority of three judges to two, reversed the decision of the Supreme Court on that point, and declared that the bequest of the residue to the archbishop and his successors was void as not

being a good charitable gift. From that judgment Archbishop Dunne and his co-executor appealed.

Buckmaster, *K.C.*, and *J. F. W. Galbraith* for the appellants.

Danckwerts, *K.C.*, *P. F. Wheeler* and *T. P. Power* (of the Colonial Bar) for the respondent.

Feb. 22, 1912. **LORD MACNAGHTEN.**—The Reverend Denis Joseph Byrne, a Roman Catholic clergyman in charge of the Roman Catholic Mission at Dalby, in the State of Queensland, disposed by will of the residue of his estate in the following words:

> "I will and bequeath . . . that the residue of my estate shall be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in this diocese."

Is that a good charitable bequest? In the Supreme Court of Queensland the full court unanimously held that it was. The High Court of Australia, by a majority of three judges to two, declared the bequest void. The learned counsel for the appellants began by insisting that inasmuch as according to the authorities a gift to a Roman Catholic archbishop and his successors, without more, would be a good charitable gift, there is to be found in this will an overriding charitable intention sufficient to supply the lack of certainty—if lack of certainty there be—in the declared object of the bequest. Their Lordships have no hesitation in rejecting this argument. A similar argument was advanced and rejected in the Court of Appeal in England in *Re Davidson*, *Minty* v. *Bourne* (1). It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee. On the other side it was contended that even if the trust declared be a charitable trust the words "wholly or in part" leave it uncertain how much of the subject-matter of the gift is impressed with the trust, because the trustee is authorised to apply part only of the residue to the purpose specified in the will. This argument was not accepted in the Supreme Court of Queensland. But it certainly found favour with some of the learned judges in the High Court. It seems to their Lordships that on the true construction of the will the effect of the words in question is merely to give the trustee a discretionary authority to break in upon the capital on the trust fund. The fund is to be "used"—an expression which seems to imply that the capital is to be kept intact—and (if the trustee thinks fit) "expended in whole or part" in promoting the object of the trust.

Passing from these two points we come to the real difficulty of the case. The fund is to be applied in such manner as the "archbishop may judge most conducive to the good of religion" in his diocese. It can hardly be disputed that a thing may be "conducive," and in particular circumstances "most conducive," to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious. In *Cocks* v. *Manners* (2) there is the well-known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conducive to the good of religion," but one which is certainly not charitable. In the present case the learned Chief Justice suggests by way of example several modes in which the fund now in question might be employed so as to be conducive to the good of religion though the mode of application in itself might have nothing of a religious character about it. As to what may be considered "most conducive to the good of religion" in the diocese of Brisbane the archbishop is given an absolute and uncontrolled discretion. That being so, apart from a certain line of decisions cited at the Bar, there would be an end of the case. The language of the bequest (to use LORD LANGDALE, M.R.'s words in *Baker* v. *Sutton* (3) (1 Keen at p. 233)) would be "open to such latitude

of construction as to raise no trust which a Court of Equity could carry into execution." If the property, as SIR WILLIAM GRANT, M.R., said in *James* v. *Allen* (4) (3 Mer. at p. 19), A

"might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute."

It was said: this is a gift for religious purposes, and the court has held over and over again that a gift for religious purposes is a good charitable gift. That is true; but the answer is: this is not in terms a gift for religious purposes, nor are the words synonymous with that expression. Their Lordships agree with the opinion of the Chief Justice that the expression used by this testator is wider and more indefinite. On this part of the case *Re White*, *White* v. *White* (5) was referred to. There the gift was "to the following religious societies, viz:—" Then there was a blank. The intended societies were not specified. KEKEWICH, J., held that there was an intestacy. The Court of Appeal held that the gift was in substance a gift to "religious societies for religious purposes," and, so holding, they considered themselves bound by a long stream of authority to determine that the bequest was a good charitable gift. Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All that they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although LINDLEY, L.J., did observe ([1893] 2 Ch. at p. 51) that "a 'religious' society may or may not be a 'charitable' society in the sense in which that expression is used." In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical with the expression "for religious purposes," and therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. But having regard to the great divergence of judicial opinion in this case and the fact that the difficulty was occasioned by the testator himself, they think that the costs of both parties as between solicitor and client ought to be paid out of the estate. B C D E F

Solicitors: *Whites & Co.*; *Trinder, Capron & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re PEEL. Ex Parte HONOUR

[KING'S BENCH DIVISION (Phillimore, J.), July 24, 1913]

[Reported 109 L.T. 223; 57 Sol. Jo. 730]

Bankruptcy—Proof—Debt contracted after commission of act of bankruptcy—Notice to creditor of act of bankruptcy—Onus of proof—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 37 (2).

By s. 37 (2) of the Bankruptcy Act, 1883: "A person having notice of any act of bankruptcy available against the debtor shall not prove . . . for any debt or liability contracted by the debtor subsequently to the date of his so having notice."

Where there is a rejection of a proof of a debt by a trustee in bankruptcy on the ground that the creditor, at the time of the debt, had notice of an available act of bankruptcy against the debtor, the onus is on the trustee to prove that the creditor had such notice.

Re Tollemache, Ex parte Revell (1) (1884), 13 Q.B.D. 727, distinguished.

Notes. The Bankruptcy Act, 1883, s. 37 (2), has been replaced by the Bankruptcy Act, 1914, s. 30 (2).

As to proof of debts contracted with notice of act of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 465; and for cases see 4 DIGEST (Repl.) 358 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to :

(1) *Re Tollemache, Ex parte Revell* (1884), 13 Q.B.D. 727; 54 L.J.Q.B. 92; 51 L.T. 379; 33 W.R. 289, C.A.; 4 Digest (Repl.) 358, *3257*.

Action tried by PHILLIMORE, J.

Benjamin Honour, the receiver in lunacy of the estate of Victor Honour, appealed from the rejection on April 17, 1913, by the trustee in the bankruptcy of Sir Robert Peel of a proof for £9,505 15s. lodged by him on behalf of Victor Honour against the bankrupt's estate. The debtor committed an act of bankruptcy on Oct. 5, 1897, upon which a petition was presented against him on Dec. 8, 1897, and a receiving order made on Feb. 23, 1898. Between Jan. 11, 1898, and Feb. 16, 1898, the debtor had various financial transactions with Victor Honour, and in consideration of various loans gave Honour a promissory note and five bills, amounting in all to £3,500. Victor Honour became of unsound mind in 1902 and his son was appointed receiver of his estate, and, in going through the lunatic's papers, discovered the bills and the promissory note. As there was no prospect of a dividend before 1912, no proof was lodged until Nov. 27, 1912. The trustee rejected the proof on the ground that the debts had been contracted after the commission of an act of bankruptcy to which his title related back, and that the creditor had not discharged the onus of proving that he had no notice of the act of bankruptcy at the time of entering into these transactions with the debtor.

Frank Mellor for the creditor.
G. C. Rankin for the trustee.

PHILLIMORE, J.—The question here arises out of a rejection of a proof by the trustee on the ground that it comes within s. 37 (2) of the Bankruptcy Act, 1883, and the point to be decided is whether the onus of proving or disproving notice of the act of bankruptcy lies upon the creditor or upon the trustee. *Re Tollemache, Ex parte Revell* (1) decided that, under s. 165 of the Bankruptcy Act, 1849, the onus of proof lay upon the creditor, but there is a distinction in the language of that section and s. 37 of the Act of 1883. There is no provision in the later Act corresponding to s. 165. Under the old law the creditor could only prove for certain debts under certain conditions; the Act of 1883 made all debts provable, except certain excepted debts, the result being to shift the onus of proof

from the creditor, who had had to show his position to be exceptional, to the trustee, who now has to show that the creditor is for some reason disentitled. *Re Tollemache* (1) could only be supported by the language of the Act of 1849; it is no longer an authority on the point under the present law. The onus is upon the trustee, in objecting to this proof on the ground of notice, to prove such notice by the creditor, and, as he is unable to do so, the proof must be admitted.

Solicitors: *Tarry, Sherlock & King*; *Colyer & Colyer.*

[*Reported by* D. W. Corrie, Esq., *Barrister-at-Law.*]

LEDBURY RURAL DISTRICT COUNCIL *v.* COLWALL PARK GRANITE QUARRIES CO., LTD.

[King's Bench Division (Scrutton, J.), March 19, 1913]

[Reported 108 L.T. 1002; 77 J.P. 198; 11 L.G.R. 841]

Highway—Damage—Extraordinary traffic—Excessive weight—Heavy traction engine and trucks on agricultural road—"Extraordinary expenses" of maintenance—Computation—Validity of surveyor's certificate—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.*, *c.* 77), *s.* 23.

A highway, which was an ordinary agricultural road in 1907, led by a zigzag route with steep gradients for one mile down the Malvern Hills to a village and four miles beyond. It had some metalling resting on a clay bottom in the centre and owing to the gradients was expensive to maintain. In 1907 a stone quarry was opened on the hills and stone was conveyed down the road to a station by a tractor drawing a truck weighing altogether twelve tons when loaded, seventy-six tons being conveyed each day. In 1911 this was supplemented by a heavy traction engine with two trucks, weighing altogether 25½ tons loaded and carrying eighty-two tons a day, which involved the local authority in considerable extra expense in maintaining the road. There were no comparable highways in the district.

Held: (i) the extra traffic in 1911 was "extraordinary traffic" of "excessive weight," in respect of which the quarry owners were liable for the "extraordinary expenses" of maintenance of the highway in which the local authority were involved under the Highways and Locomotives (Amendment) Act, 1878, s. 23: *Hill* v. *Thomas* (1), [1893] 2 Q.B. 333, applied.

(ii) the sum for which the quarry owners were liable was the excess of the cost of repair of the section of road used over the amount which would have been spent on repairing damage done by other traffic over the period, excluding any additional cost due to improvement of the road.

A surveyor's certificate under s. 23 of the Highways and Locomotives (Amendment) Act, 1878 [now s. 62 of the Highways Act, 1959], that extraordinary expenses amounting to £770 have been incurred by his council "in repairing the highway known as main road No. 6" by reason of damage done by excessive weight and extraordinary traffic during a specified period is valid although only part of the highway was damaged and was the subject of a claim in an action, since it was not necessary to certify the exact parts of the highway where the damage was done.

Notes. The Highways and Locomotives (Amendment) Act, 1878, s. 23, is now repealed and replaced by the Highways Act, 1959, s. 62.

A Referred to: *Weston-Super-Mare U.D.C.* v. *Butt*, [1919] 2 Ch. 1.

As to extraordinary traffic and excessive weight on a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 153; and for cases see 26 DIGEST (Repl.) 437. For the Highways Act, 1959, s. 62, see 39 HALSBURY'S STATUTES (2nd Edn.) 480.

Cases referred to:

B (1) *Hill* v. *Thomas*, [1893] 2 Q.B. 333; 62 L.J.M.C. 161; 69 L.T. 553; 57 J.P. 628; 42 W.R. 85; 9 T.L.R. 647; 4 R. 565, C.A.; 26 Digest (Repl.) 439, *1370.*

(2) *Whitebread* v. *Sevenoaks Highway Board*, [1892] 1 Q.B. 8; 61 L.J.M.C. 59; 65 L.T. 855; 56 J.P. 214, D.C.; 26 Digest (Repl.) 442, *1398.*

(3) *Tonbridge Highway Board* v. *Sevenoaks Highway Board* (1884), 49 J.P. 340; C sub nom. *Tunbridge Highway District Board* v. *Sevenoaks Highway District Board*, 33 W.R. 306, D.C.; 26 Digest (Repl.) 442, *1397.*

(4) *Shepton Mallet R.D.C.* v. *John Wainwright & Co.* (1908), 72 J.P. 459; 24 T.L.R. 894; 6 L.G.R. 1121; 26 Digest (Repl.) 442, *1400.*

(5) *Williams* v. *Davies* (1880), 44 J.P. 347, D.C.; 26 Digest (Repl.) 443, *1403.*

(6) *Geirionydd R.D.C.* v. *Green*, [1909] 2 K.B. 845; 78 L.J.K.B. 1039; 100 L.T. D 418; 73 J.P. 137; 25 T.L.R. 282; 7 L.G.R. 308, C.A.; 26 Digest (Repl.) 439, *1372.*

(7) *Billericay R.D.C.* v. *Poplar Union and Keeling*, ante p. 603, [1911] 2 K.B. 801; 80 L.J.K.B. 1241; 105 L.T. 476; 75 J.P. 497; 55 Sol. Jo. 647; 9 L.G.R. 796, C.A.; 26 Digest (Repl.) 452, *1478.*

Action under s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

E The plaintiffs were the authority which had undertaken to repair the highway in question. The defendants were the proprietors of a stone quarry situate at West Malvern, near to the district road belonging to the Malvern Urban District Council. The plaintiffs claimed from the defendants the sum of £770 10s. 2d., the amount of extraordinary expenses incurred by the plaintiffs in repairing the Ledbury and Malvern main road, in the parish of Colwall, by reason of the damage thereto F caused by excessive weight passing along the road and extraordinary traffic thereon in October, November, and December, 1911, and January, February, March, and April, 1912, such weight having been conducted thereon by or in consequence of the order of the defendants. The sum of £770 10s. 2d. was certified by the plaintiffs' surveyor to be the amount of the extraordinary expenses.

G By the Highways and Locomotives (Amendment) Act, 1878:

"23. Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight H passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

I By s. 12 (1) (c) of the Locomotives Act, 1898, s. 23 was amended as follows:

"There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

Arthur Powell, K.C., and *John G. Hurst* for the plaintiffs.

Hugo Young, K.C., and *Micklethwait* for the defendants.

Cur. adv. vult.

Mar. 19, 1913. **SCRUTTON, J.,** read the following judgment.—Ledbury Rural District Council sued Colwall Park Granite Quarries Co., Ltd., for extraordinary

expenses amounting to £770 10s. 2d., occasioned in repairing damage caused by extraordinary traffic between October, 1911, and April, 1912, inclusive, conducted by the order of the defendants on highway No. 6, which leads from the Wyche Cutting on the Malvern Hills to the Cross-in-Hands on the way to Ledbury.

The highway in question, the nature of which appears from the maps and scale of gradients put in evidence, zigzags steeply down from the Wyche Cutting, including a very sharp pitch, known as Goodwin's Pitch, of a gradient of 1 in 6, and then continues in a very gradual descent to the village of Colwall. The length of this section is one mile, two furlongs, ninety-five yards, or 1·36 miles. It continues from abreast of Colwall Station to the Cross-in-Hands—a distance of 3·85 miles; its total length being five miles, one furlong, ninety yards, or 5·2 miles. Its character in 1907 was that of an ordinary agricultural road, similar to the ordinary roads in Herefordshire when on the level; metalled in the centre to a depth of from 4 in. to 6 in., but with no regular and constant foundation, and unmetalled at the sides. The metal rested on clay. Where the road zigzagged down the Malvern Hills, it was expensive to maintain, as springs oozed from the hills and trickled over the clay beds. It was cut up by the skids of horse vehicles, and in places where it was overhung by trees it was generally wet. It was used by ordinary agricultural traffic, by tradesmen's carts, and, to some extent, by holiday traffic from Malvern. When houses were built in Colwall, there was carting of bricks and timber. It was not used for carting stone except very occasionally, and then only in horse vehicles.

At the end of 1907, the predecessors of the defendants opened a quarry on the Herefordshire side of the Malvern Hills, but outside the Ledbury district, and, therefore, where it contributed nothing to the highway rates of the district. They began carting from this quarry to Colwall Station at first by tractors, or light steam motors, followed by one truck. These ran daily, making four journeys each way. The weight of the tractor was five tons, and of the truck two tons, and its load five tons, making twelve tons loaded and seven tons light, or seventy-six tons a day. From 1907 to 1910 damage was done to the road, but the plaintiffs and the predecessors of the defendants, desiring to avoid litigation, came to a compromise without prejudice to the rights of either party, by which the predecessors of the defendants on two occasions supplied from the quarry a considerable quantity of stone free for the repair of the road. In 1910 the defendants became the owners of the quarry, laid a tramway down the hill, and used a private road of theirs, by which a good deal of their traffic was diverted from the road in question. The tramway, however, was not very convenient and broke down, and in October, 1911, the defendants began to use the highway in question, not only by their tractor and truck as stated above, but also for the first time by a traction engine weighing eleven and a half tons drawing two trucks, each weighing seven tons loaded and two tons light, making two journeys each way, or eighty-two tons a day in addition to the seventy-six tons a day of the tractors. The traffic thus amounted to 158 tons a day, or over 900 tons a week. The winter in question was a wet winter; the road, as appears by the photographs, became badly cut up, and after temporary patching in the worst places it underwent extensive repairs in the summer of 1912. The surveyor gave a certificate under s. 23 of the Act of 1878, which was to the following effect:

"I the undersigned Ronald George Gurney of Ledbury, being the duly appointed surveyor for the Rural District Council of Ledbury in pursuance of the provisions of the Highways and Locomotives (Amendment) Act, 1878, do hereby certify that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses amounting to seven hundred and seventy pounds ten shillings and twopence (£770 10s. 2d.) have been incurred by the Rural District Council of Ledbury in repairing the highway known as main road No. 6, being the Ledbury and Malvern main road situate in the parish of Colwall in the county of Hereford, which highway the Rural District

A Council of Ledbury is liable to repair, by reason of the damage done to the said highway caused by excessive weight passing along the same and extraordinary traffic thereon during the months of October, November, and December, 1911, and January, February, March, and April, 1912, and that such weight and traffic have been conducted by or in consequence of the order of the Colwall Park Granite Quarries Co., Ltd., of Colwall in the county of
B Hereford."

The present action was then commenced on Oct. 3, 1912, for the amount mentioned in the certificate.

Counsel for the defendants argued in the first place that the action would not lie, because the certificate did not comply with the section in respect that, while
C the certificate was as to highway No. 6, the statement of claim was for only part of highway No. 6, between Colwall Station and the Wyche Cutting. I think this objection fails. If the surveyor certifies that extraordinary expenses have been incurred in repairing a highway, it is not necessary for him, in my opinion, to certify the exact parts of the highway where the damage was done. It would be different if it appeared that he was certifying as to one part of the highway, and
D the claim was made as to another part; but I find in this case that the surveyor in his certificate was considering the stretch of road mentioned in the statement of claim, the damage done thereon, and the expenses in relation thereto.

Counsel next contended that there was here no extraordinary traffic. Stone quarries, he argued, were a well-known and ordinary industry of the Malvern Hills, and the locomotives and tractors used by his clients were authorised by statute.
E On this question I have to apply the definition of "extraordinary traffic" given by BOWEN, L.J., in *Hill* v. *Thomas* (1) ([1893] 2 Q.B. at pp. 340, 341). It will include:

> "All such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair"

F —a traffic which is so exceptional as

> "substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common."

This definition has been repeatedly applied to cases where a natural product of the soil begins to be carried for mercantile purposes along a road on which, up to that
G time, it has not been carried, or by methods hitherto unused. See as to stone, *Whitebread* v. *Sevenoaks Highway Board* (2), *Tonbridge Highway Board* v. *Sevenoaks Highway Board* (3), and *Shepton Mallet R.D.C.* v. *John Wainwright & Co.* (4); and as to timber, *Williams* v. *Davies* (5) and *Geirionydd R.D.C.* v. *Green* (6). I find that the defendants' traffic was "extraordinary traffic" within the definition given in *Hill* v. *Thomas* (1). Stone had never been carried on this road so con-
H tinuously and in such quantities before 1908, and what happened between 1908 and 1911 did not make the traffic "ordinary." In fact, the traction engine with two trucks had never been used before the period in question in this action, and I have no doubt that the greater part of the damage was done by this traction engine with its train, which I find to be not only "extraordinary traffic" but also "excessive weight."

I There remains the difficult question as to the amount of extraordinary expenses. The actual expense of repair of highway No. 6 in the summer of 1912 was £1,270. The average cost of repair per mile of the other highways in the plaintiffs' district for the preceding three years was £52 14s. 2d. per mile, or for highway No. 6 (5·2 miles), £274, which, being deducted from £1,270, gave £996; but the surveyor thought (and I agree with him) that as these highways were not comparable with, and were much cheaper to maintain than, the road in question, it was not fair to take the ordinary expenditure on these other roads as the limit, in excess of which the defendants' liability began. The average expenditure on highway No. 6

throughout for the preceding three years was £106 a mile, or £553 11s. 8d., which the surveyor reduced to £500 odd by deducting, for some reason I did not succeed in understanding, the wages during the winter months, leaving £1,270 less £500, i.e., £770, the amount claimed in this action. But I was of opinion this was not fair to the defendants. They only used the section Wyche–Colwall, which, owing to its gradients and substratum, was ordinarily a far more expensive section than the section Colwall to Cross-in-Hands. The surveyor estimated that, while £106 was the three years' average per mile for the whole road, £80 was the same average per mile for the section Cross-in-Hands–Colwall, which figures, as a matter of arithmetic, give about £180 per mile as the cost of the ordinary repairs for the section Colwall to The Wyche. This is more than confirmed by the surveyor's evidence that, of 2,622 tons of stone used in repairing the road from April to September, 1912, 2,237 tons were used from Colwall to The Wyche, and 385 tons from Colwall to Cross-in-Hands.

After carefully reading the judgments of the Court of Appeal in *Billericay R.D.C.* v. *Poplar Union and Keeling* (7), especially that of BUCKLEY, L.J., and bearing in mind that (as I find) there are no other comparable highways in the district, I hold that the principle to apply is to hold the defendants liable for the excess of the amount actually spent in repairing the damage done to the section of the road actually used by the defendants over the amount which would have been spent in repairing the damage done to the same section of the road by the other traffic (other than the defendants' traffic) which actually used it during the period complained of. I have taken into account in the calculation that, as the winter was a wet winter, the ordinary expenditure on repairs would have been higher; that the ordinary expenditure on repairs had been steadily rising for some years owing to the extra burdens of traffic and higher standard of road maintenance, and also, as I find to be the case, that the road was not merely repaired but improved, and that the defendants ought not to pay for betterment as distinct from repair, or for work so far as it will lessen the ordinary cost of repairs in subsequent years. I have carefully considered the evidence on this principle, and I assess the extraordinary expenses due to the damage caused by the extraordinary traffic of the defendants at £440, for which I give judgment.

Judgment for plaintiffs.

Solicitors: *Williamson, Hill & Co.*, for *Russell & Co.*, Ledbury; *Upton & Co.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

GELMINI *v.* MORIGGIA AND ANOTHER

[KING'S BENCH DIVISION (Channell, J.), April 24, 1913]

[Reported [1913] 2 K.B. 549; 82 L.J.K.B. 949; 109 L.T. 77; 29 T.L.R. 486]

Limitation of Action—Promissory note—Last of days of grace a Sunday—Writ issued six years from following Monday—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*R.S.C., Ord.* 64, *r.* 3.

A promissory note made on Dec. 20, 1905, was payable nine months after date, and, the last of the days of grace being Sept. 23, 1906, a Sunday, it became due and payable on the previous day, Sept. 22, 1906. An action on the note was brought by a writ issued on Monday, Sept. 23, 1912.

Held: the action was barred by s. 3 of the Limitation Act, 1623, since

(i) the cause of action arose on the expiration of Sept. 22, 1906, on which day default in payment occurred, and "six years after such cause of" action expired on Sept. 22, 1912, and

(ii) the time limit laid down by the Act of 1623 was not extended by R.S.C., Ord. 64, r. 3, providing for the doing of any act or the taking of any proceeding on a Monday where the time for it expired on a Sunday.

Morris v. *Richards* (1) (1881), 45 L.T. 210, applied.

Notes. The Limitation Act, 1623, s. 3, is now repealed and replaced by the Limitation Act, 1939, s. 2 (1).

Not followed: *Marren* v. *Dawson Bentley & Co., Ltd.*, [1961] 2 All E.R. 270.

As to the running of time in limitation of actions, see 24 HALSBURY'S LAWS (3rd Edn.) 193 et seq.; and for cases see 32 DIGEST 327.

Case referred to:

(1) *Morris* v. *Richards* (1881), 45 L.T. 210; 46 J.P. 37; 32 Digest 330, *162*.

Also referred to in argument:

Kennedy v. *Thomas*, [1894] 2 Q.B. 759; 63 L.J.Q.B. 761; 71 L.T. 144; 42 W.R. 641; 10 T.L.R. 572; 38 Sol. Jo. 616; 9 R. 564, C.A.; 1 Digest (Repl.) 24, *179*.

Reeves v. *Butcher*, [1891] 2 Q.B. 509; 60 L.J.Q.B. 619; 65 L.T. 329; 39 W.R. 626, C.A.; 32 Digest 337, *210*.

Lester v. *Garland* (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, *203*.

Russell v. *Ledsam* (1845), 14 M. & W. 574; 14 L.J.Ex. 353; 5 L.T.O.S. 495; 9 Jur. 557; 153 E.R. 604; affirmed sub nom. *Ledsam* v. *Russell* (1847), 16 M. & W. 633, Ex. Ch.; (1848), 1 H.L.Cas. 687, H.L.; 42 Digest 950, *235*.

Goldsmiths' Co. v. *West Metropolitan Rail. Co.*, [1904] 1 K.B. 1; 72 L.J.K.B. 931; 89 L.T. 428; 68 J.P. 41; 52 W.R. 21; 20 T.L.R. 7; 48 Sol. Jo. 13, C.A.; 42 Digest 950, *237*.

Browne v. *Black*, [1911] 1 K.B. 975; 80 L.J.K.B. 758; 104 L.T. 392; 27 T.L.R. 314; 55 Sol. Jo. 350, D.C.; affirmed, [1912] 1 K.B. 316; 81 L.J.K.B. 458; 105 L.T. 982; 28 T.L.R. 119; 56 Sol. Jo. 144, C.A.; 42 Digest 145, *1436*.

Action on a promissory note.

The plaintiff claimed to recover from the defendants the sum of £403 10s. for principal and interest due on a joint and several promissory note for £313 10s., dated Dec. 20, 1905, payable nine months after date to the plaintiff or his order. In the alternative, the plaintiff claimed to recover the same sum of £313 10s. under a written agreement between the plaintiff and the defendants, dated Sept. 23, 1906 (in mistake for Sept. 24, 1906), whereby the defendants, in consideration of time being given to them by the plaintiff, agreed to pay the sum by instalments or

otherwise as therein mentioned. Amongst other defences the defendants pleaded that A

"the alleged debt which is claimed in respect of the said alleged promissory note did not accrue within six years before this action, and is barred by the Limitation Act, 1623, s. 3."

The date on which the last of the three days of grace expired was Sunday, Sept. 23, 1906. The writ in the action was issued on Monday, Sept. 23, 1912, and the question was whether the action was barred by s. 3 of the Limitation Act, 1623, by reason of the writ having been issued one day too late. By s. 3 of the Limitation Act, 1623: B

"All actions of debt grounded upon any lending or contract without specialty . . . shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), . . . within six years next after the cause of such actions or suit, and not after." C

By R.S.C., Ord. 64, r. 3:

"Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open." D

Moresby for the plaintiff.

T. M. Healy, K.C., and *H. Nield* for the defendants.

E

CHANNELL, J.—In this case on the preliminary point as to the Statute of Limitations I have a very clear opinion. It would, I think, be a remarkable thing if counsel for the plaintiff had for the first time discovered a new point on the Limitation Act, 1623, under which an action of debt must be commenced within six years next after the cause of such action or suit, and not after. In *Morris* v. *Richards* (1), tried before Mr. Commissioner WILLS, there were two points to be F considered. One was whether, when the last day of grace for the payment of a note falls on a Sunday, although the note is payable on the Saturday, the cause of action does not arise until the expiration of the third day of grace. That case was decided in 1881, and at that time the days of grace depended on mercantile usage, but they have since become statutory by s. 14 of the Bills of Exchange Act, 1882. In that case the note was made at three months on Mar. 11, 1874, and, G therefore, including the three days of grace, it was primâ facie due on June 14, 1874, that day being a Sunday. The writ in the action bore date June 14, 1880, and the defence was that the cause of action did not accrue within six years before the commencement of the action, and it was held by the commissioner that the action was barred. In giving his judgment he said (45 L.T. at p. 211):

"It must be taken now to be established as a part of the law mercantile, H that a bill or note which, according to its terms, imports an obligation to pay on a given date, really obliges the party to pay in ordinary cases on the third day after such date; but looking to the way in which that proposition, now one of law, has come to be one of that nature, it is evident that it merely expresses the result of the general practice of mercantile man, and that the proposition must be taken subject to such limitations as are established by I equally universal practice. One of those limitations is that, if the third day be a Sunday, the bill or note is payable on the previous day. Primâ facie, the obligation to pay on the third day in the one case, and on the second in the other, must rest upon grounds of precisely the same kind—namely, it must depend upon the universal practice, that payment which primâ facie would have to be made on a given day was made at a date later by three days in the one case, and by two in the other. I see, therefore, no ground primâ facie for supposing that different consequences are to follow if the third day in the one

case, or the second day in the other, be allowed to elapse without payment having been made. In either case, primâ facie the cause of action is complete, and it lies upon those who set up the distinction to establish it."

That was so decided in 1881, and in the next year that rule became statutory law by the Bills of Exchange Act, 1882, s. 14; and it well may be that the legislature in passing that Act had that decision of Mr. Commissioner WILLS in mind. That decision does not seem to me to have much bearing on the present case except that it was there assumed by everyone that, if a writ had been issued in the same circumstances as in the present case—viz., on the Monday—it would have been too late.

Another point was decided by Mr. Commissioner WILLS. The promissory note in that case fell due on June 14, 1874, but as that day was a Sunday and the note was payable on the previous day, he held that the cause of action arose as soon as June 13, 1874, was passed, and therefore the latest day on which the writ could be issued in order to comply with the statute would be June 13, 1880, but it so happened that June 13, 1880, was a Sunday, so that no writ could be issued on that day, and the writ was accordingly issued on the Monday—June 14, 1880. The commissioner held that R.S.C., Ord. 57, r. 3, then in force, which is in identical terms with the present r. 3 of Ord. 64, did not apply in that case, as the provision in that rule was never intended to have any effect on the Statute of Limitations. That decision may possibly not be binding on me, but as it agrees with my own view of the matter, I shall follow it.

The next point is what is the true rule for the computation of the six years under this Statute of Limitations. An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to make a payment on a certain day has the whole of that day whereon to make the payment; and therefore until that day has expired no action can be brought as the cause of action is not complete. The action can be brought on the next day to that on which the payment was due, as at the commencement of that day the cause of action is complete. Now, the statute says that the action must be brought "within six years next after" the cause of action. The cause of action arises on the expiration of the day on which payment ought to have been made, and consequently an action can be brought on the day following the day on which payment ought to have been made, and that day on which the action can first be brought is the first day of the six years within which the action must be brought. Supposing that the day on which an action can be brought is a Thursday and that the period for bringing the action is a week, then the creditor could bring the action at any time up to and including the following Wednesday, but he could not bring it on the following Thursday, as there are not two Thursdays in the week. The rule is the same where the period of limitation is six years.

In the present case the time for the payment of this promissory note expired at the end of Sept. 22, 1906, and after that time the cause of action was complete and an action could have been brought on the note for the first time on Sept. 23, 1906; but as there cannot be seven Sept. 23s in six years, the writ which was issued on Sept. 23, 1912, was outside the six years. I do not think that the rule which has been referred to, that the day on which the cause of action arises is to be excluded from the computation, applies to exclude the first day on which the action can be brought. It is the previous day which is excluded, the day on which payment must be made and on the expiration of which the cause of action becomes complete. Therefore, as far as the cause of action arose on the promissory note, I am of opinion that the writ was issued one day too late.

[The case was then tried on the alternative cause of action, and judgment given for the plaintiff for £313 10s.]

Solicitors: *W. R. Bennett & Co.*; *Turner & Osborn.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

Re METER CABS, LTD.

[CHANCERY DIVISION (Swinfen Eady, J.), October 25, 26, 1911]

[Reported [1911] 2 Ch. 557; 81 L.J.Ch. 82; 105 L.T. 572; 56 Sol. Jo. 36; 19 Mans. 92]

B

Solicitor—Lien—Extent of lien—Arbitration—Sums recovered for company—Winding-up of company—Solicitor not appointed solicitor to liquidators—Lien on fund recovered by his exertions for costs of arbitration and cost of establishing his claim.

C

A solicitor was employed in an arbitration by a company for which he recovered certain moneys. While the arbitration was in progress the company went into liquidation, and the committee of inspection did not appoint the solicitor as solicitor to the liquidators.

Held: though he had not been appointed solicitor to the liquidators, he had a common law lien on the fund recovered by his exertions in the arbitration, and that right extended to the cost of establishing his claim.

D

Re Born (1), [1900] 2 Ch. 433, applied.

Notes. Referred to: *Meguerditchian* v. *Lightbound*, [1916–17] All E.R.Rep. 565; *Re Eden, Watkins* v. *Eden*, [1920] 2 K.B. 333.

As to common law lien on funds recovered, see 36 HALSBURY'S LAWS (3rd Edn.) 180–184; and for cases see 42 DIGEST 273 et seq.

E

Cases referred to:

(1) *Re Born, Curnock* v. *Born*, [1900] 2 Ch. 433; 69 L.J.Ch. 669; 83 L.T. 51; 49 W.R. 23; 44 Sol. Jo. 611; 42 Digest 299, *3327*.

(2) *Jones* v. *Turnbull* (1837), 2 M. & W. 601; 5 Dowl. 591; Murp. & H. 106; 6 L.J.Ex. 166; 1 Jur. 638; 150 E.R. 897; 42 Digest 275, *3093*.

(3) *Emden* v. *Carte* (1881), 19 Ch.D. 311; 51 L.J.Ch. 371; 45 L.T. 328; 30 W.R. 17, C.A.; 42 Digest 297, *3315*.

F

(4) *Guy* v. *Churchill* (1887), 35 Ch.D. 489; 56 L.J.Ch. 670; 57 L.T. 510; 35 W.R. 706; 3 T.L.R. 600, C.A.; 42 Digest 296, *3302*.

(5) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L.R. 9 Eq. 367; 39 L.J.Ch. 492; 22 L.T. 195; 18 W.R. 444; 10 Digest (Repl.) 923, *6312*.

(6) *Re Hill* (1886), 33 Ch.D. 266; 55 L.T. 104, C.A.; 42 Digest 211, *2363*.

G

Adjourned Summons.

On Oct. 8, 1909, Walker was instructed to act as solicitor for the company in an arbitration, and he recovered £45 on Jan. 18, 1910, and £29 15s. in June, 1911. On Jan. 29, 1910, a resolution was passed for the voluntary winding-up of the company, and Murgatroyd was appointed liquidator. On Feb. 16, Corfield was appointed liquidator in the place of Murgatroyd. On Feb. 17, a summons was taken out, and on Mar. 15 by a consent order Murgatroyd and Corfield were appointed joint liquidators, and five people were appointed a committee of inspection. At a meeting of the committee of inspection on Mar. 17, a proposal was made that Walker should be appointed solicitor to the liquidators, but other solicitors were appointed. Walker sent in two bills for £60 16s. 8d. and £23 16s. 4d., and a charge of £4 9s. 6d. for letters and attendance.

H

I

H. M. Giveen for the applicant.

Harman for Walker.

Cur. adv. vult.

Oct. 26, 1911. **SWINFEN EADY, J.,** held on the evidence that the retainer was proved, and continued: At common law a solicitor is entitled to a particular lien on a fund recovered by his exertions, and this lien prevails notwithstanding the client's bankruptcy.

In *Jones* v. *Turnbull* (2) an uncertificated bankrupt brought an action for work done by him, and on a reference a certain sum was found to be due to him which his assignees claimed. On a fresh action being brought it was held that the defendant might call on the assignees by an interpleader rule to support their claim, and that upon such rule the lien of the bankrupt's attorneys for their costs in the former action and the reference ought to be satisfied out of the amount claimed. In *Emden* v. *Carte* (3) an undischarged bankrupt brought an action for work done, and it was held that his solicitor was entitled to a charging order for costs up to the time of the intervention of the trustee. In *Guy* v. *Churchill* (4) an action dismissed with costs succeeded on appeal, and the plaintiff became bankrupt; the solicitors for the plaintiff were held to have a lien on the costs repaid for the difference between party and party and solicitor and client costs. COTTON, L.J., said (35 Ch.D. at p. 491):

> "The lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it";

and LINDLEY, L.J., said:

> "It is right that they who get the benefit of the recovery of money should bear the expense of recovering it."

In BUCKLEY ON COMPANIES (9th Edn.), p. 398, it is stated that:

> "The solicitor to the liquidator is, semble, entitled to a lien for his costs on a fund recovered in the winding-up through his instrumentality,"

and he cites *Re Massey* (5). In *Re Born* (1) a summons for a charging order was taken out, and FARWELL, J., said ([1900] 2 Ch. at p. 435):

> "It is very material to consider whether if I make a charging order, I am thereby giving the applicants a new right, or merely enabling them more cheaply and speedily to enforce a right they already possess. Now, it is plain that they have a common law lien on the company's share of the fund in court for the amount of their costs. It would be monstrous if this were not so, as the company could never have recovered the money without their exertions. It resembles the case of debenture-holders who have to allow a liquidator's costs when they take the benefit of his exertions, and it is clear that justice calls for such a lien."

That is applicable to the present case. The solicitor has a common law lien upon the moneys recovered in the arbitration. The right extends to the cost of establishing his claim. In *Re Hill* (6) it was held that the costs incurred by the solicitor in establishing against the plaintiff his retainer as solicitor in the matter were rightly included in the taxation. The solicitor is entitled to have his bill when taxed paid out of the fund, and to have the costs of the adjournment paid into court.

Solicitors: *Sharpe, Pritchard & Co.*, for *Walker*, Manchester; *Harris, Cheetham & Cunningham.*

[*Reported by* G. B. HAMILTON, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA *v.* ADELAIDE STEAMSHIP CO., LTD.

[PRIVY COUNCIL (Viscount Haldane, L.C., Lord Shaw, Lord Moulton and Lord Parker of Waddington), April 21, 22, 23, May 2, 5, 6, 7, 8, 27, 28, July 25, 1913] B

[Reported [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp.M.L.C. 361; 29 T.L.R. 743]

Contract—Illegality—Public policy—Restraint of trade—Monopoly—Unreasonable increase in prices—Onus of proof of likelihood of increase—Question for court—Criminal offence—Need to prove criminal conspiracy to do something unlawful or something lawful by unlawful means. C

A contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce a "pernicious monopoly," i.e. a monopoly calculated to enhance prices to an unreasonable extent. The onus of showing that any contract is calculated to D produce a monopoly, or enhance prices to an unreasonable extent, will lie on the party alleging it, and if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. The question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the court to be determined after construing the contract and considering the circumstances existing when E it was made. No contract was ever an offence at common law merely because it was in restraint of trade. Combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy the essence of which is a contract or combination to do something unlawful or something lawful by unlawful means. F

Australia—Contract—Illegality—Restraint of trade—"Detriment of public"—Increase in prices—Need to prove intention to charge excessive or unreasonable prices—Agreement to maintain prices to avoid "cut-throat" competition—Exclusive mutual agreement with purchasing agents.

By s. 4 (1) (a) of the Australian Industries Preservation Act, 1906, it is an G offence for any person to enter into a contract "with intent to restrain trade or commerce to the detriment of the public." By s. 7 (1) it is an offence to monopolise trade or commerce with intent to control to the detriment of the public the supply or price of any merchandise.

Held: the prosecution, alleging offences within those subsections, could not rely on a mere intention to raise prices as proving an intention to injure the H public; to prove an intention to injure the public within the subsections by raising prices, an intention to charge excessive or unreasonable prices must be apparent.

Colliery owners entered into an agreement among themselves for the control of the amount of coal to be produced and the price at which it was to be sold. They also entered into an agreement with "purchasing agents" by which they I undertook not to supply any coal for the inter-State trade except to the purchasing agents who undertook not to deal in any coal except what they purchased from the colliery owners.

Held: (i) while the agreement among the colliery proprietors tended to raise and maintain the price of coal by precluding underselling among them, it had been proved that the prices prevailing when negotiations for the agreement were begun were disastrously low owing to "cut-throat" competition which had prevailed for some years; it could never be of real benefit to coal consumers

that colliery proprietors should carry on their business at a loss, which would result in pits being closed, loss of capital, and unemployment, or that any profit they made should depend on miners' wages being reduced to a minimum; there was no trace in the agreement of an intention to raise the price of coal to an unreasonable extent; and, therefore, no offence had been proved: (ii) the terms of the agreement with the purchasing agents were not necessarily unreasonable or injurious to the public, and that agreement also did not constitute an offence under either subsection.

Notes. Applied: *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914–15] All E.R.Rep. 752. Considered: *McEllistrim* v. *Ballymacelligott Co-op. etc., Society*, [1919] A.C. 548; *Dewes* v. *Fitch* [1921] 2 Ch. 159; *Rawlings* v. *General Trading Co.*, [1921] 1 K.B. 635; *Thompson* v. *British Medical Association (N.S.W. Branch)*, [1924] A.C. 764; *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1; *Palmolive Co.* v. *Freedman*, [1928] Ch. 264. Referred to: *New South Wales* v. *Commonwealth* (1915), 20 C.L.R. 54; *Australian Alliance Assurance Co.* v. *Goodwyn* (1916), Q.S.R. 225; *Duncan* v. *Queensland* (1916), 22 C.L.R. 556; *Morris* v. *Saxelby*, [1916–17] All E.R.Rep. 305; *Horwood* v. *Millar's Timber and Trading Co.*, [1916–17] All E.R.Rep. 847; *Great Western and Metropolitan Dairies* v. *Gibbs* (1918), 34 T.L.R. 344; *Heron* v. *Port Heron Co-op. Ltd.* (1922), 30 C.L.R. 315; *Bain* v. *Bain* (1923), 33 C.L.R. 317; *R.* v. *Boston* (1923), 33 C.L.R. 386; *Gabriel* v. *Ah Mook* (1924), 34 C.L.R. 591; *Williamson* v. *Ah On* (1926), 39 C.R.L. 95; *Crown Milling Co.* v. *R.* [1927] A.C. 394; *English Hop Growers* v. *Dering*, [1928] All E.R.Rep. 396; *Toomey* v. *Spooner* (1930), 31 S.R. (N.S.W.) 236; *Lawler* v. *Lawler* (1937). S.A.S.R. 44; *McFarlane* v. *Daniell* (1938), 38 S.R. (N.S.W.) 337; *Cato* v. *Costello* (1939), Q.S.R. 318; *Connors* v. *Connors* [1940] 4 All E.R. 179; *A.-G.* v. *Brickworks Pty., Ltd.* (1941), 41 S.R. (N.S.W.) 72; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142; *Albion Quarry Co.* v. *Associated Quarries* (1945), V.L.R. 1; *Durack* v. *W. A. Trustee Executor Co.* (1945), 72 C.L.R. 189; *Tool Metal Co.* v. *Tungsten Electric Co.*, [1955] 2 All E.R. 657; *Kores Mfg. Co.* v. *Kolok Mfg. Co.*, [1958] 2 All E.R. 165.

As to freedom of trade and monopoly, see 32 HALSBURY'S LAWS (2nd Edn.) 338 et seq.; and as to restraint of trade by agreement, see ibid., 397 et seq., but these passages must be read in the light of the Restrictive Practices Act, 1956: 36 HALSBURY'S STATUTES (2nd Edn.) 931. For cases see 43 DIGEST, 8–15, 19 et seq.

Cases referred to:

(1) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

(2) *Case of Monopolies, Darcy* v. *Allen* (1602), Moore, K.B. 671; 1 Web. Pat. Cas. 1; 11 Co. Rep. 84b; Noy, 173; 72 E.R. 830; 43 Digest 8, *35*.

(3) *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; 62 L.J.Ch. 273; 68 L.T. 833; 41 W.R. 604, C.A.; affirmed sub nom. *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(4) *Horner* v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181*.

(5) *Underwood & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300; 68 L.J.Ch. 201; 80 L.T. 306; 47 W.R. 347; 15 T.L.R. 177; 43 Sol. Jo. 261, C.A.; 43 Digest 74, *777*.

(6) *North-Western Salt Co.* v. *Electrolytic Alkali Co., Ltd.* (1912), 107 L.T. 439, C.A.; on appeal, [1914–15] All E.R.Rep. 752; [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 43 Digest 11, *52*.

(7) *Hilton* v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest 10, *50*.

(8) *Standard Oil Co. of New Jersey* v. *United States* (1910), 221 U.S. 1.

Also referred to in argument:

Mitchel v. *Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, *59.*

R. v. *Waddington* (1800), 1 East, 143; 102 E.R. 56; 14 Digest (Repl.) 371, *3607.*

Wickens v. *Evans* (1829), 3 Y. & J. 318; 43 Digest 13, *71.*

Mallan v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258.*

Hare v. *London & North-Western Railway* (1860), 1 John & H. 252; 30 L.J.Ch. 280; 2 L.T. 229; 8 W.R. 352; 70 E.R. 610; 1 John 722; subsequent proceedings (1861), 2 John & H. 80; 30 L.J.Ch. 817, 821, n; 3 L.T. 289; 9 W.R. 33; 7 Jur.N.S. 1145, 1147, n; 70 E.R. 741; 10 Digest (Repl.) 1261, *8905.*

Collins v. *Lock* (1879), 4 App. Cas. 674; 48 L.J.P.C. 68; 41 L.T. 292; 28 W.R. 189, P.C.; 43 Digest 21, *137.*

Allen v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164.*

Quinn v. *Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179.*

United Shoe Machinery Co. of Canada v. *Brunet*, [1909] A.C. 330; 78 L.J.P.C. 101; 100 L.T. 579; 25 T.L.R. 442; 53 Sol. Jo. 396, P.C.; 43 Digest 15, *80.*

Russell v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421; 106 L.T.Rep. 433; 81 L.J.K.B. 619; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.; 43 Digest 32, *254.*

United States v. *American Tobacco Co.* (1910), 221 U.S. 106.

Appeal by the Attorney-General of Australia from a judgment of the High Court of Australia in its appellate jurisdiction reversing a judgment of ISAACS, J., in his favour.

The action was brought by the Attorney-General under the provisions of an Act of the Commonwealth Parliament, No. 9 of 1906, intituled

"An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies,"

and also of two amending Acts, No. 5 of 1908 and No. 26 of 1909, against forty defendants to recover pecuniary penalties for alleged breaches of ss. 4 (1) (a), 7 (1), and 9 of the Act of 1906, and also for an injunction restraining the defendants from the repetition or continuance of the alleged offences.

Sir Robert Finlay, K.C., Wise, K.C. (of the Australian Bar), and *Arthur Page* for the appellant.

C. F. Mitchell, K.C. (of the Australian Bar), *Atkin, K.C., F. P. M. Schiller* and *A. C. Nesbitt* for the respondents.

July 25, 1913. **LORD PARKER OF WADDINGTON.**—This is an appeal from an order of the High Court of Australia in its appellate jurisdiction reversing a judgment of ISAACS, J., and made in an action instituted by the Attorney-General of the Commonwealth under the provisions of the Australian Industries Preservation Act, 1906, and two amending Acts—No. 5 of 1908 and No. 29 of 1909. The Act of 1906 was a new departure in legislation, and its true construction may be a matter of far-reaching economic importance. Their Lordships propose to consider its provisions with some particularity. Before doing so, however, it will be convenient, having regard to the arguments both here and in the courts below, to refer to the law as it existed prior to and at the passing of the Act in relation to monopolies and contracts in restraint of trade.

At common law every member of the community is entitled to carry on any trade or business he chooses, and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his trade or business unless there

exists some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common—that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases, and in such manner as he thinks best in his own interests.

The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll, being a derogation from the public right of passage, could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies. Further, monopolies were in the eyes of the lawyers of that time attended with the following evils: First, increase in the price of the wares; and, secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition (*Case of Monopolies, Darcy* v. *Allen* (2) (11 Co. Rep. at p. 86b)).

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community, if interested to maintain freedom of trade, is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3). For a contract in restraint of trade to be enforceable in a court of law or equity, the restraint, whether it be a partial or general restraint, must (to use the language of LORD MACNAGHTEN, evidently adapted from that of TINDAL, C.J., in *Horner* v. *Graves* (4)) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in which favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. LINDLEY and BOWEN, L.JJ., had suggested in the court below that though a restraint might be reasonable as between the parties to the contract it might be

unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by LINDLEY, L.J., in *Underwood & Son, Ltd.* v. *Barker* (5). The term "monopoly" cannot be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned lords justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable, however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may, therefore, in a popular sense be called a monopoly. It is so called by FARWELL, L.J., in *North-Western Salt Co.* v. *Electrolytic Alkali Co., Ltd.* (6), now under appeal to the House of Lords [see [1914] A.C. 461 where questions relating to the effect of failure to plead illegality on the exercise of the power of the court to refuse to enforce a contract in restraint of trade was dealt with].

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of engrossing, which, according to HAWKINS' PLEAS OF THE CROWN (vol. 1, bk. 1, c. 29, s. 9), consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by LINDLEY and BOWEN, L.JJ., as a pernicious monopoly—that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Vict., c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly, or enhance prices to an unreasonable extent, will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible. It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly, combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interest involves the right of combining with others in a common course of action, provided

such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1).

Such having been the state of the law when the Australian Act of 1906 was passed, their Lordships will proceed to consider the various provisions of that Act and its proper interpretation. The full title of the Act is

> "An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies,"

and Part 2, comprising ss. 4 to 14, inclusive, is intituled "Repression of Monopolies." Section 4 provides that

> "Any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of or engages in any combination in relation to trade or commerce with other countries or among the States of the Commonwealth (a) with intent to restrain trade or commerce to the detriment of the public; or (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence."

The penalty is fixed at £500. Section 6 defines unfair competition as "unfair under the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved. Section 7 provides:

> "Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States with intent to control to the detriment of the public the supply or price of any service, merchandise, or commodity, is guilty of an offence. Penalty £500."

Section 9 provides:

> "Whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or privy to (a) the commission of any offence against this Part of this Act . . . shall be deemed to have committed the offence. . . . Penalty £500."

Section 10 of the Act enables the Attorney-General of the Commonwealth to institute proceedings for an injunction restraining the carrying out of any contract or combination which is, in fact, in restraint of trade or commerce to the detriment of the public, or is, in fact, destructive or injurious by means of unfair competition to any such Australian industry as is mentioned in s. 7. The amending Act, No. 5 of 1908 [as itself amended by the 1909 Act], contains a provision that in any prosecution for an offence against ss. 4, 7, or 9, of the Act of 1906 the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent.

It is in their Lordships' opinion quite clear that the terms "monopolies" and "monopolise," as used in the Act of 1906, do not refer to a monopoly in the strict legal sense, but in the more popular sense, in which LINDLEY and BOWEN, L.JJ., used the term "monopoly" in the dicta above mentioned. "Destructive monopoly" is equivalent to "pernicious monopoly" as used by the learned lords justices, and, no doubt, undue enhancement of the prices of goods or services is contemplated as one of the evils which may render a monopoly in the popular sense destructive or pernicious, it being assumed that such enhancement is to the public injury or detriment. Similarly, there can be little doubt that one of the ways in which a restraint of trade might in view of the Commonwealth legislature be detrimental to the public was by its creating a pernicious monopoly in this popular sense of the word. There may, of course, be other ways in which a monopoly or restraint of trade may enure to the public detriment, but undue enhancement of prices must

certainly be one. It should be observed that for the statutory misdemeanours created by ss. 4 and 7 there must be an intention to bring about all or some of the evils against which the Act is directed, and if there be such an intention it is quite immaterial whether these evils have or have not actually ensued. But in proving the intention the actual results of the contract or combination, or the monopoly or attempt to monopolise, may be of great materiality, for in a court of law every man is taken to intend the natural or necessary consequences of his action. This point is emphasised by contrasting ss. 4 and 7 with s. 10, under which the contract or combination must be proved to have led to the evils against which the Act is directed. Thus, in proceedings for offences under ss. 7 and 9 the prosecutor must first establish the contract or combination or the monopoly or attempt to monopolise. He must then establish the wrongful intention necessary to constitute the misdemeanour. In establishing the contract or combination or the monopoly or attempt to monopolise, he may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim. But the wrongful intention must always be proved by proper evidence. For this purpose the prosecutor may, if he chooses, tender proof that the evils against which the Act is directed were the natural or necessary consequences of the contract or combination, monopoly or attempt to monopolise, and that these evils have in fact ensued. He cannot, however, in their Lordships' opinion, plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of the Act of 1908 as rendering proof of what he pleads unnecessary. With regard to s. 10, these last-mentioned provisions appear to have no application at all, and s. 10 itself has nothing to do with monopolies or attempts to monopolise, but is limited to contracts or combinations in restraint of trade or destructive of Australian industries.

It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which, if embodied in a contract, would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcement of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such contract had an intention to injure the public. It is quite common in a contract of service to find a clause restricting the area in which the employee may carry on a business similar to that of his employer after the termination of the service, and such area is often held too wide for the restraint to be enforceable. In such cases both parties have as a rule bargained with a single view to their own interests, though, in the opinion of the court, they have been mistaken as to the area of the restraint required in their own interest, but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations, such as that which was the subject of the decision in *Hilton* v. *Eckersley* (7). If this were the true effect of the Act, no trade union would be free from the risk of proceedings under s. 4. It was said that this result with regard to trade unions was foreseen and provided against, by making the fiat of the Attorney-General necessary for any such proceedings, but their Lordships cannot believe that the legislature intended to make the existence of trade unions, the economic advantage of which has often been recognised in modern legislation, dependent on the economic views of the government for the time being or its law officers. It was also strongly urged that in the term "detriment to the public" the public means the consuming public, and that the legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution.

A It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended.

In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under B the analogous statute known as the Sherman Act and in particular on *Standard Oil Co. of New Jersey* v. *United States* (8). Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint C of trade and every monopoly or attempt to monopolise a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test D in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolise which involve detriment to the public, and in which a sinister intention is of the essence of the offence.

Their Lordships are now in a position to consider the actual facts of the present case and the inferences to be drawn therefrom, it being borne in mind that the offences charged against the respondent companies are under s. 4 (a), and, alter- E natively, under s. 7 (1) of the Act of 1906, while the other respondents are charged under s. 9 with aiding and abetting the respondent companies in those offences. The chief coalfield in New South Wales is the Newcastle coalfield. This field has been worked for nearly a century, and was for many years the only coalfield worked in New South Wales. Later, the Southern Collieries and the Lithgow or Western Collieries were opened up, and their coal began to compete with the Newcastle F coal. The latter coal has, however, the advantage of easier access to deep water, and is for some purposes better than coal from the southern or western collieries. For the last forty years wages in the Newcastle coalfield have, by agreement between the colliery proprietors and the workmen, varied with the selling price of coal. There is an assumed minimum price paid per ton for the best coal f.o.b. at Newcastle corresponding with an assumed minimum hewing rate. The probable G price f.o.b. at Newcastle is declared for each year in advance by agreement between the colliery proprietors and the workmen, and for every 1s. by which the declared price exceeds the minimum price the minimum hewing rate is increased by 4d. and the wages of certain other workmen by sums amounting to 2½d., so that out of every shilling advance in price, 6½d. in all goes to the workmen. It is not the practice to vary the declared price by fractions of 1s. This method of determining H wages appears to their Lordships to be eminently reasonable and well calculated to prevent labour troubles. The declaration of the probable price for any year for the purpose of determining wages does not, however, in itself preclude the colliery proprietors from selling their coal at such prices as they think fit. It does not itself prevent the actual price of coal being determined by free competition, and for this reason the colliery proprietors of the Newcastle coalfield have from time to I time entered into a combination or agreement, usually called "a vend," upon terms which, on the one hand, preclude any of its members selling the best coal at less than the declared price, and other grades of coal at proportionate prices, and, on the other, assure to each individual proprietor a certain proportion of the total output. Such a combination or agreement would, of course, be in restraint of trade, and the question whether or not it was enforceable at common law would depend on the considerations to which their Lordships have already referred. In the first years of the present century a new coalfield situate about twenty miles from Newcastle, and sometimes called the Maitland coalfield, began to be developed,

and Maitland coal gradually forced its way into the market in competition with Newcastle coal. The competition was so fierce that it became impossible to maintain any "vend" among the colliery proprietors in the Newcastle field. These proprietors accordingly entered on a course of ruinous competition with each other and with the colliery proprietors in the Maitland field until the spring of 1906 when, though the declared price of the best coal was for the purposes of the hewing rate 9s., such coal was being actually sold f.o.b. at Newcastle at 7s. 6d. only. The collieries in the Newcastle coalfield were ceasing to pay dividends and falling into the hands of the banks who had financed them; the miners had little chance of an advance in wages, though there had been a general advance in prices; and the prosperity of Newcastle, which is dependent on the coal industry and the shipping industry in connection therewith, was seriously threatened. Further, the coal output of the Newcastle field was, in the spring of 1906, about equally divided between the home trade, the inter-State trade, and the foreign trade. For the purpose of the inter-State and foreign trade the colliery proprietors sold their coal f.o.b. at Newcastle. In the case of the inter-State trade such coal was for the most part bought by shipping companies who owned coal vessels in which they carried it to the various ports of disembarkment in the States and there sold it wholesale or retail. In some cases the coal sold was delivered to the purchasers straight from the vessel itself. In other cases it was landed and stored by the shipping companies and subsequently sold. The shipping companies, in fact, carried on the business of coal merchants as well as the business of shippers. Under these circumstances it was essential in the interest of the colliery owners that there should be a sufficient number of shipping companies always ready to purchase and ship their coal, and it was essential in the interest of the shipping companies that they should always be able to purchase and ship coal as soon as their vessels arrived at Newcastle; otherwise the colliery proprietors might be put to expense in storing coal pending the arrival of a vessel in which it could be shipped, and the shippers might incur expense in the nature of demurrage. J. and A. Brown & Co., who owned the chief colliery in the Maitland field, had vessels of their own and were themselves exporting coal to Melbourne and Adelaide, and selling it there through their own agents. The shipping companies were already suffering from the low prices at which J. and A. Brown & Co. sold their coal in those towns. Moreover, some of the shipping companies had controlling interests in companies owning collieries in the Newcastle and Maitland fields, and were suffering from the reduction due to the competition of J. and A. Brown & Co. in the f.o.b. prices at Newcastle as well as the c.i.f. prices at Melbourne and Adelaide.

It was under these circumstances that on Jan. 5, 1906, there was a meeting of some of the proprietors of collieries in the Newcastle and Maitland fields. The chairman pointed out the necessity of forming an association of all the collieries if the existing very unsatisfactory state of the coal trade was to be improved. The meeting thereupon passed a resolution that it was desirable to form an association to raise and maintain the price of coal, and a committee was appointed to draft a scheme. The idea obviously was to reconstitute the "vend," admitting the colliery owners in the Maitland field, whose competition had proved so disastrous. The necessity of obtaining the concurrence of those shipping companies who had interests in the Newcastle and Maitland fields was expressly recognised. Lengthy negotiations followed, of which a record was preserved and put in evidence at the trial. Ultimately a draft agreement, hereinafter called "the vend agreement," was prepared, and in April, 1906, assented to by a number of the colliery proprietors, including J. and A. Brown & Co., and, though never actually executed, was no doubt acted on and considered binding by the assenting parties. The chief provisions of the vend agreement may be stated as follows. An association is formed of which the colliery companies and firms parties thereto are the original members. There is provision for the admission of new members and the withdrawal of members under defined circumstances. Each constituent company or

A firm appoints a representative, and these representatives constitute a board. The voting power of each representative on the board is determined by the proportion of the total trade which under a subsequent clause of the agreement is allotted to the company or firm by which he is appointed. The board may appoint and delegate any of its powers to an executive committee, and (under cl. 9) must appoint a representative whose duty it is to allocate to the particular collieries the B proportions of the inter-State trade to be fulfilled by them respectively. The resolutions of the board are to be binding on the members of the association. Each member contributes to the general funds of the association, as to the application of which the board has complete discretion. The total trade is allotted in certain proportions between the original members, provision being made for the increase or decrease of these proportions in the event of the admission of new C members or the withdrawal of old members, or in other events specified. No member is to open up any new shaft, pit, or adit unless there be danger of his being unable to maintain his allotted proportion of the total trade by means of his existing shafts, pits, and adits. The board is to fix the selling price of all coal won from the collieries of the members of the association, and for this purpose these collieries are divided into four classes. The prices are to be the same for D all collieries in the same class, and to all purchasers irrespective of quantity, but so that the board may, to meet the exigencies of trade, fix differential rates for particular markets, contracts, or classes of coal, and if it sanctions a contract for the supply of coal at less than the selling price for the time being may compensate the contractor out of the general funds of the association. All members of the association may dispose of the produce of their collieries without restriction as to E quantity and manner except as therein provided, but in order to induce members whose trade may fall off not to endeavour to increase it by underselling contrary to the agreement, every member whose trade in any quarter exceeds his estimated proportion is to contribute in manner therein provided to a fund for compensating those members whose trade is less than their estimated proportions, accounts in this respect being adjusted at the end of each year, having regard to the total trade F for such year and the actual proportions in such trade allotted to the various members. The agreement also contains clauses with regard to strikes, lock-outs, and references to the Industrial Court. The agreement is expressed to commence on Jan. 1, 1907, and to continue in operation for a year, but there are provisions for its earlier determination and its extension for a further period. Their Lordships are of opinion upon the evidence that the vend agreement was acted upon from G early in April, 1906, and must be taken to have been extended and renewed with minor variations from year to year, and to have been in force at the commencement of these proceedings. It is obviously an agreement in restraint of trade.

During the negotiations which led up to the vend agreement, the possibility and desirability of securing a steady market for coal for the inter-State trade was a subject of discussion. This was a matter of interest not only to the colliery H proprietors but to those shipping companies who were interested in Newcastle or Maitland coal. A suggestion was made that with this object it might be advisable for the vend when constituted to enter into some agreement with the shipping companies who had theretofore purchased most of the Newcastle coal for the purposes of the inter-State trade. After prolonged negotiations between the colliery proprietors, on the one hand, and the shipping companies, on the other hand, a I draft agreement, hereinafter called the shipping agreement, was prepared and in September, 1906, assented to by the colliery proprietors constituting the vend, including J. and A. Brown & Co., on the one hand, and the four respondent companies and J. and A. Brown & Co., on the other hand, J. and A. Brown & Co. assenting both as colliery proprietors and as shippers. The shipping agreement was never actually executed, but it was no doubt acted upon and considered binding by the assenting parties. Its chief provisions may be stated as follows. The colliery proprietors, therein called the vendors, are to sell to the shipping companies, therein called the purchasing agents, all the coal which the latter may

require for the inter-State trade, such coal being purchased from all or some of the collieries therein referred to as mentioned in a schedule which is not in evidence, but which no doubt comprised the vend collieries, classified in the same manner as in the vend agreement. The vendors and purchasing agents are each to appoint a representative; the representative of the purchasing agents is a week before the commencement of each month to give notice to the vendor's agent of the approximate quantity and the particular class of coal required during such month, and the vendors are to supply that quantity and class accordingly. The vendors are, if possible, to comply with any requisition of the purchasing agents if they require coal from any particular colliery, but only when such colliery has not already reached its limit of output. When, however, the purchasing agents have with the assent of the vendors contracted to supply coal from a particular colliery, such coal is, if practicable, to be supplied whether or not such limit has been reached. This provision undoubtedly refers to the vend agreement. The coal is to be delivered f.o.b. at Newcastle, the prices to be paid for the various classes being fixed by the colliery proprietors each year in November and to take effect for the ensuing year commencing Jan. 1. The vendors are not to supply any coal for the inter-State trade except to the purchasing agents, and the purchasing agents are not (with certain exceptions) to deal in or carry any coal except what they purchase from the vendors. The purchasing agents are not to resell any coal purchased from the vendors at higher prices per ton that the c.i.f. prices therein specified. These maximum c.i.f. prices vary with the f.o.b. prices at Newcastle, but to an extent which cannot be accounted for by any increase in cost, insurance, or freight attributable to the increased f.o.b. prices. The intention obviously is to give the purchasing agents an opportunity of benefiting by any increase in the f.o.b. prices provided they can obtain orders at increased c.i.f. prices. The purchasing agents may exceed these c.i.f. prices by 3s. a ton on large coal supplied under contracts with a single consumer not exceeding 10,000 tons in any one year, and also, where the resale is not c.i.f. at any port of delivery by the amount of costs actually incurred for lighterage, wharfage, carriage, or otherwise as therein mentioned. If the purchasing agents sell at prices exceeding the maximum prices specified they are to account to the vendors for the excess, it being the intention of the parties to place the purchasing agents in the position of agents only, but clothed with a liability for all coal ordered at the rates agreed on, and that the difference between such rates and the maximum prices on resale shall represent compensation for freight and remuneration for work of realisation. Where, however, the vendors consent to a resale at a price higher than the maximum, the amount of the excess is to be equally divided between the vendors and the purchasing agents. The shipping agreement is expressed to commence on Jan. 1, 1907, and to continue for one year from that date. There are no provisions for its earlier determination or for its renewal, but their Lordships are of opinion, on the evidence, that it was acted upon not only in 1907, but in 1908, and also in 1909 and 1910, and must be taken to have been renewed accordingly. It also is without doubt a contract in restraint of trade.

It is the shipping agreement and not the vend agreement which is impeached in these proceedings, but the Crown does not admit that the vend agreement could not itself have been impeached under ss. 4 (a) and 7 (1) of the Act. If the intention with which the vend agreement was entered into be unlawful, it would be evidence of a like unlawful intention in entering into the shipping agreement, for the latter agreement was undoubtedly entered into by the colliery proprietors in furtherance of the policy embodied in the vend agreement, and the shipping companies were well acquainted with the terms of the vend agreement. If, on the other hand, the vend agreement were entered into with no unlawful intent, it would make it much harder to infer an unlawful intent from the shipping agreement. Their Lordships, therefore, propose to consider whether an unlawful intention, i.e., an intention to restrain trade to the detriment of the public, can be gathered from these agreements considered separately or as part of a general

scheme, it being admitted that each agreement constitutes a contract or combination in restraint of trade.

The unlawful intention alleged is, so far as the vend agreement is concerned, in substance an intention to injure the public (i) by raising the price of coal, and (ii) by annihilating competition in the Newcastle coal trade. There was some suggestion of an intention to injure the public in other ways—namely, by causing delays or difficulties in prompt compliance with contracts for the supply of coal or a particular class of coal. This suggestion can, in their Lordships' opinion, be properly ignored. It attributes to the parties an intention to bring about delays and difficulties from which they could derive no possible benefit, and that, too, though the vend agreement, from which the court is asked to infer the intention, contains provisions designed, so far as consistent with its main object, to preclude such delays or difficulties from arising at all. There can be no doubt that the vend agreement was intended to preclude competition in the sense of underselling among its members, and by this means to raise and maintain the price of coal won from the Newcastle and Maitland coalfields. Ceteris paribus low prices are of advantage to the consuming public, and their Lordships will assume that in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would from the standpoint of public interest require some justification.

In the present case, however, it was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. Even ISAACS, J., who decided in favour of the Crown, was apparently of opinion that there was early in 1906, at any rate, some case for raising the price of coal considerably above its then selling price of 7s. 6d. per ton. It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent. Not only can no trace be found in the vend agreement of an intention to raise the price of coal to an unreasonable extent, but such an intention is highly improbable, for it was not in the interest of the vend to charge unreasonable prices. The vend did not comprise all the collieries in the Newcastle and Maitland fields, nor any of the southern or western collieries. It did not, therefore, eliminate competition either in home trade, the inter-State trade, or the foreign trade. It is to be observed that the selling price to be fixed under the vend agreement applies to all these trades. If the vend fixed the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors. It would certainly check the demand for the coal of its members. That this is so is apparent from the action of the vend in 1909, when, in spite of pressure from the miners, they refused to advance the price of coal for the ensuing year more than 1s., because, in their opinion, it would be impossible to obtain any greater price in the foreign market. It was argued that the vend controlled so large a proportion of the home and inter-State trade that they could afford to ignore the competition of others in the home and inter-State markets, but in the foreign market there was no limit to

the competition to which they were subject. Had there been any intention of charging excessive prices in the home or inter-State trade, as opposed to the foreign trade, one would have expected the vend agreement to provide for reduced prices for coal supplied for foreign consumption. It was argued that this might have been done under the terms of the vend agreement. But no inference adverse to the vend can, in their Lordships' opinion, be drawn from this possibility, and it was never, in fact, done. Indeed, their Lordships cannot find any satisfactory evidence that, except in some few isolated cases, and for some special reason, coal was ever supplied for the foreign trade at less price than for the inter-State or home trade. The vend agreement may or may not contain provisions unenforceable at common law, but it certainly does not, on the face of it, disclose any such intention to injure the public as would make it illegal under s. 4 (a) of the Act, either because it was intended to limit competition among its members, or because it was intended to raise and maintain prices. Again, even assuming that the vend agreement amounts to an attempt to create a monopoly within the meaning of s. 7 of the Act, it certainly does not, on the face of it, disclose any intention of controlling the supply or price of coal to the detriment of the public by unduly raising prices or otherwise.

Passing to the shipping agreement, their Lordships are of opinion that there is still less justification for inferring from its provisions any such unlawful intention as would make it an offence under either s. 4 (a) or s. 7 of the Act. In substance it constitutes the shipping companies sole agents of the colliery proprietors for the purposes of their inter-State trade, the agents, as is not unusual in such cases, being responsible to their principals for the wholesale prices of the goods supplied, and being dependent for their own remuneration on the difference between the wholesale and retail prices. In contracts of this sort it is not uncommon to find a provision specifying the minimum retail price, a provision which might be very material from the standpoint of public interest. But there is no such provision in the present case. On the contrary, the agreement contains provisions specifying the maximum retail prices and imposing penalties if these prices be exceeded; and, further, it leaves it open to the shipping companies to compete with and undersell each other on the market. It is, of course, possible, if not probable, that the shipping companies had some arrangement between themselves precluding such competition, but there was no evidence whatever of any such arrangement. The inference their Lordships draw from the provisions of the shipping agreement fixing the maximum retail prices is that the colliery proprietors considered that it was not to their advantage that the shipping companies should unduly raise the price of coal to the ultimate consumer. It would give too great an advantage to their competitors in the coal trade. There is no ground for supposing that these maximum prices were intended to be minimum prices, or that if intended to be minimum prices they were necessarily excessive. Much stress was laid on those clauses of the agreement under which the colliery proprietors were not to sell coal for the inter-State trade to any persons other than the shipping companies, and the latter were not for inter-State purposes to purchase or carry coal for any persons other than the colliery proprietors. Similar provisions are quite common in contracts of exclusive agency, and, in their Lordships' opinion, are not necessarily unreasonable or injurious to the public. There is no evidence that the tonnage of the shipping companies was more than sufficient for their inter-State trade in coal, or that the effect of the agreement was to render their vessels idle. Of course the agreement precluded colliery proprietors not parties thereto from being able to avail themselves of these vessels. But a similar result follows whenever vessels are chartered by a single person or by a group of persons. The shipping companies were not the only persons engaged in the shipping trade in coal; they owned only about the same proportion of the total tonnage engaged in the Newcastle inter-State coal trade as the proportion of such trade represented by the parties to the vend agreement. So far as other colliery proprietors were concerned they were not by reason of the shipping agreement in any worse position than they would have been

had the parties to the vend chartered all the vessels of the shipping companies, and, having regard to the exigencies of the inter-State trade, such action on the part of the parties to the vend would have been quite reasonable. With regard to the other provisions of the shipping agreement, their Lordships are of opinion that they were really to the advantage of the consumers as tending to ensure a reasonably steady supply to meet the inter-State demand.

There being nothing on the face of the vend agreement or of the shipping agreement from which an intention to injure the public by raising the price of coal to an unreasonable extent can be inferred, the question remains whether these agreements, if considered together as parts of a single scheme, can give rise to an inference of any such intention. Their Lordships are of opinion that this question, too, must be answered in the negative. If, as their Lordships think, there was justification for a combination of colliery proprietors to raise the price of coal, it was obviously reasonable on their part to take precautions to secure a market for their coal at the increased price. They could do this in various ways. At one time they appear to have contemplated forming a company by the agency of which their coal would be distributed to the ultimate consumers, but they finally adopted the plan of appointing the shipping companies their exclusive agents for that purpose. On the other hand, the shipping companies, if a vend were formed, would either have to purchase coal from the vend at increased prices or obtain their coal elsewhere with considerable risk of loss from an unsteady or insufficient supply and the introduction of fresh competitors in the shipping business. Some arrangement with the vend would be advisable in their own interest, and again it was not unreasonable that this arrangement should take the form of an agreement of exclusive agency. Their Lordships conclude that neither the vend agreement nor the shipping agreement taken separately, nor both agreements taken together as parts of a single scheme, can raise any legitimate inference that any of the parties concerned, whether colliery proprietors or shipping companies, acted otherwise than with a single view to their own advantage, or had any intention of raising prices or annihilating competition to the detriment of the public.

It remains to be considered whether, if no legal intention can be gathered from the agreements themselves, such an intention can be inferred from what was actually done pursuant to the agreements. The selling price of the best coal, f.o.b. at Newcastle, was during the negotiations for the vend agreement raised from 7s. 6d. to 9s., and this price prevailed during the last months of 1906. It was under the vend agreement itself raised to 10s. for the year 1907, and 11s. for 1908 and subsequent years. It was contended that these prices were unreasonable and excessive, and ISAACS, J., found as a fact that in 1907 9s. 1d. and in 1908, 1909, and 1910 9s. 8d. were the highest prices which could reasonably have been charged. On the other hand, the Court of Appeal was of opinion on the evidence that the f.o.b. prices actually charged were not only not shown to have been excessive or unreasonable, but were shown affirmatively to have been reasonable. Their Lordships agree with the opinion of the Court of Appeal and consider that the criticisms of the Chief Justice on the process by which ISAACS, J., arrived at his conclusions of fact in this respect were fully justified. The onus of proving that the prices charged were unreasonable clearly lay with the Crown, and the Crown tendered no satisfactory evidence in this respect. There was no evidence whatever as to the profits made by the colliery proprietors when the prices in question prevailed. On the other hand, there was evidence that with the hewing rate at 4s. 2d., which was admitted to be the lowest hewing rate consistent with a fair remuneration to the miners, and which corresponds to a declared price of 11s., the colliery proprietors could not afford to sell the best coal, f.o.b., at less than 11s. Further, there is evidence that the prices actually charged inter-State were also obtained in the foreign market, where at any rate free competition prevailed.

With regard to the prices charged c.i.f. or in the retail trade by the shipping companies there is, again, no satisfactory evidence that they were not perfectly reasonable prices. The shipping companies do not appear to have raised the c.i.f.

or retail prices even to the maximum prices they were entitled to charge as between themselves and the colliery proprietors. There is no evidence as to the profits they made either before or after the shipping agreement came into operation. The most noticeable instances of a rise in c.i.f. or retail prices after the agreement came into operation are in the case of sales in Melbourne and Adelaide, where the shipping companies had been suffering from the competition of J. and A. Brown & Co. There is, in their Lordships' opinion, no justification for the assumption that the c.i.f. or retail prices which prevailed early in 1906 were prices which ensured to the shipping companies a reasonable profit in respect of the carriage and distribution of the coal, or that, assuming this and making proper allowance for the rise in f.o.b. prices, the c.i.f. or retail prices charged in subsequent years were unreasonable. As pointed out by the Chief Justice, the rise in the f.o.b. prices is only one of the many considerations which would be material in forming an opinion whether an increase in c.i.f. or retail prices was justifiable. As to the other modes in which it was said that the public were injured by reason of the agreements in question, their Lordships consider that, even if there were ample proof of the injury alleged, no inference could be drawn therefrom as to the intention of the parties in entering into these agreements. The parties to the agreements might gain by raising the price of coal, but they could gain nothing by putting difficulties in the way of their own customers. Such inconvenience as from time to time arose did not exceed what was to be expected from time to time in the conduct of so great a business. Finally, it was contended that a sinister intention might be inferred from the policy of the colliery proprietors and shipping companies towards their companies in the coal trade, and great stress was laid in this connection on the efforts made to bring the Burwood Extended, the Lymington, and the Newcastle Wallsend Collieries into the combination, and to check the competition of Scott, Fell & Co. and Kethel & Co. Their Lordships do not think that it would be proper to draw any inference from this policy as to the intention of the parties in entering into the agreements in question: the policy pursued is in no way foreshadowed or contemplated in either agreement, nor was it the necessary outcome of either agreement. It must not, however, be supposed that their Lordships view with approval everything which was done in pursuance of this policy.

In their Lordships' opinion the decision appealed against was right, first, because so far as the Crown relied upon s. 4 (a) and s. 7 of the Act, there was no evidence (at any rate no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and, secondly, because so far as the Crown relied on s. 10 there was no evidence (at any rate no sufficient evidence) of injury to the public.

Solicitors: *J. H. Galbraith*; *Wadeson & Malleson.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

HOUGHTON *v.* PILKINGTON

[KING'S BENCH DIVISION (Bray and Bankes, JJ.), June 21, 1912]

[Reported [1912] 3 K.B. 308; 82 L.J.K.B. 79; 107 L.T. 235; 28 T.L.R. 492; 56 Sol. Jo. 633]

B

Master and Servant—Liability of master for act of servant—Negligence of servant—Authority of servant to impose on master duty to take care—Fellow servant injured—Help accepted from plaintiff—Plaintiff subsequently injured.

The defendant was the owner of a milk float which was driven by his servant accompanied by a boy who assisted in delivering the milk. During the course C of a round, the boy fell out of the float and was rendered unconscious. The plaintiff who saw the accident went to the boy's assistance and said to the servant: "Shall I help you to take him home?" to which the servant replied: "You can if you will. Get in." The plaintiff got into the float which started suddenly and she was thrown out and injured. The plaintiff contended that the servant had authority to obtain assistance, and, therefore, owed her a duty of D care which he had failed to perform.

Held: the servant had no authority to impose upon his master an obligation or duty to take care and the defendant was not liable.

Notes. As to the liability of a master to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST 125 et seq.

E Cases referred to:

(1) *Cox* v. *Midland Counties Rail. Co.* (1849), 3 Exch. 268; 5 Ry. & Can. Cas. 583; 18 L.J.Ex. 65; 12 L.T.O.S. 403; 13 Jur. 65; 12 J.P.Jo. 820; 154 E.R. 884; 1 Digest (Repl.) 409, *667*.

(2) *Holmes* v. *North Eastern Rail. Co.* (1869), L.R. 4 Exch. 254; 38 L.J.Ex. 161; 20 L.T. 616; 17 W.R. 800; affirmed [1871], L.R. 6 Exch. 123; 40 L.J.Ex. F 121; 24 L.T. 69, Ex. Ch.; 36 Digest (Repl.) 49, *257*.

(3) *Wright* v. *London and North Western Rail. Co.* (1876), 1 Q.B.D. 252; 45 L.J.Q.B. 570; 33 L.T. 830; 40 J.P. 628, C.A.; 34 Digest 216, *1785*.

(4) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; 26 L.J.Ex. 171; 28 L.T.O.S. 357; 3 Jur.N.S. 395; 5 W.R. 364; 156 E.R. 1413; 34 Digest 215, *1782*.

(5) *Potter* v. *Faulkner* (1861), 1 B. & S. 800; 31 L.J.Q.B. 30; 5 L.T. 455; 26 G J.P. 116; 8 Jur.N.S. 259; 10 W.R. 93; 121 E.R. 911, Ex. Ch.; 34 Digest 216, *1783*.

Also referred to in argument:

Bass v. *Hendon Urban District Council* (1912), 28 T.L.R. 317, C.A.; 34 Digest 210, *1732*.

Hawtayne v. *Bourne* (1841), 7 M. & W. 595; 10 L.J.Ex. 224; 5 Jur. 118; 151 E.R. H 905; 1 Digest (Repl.) 370, *413*.

Walker v. *Great Western Rail. Co.* (1867), L.R. 2 Exch. 228; 36 L.J.Ex. 123; 16 L.T. 327; 15 W.R. 769; 1 Digest (Repl.) 409, *665*.

Appeal by the defendant from a decision of His Honour JUDGE HAMILTON in favour of the plaintiff in an action brought by the plaintiff against the defendant I for damages for personal injuries caused by the negligence of the defendant's servant.

Eastham for the defendant.
Compston Smith for the plaintiff.

BRAY, J.—This case raises a point of some importance. The action was brought by the plaintiff to recover damages for personal injuries sustained by her owing to the alleged negligence of the defendant's servant. The facts are quite simple. The defendant had a milk walk and he sent his servant Heaps, a man of about twenty

years of age, in charge of the milk cart. He was accompanied, with his master's authority, by a boy who was also in the service of the defendant. The boy unfortunately fell off the cart and was rendered unconscious. Thereupon, the plaintiff very kindly and properly from one point of view, stepped forward and said, "Shall I help you to take the boy home?" Heaps replied, "You can if you will, get in," and the plaintiff thereupon got into the cart. Heaps took hold of the reins and owing to some mischance or negligence on his part, the horse started whilst the plaintiff was still in an insecure position and she fell out of the cart and was injured. That was the injury which she said was caused by the negligence of the defendant.

To establish negligence the plaintiff must establish two things. First that the defendant owed a duty to her, and secondly that there was a breach of that duty. The main argument before us has been as to whether there was any duty which the defendant owed to the plaintiff that his servant should take reasonable care. The learned judge held that there was a duty on the defendant's servant in what amounted to an emergency to secure assistance on behalf of his master. The question we have to consider is whether that view is right in law and whether such a duty arose in these circumstances. To ascertain whether there was such a duty one must consider whether Heaps had authority to invite the plaintiff to do what she did. Where was that authority, and how was it obtained? It clearly was not in the ordinary course of his employment to ask anybody to ride in the milk-cart because it was not constructed to carry people, but milk. Clearly, therefore, he had no authority to invite anybody to get into the cart unless it can be that the law infers such an authority from the emergency which arose. That question was considered in *Cox* v. *Midland Counties Rail. Co.* (1), and was there decided in favour of the defendants. In that case there had been a railway accident, and several people were very badly injured, and some official of the company called in a surgeon, and the surgeon brought an action for his fees. Whether he had a right of action for his fees depended on whether the defendants were bound by the act of their servant in calling in the surgeon. It was contended that they were so bound because there was an emergency. PARKE, B., in giving judgment said (3 Exch. at p. 277):

> "It is not easy to decide whether unforeseen accidents would occur more frequently in the carriage of passengers by locomotive power on railroads, or by carrying the like number by coach on ordinary roads. Certainly, there is no such difference so as to make the duties of an engine driver and coachman different, as to the power of making such contracts as that in question; nor the duties of porters, clerks, or other servants connected with the conveying department. Could it be maintained with respect to a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horsekeeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power."

The only distinction that can be drawn between that case and the present is this: In that case the servant was apparently binding or seeking to bind his masters by a contract to pay for services, whilst in the present case he gave an invitation which involved an obligation to take reasonable care. In either case what he did was to impose on the master an obligation, and if in the earlier case the court held that there was no authority to create the obligation to pay for the services rendered at

A the servant's request, I think that in the case before us the servant could not create an obligation to take care.

That really disposes of the matter, but we have been referred to other authorities with which I must deal. Those cases were *Holmes* v. *North Eastern Rail. Co.* (2) and *Wright* v. *London and North Western Rail. Co.* (3). In both these cases the plaintiff was on the premises of the defendants, with the consent of the station-
B master, for the purpose of receiving in the one case some coal and in the other a heifer. He did something more than merely receive the goods—namely, assist in the unloading of them, in the one case getting into a truck to throw out the coal and in the other assisting to shunt a truck. In the one case the plaintiff fell down a concealed hole and in the other a train ran into him. It seems to me that the ground upon which the court decided these cases in favour of the plaintiff was this. There
C was authority in the stationmaster to invite the plaintiff on to the premises and thereupon a duty was created in the railway company to take reasonable care that he should not be injured, and having regard to the practice which had prevailed, in each case the court decided that what the plaintiff was doing did not release the defendants in any way from their duty. There was still a duty imposed on the company to take care as the result of having invited the plaintiff on to their
D premises. It was not the case of a mere licensee but of a person invited on to the premises for the purpose of the common business of the plaintiff and the defendants. There remain to be considered the two cases of *Degg* v. *Midland Rail. Co.* (4) and *Potter* v. *Faulkner* (5), in which it was held that the defendants were not liable. In both of these cases the plaintiff had, at the request of a servant of the defendants, assisted in the working of the service, and it was held that at most the duty cast
E upon the defendant was the same which he owed to a fellow servant. It is not necessary in the present case to decide whether the plaintiff became a fellow servant of Heaps. I do not think she did, and, therefore, in my opinion, those cases are not really material.

The ground upon which we decide this case is that the servant had no authority to impose upon his master an obligation or duty to take care. That being our
F opinion, the result is that this appeal must be allowed and judgment entered for the defendant.

BANKES, J.—I agree. The learned judge in his judgment said that there was an obligation on the defendant's servant to secure assistance on the part of his master. If by that he meant that there was a legal obligation, I certainly do not
G agree with him. I rather read his judgment as meaning that an emergency had arisen which gave the servant an implied authority to invite the plaintiff into the cart for the purpose of rendering assistance to the injured boy. When I first heard the judgment read, I must confess that I thought, apart from authority, that the view expressed by the learned judge was the right one. But having been referred to the authorities I am satisfied that in principle this point is covered by the
H decision in *Cox* v. *Midland Counties Rail. Co.* (1), and that we cannot, consistently with that authority, hold that the servant here had any implied authority to request the plaintiff to come into the cart and render assistance. If there was no authority in the servant to invite the plaintiff into the cart I cannot see that there can be any duty created between the master and the plaintiff. That being so, in my opinion the judgment of the learned judge was wrong and this appeal must be allowed.

I

Appeal allowed.

Solicitors: *Barlow, Barlow & Lydes*, for *James Chapman & Co.*, Manchester; *E. C. Rawlings & Butt*, for *J. H. Neville*, Chorley.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

A

GLEGG *v.* BROMLEY. GLEGG AND ANOTHER, CLAIMANTS

[COURT OF APPEAL (Vaughan Williams, Fletcher Moulton, L.JJ., and Parker, J.), April 18, 19, 22, 1912]

[Reported [1912] 3 K.B. 474; 81 L.J.K.B. 1081; 106 L.T. 825] B

Chose in Action—Assignment—Equitable assignment—Fruits of action for slander —Consideration—Indebtedness to assignee and request for security, and further advance for purposes of action—Preference to assignee-creditor—Knowledge of preference by assignee—Statute 13 *Eliz., c.* 5, *s.* 6.

On May 21, 1910, the assignor, Mrs. G., being then indebted to her husband C in a large sum of money, executed a deed of assignment in his favour, whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him "all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the action of *Glegg* v. *Bromley*, or under or by virtue of any verdict, compromise, or agreement, which she may obtain, or to which she may become party D in or consequent upon the said action or otherwise howsoever, under or by reason of the same, to hold the same . . . subject to redemption on payment of all moneys due to him." The action referred to was an action for slander brought by the plaintiff against Lady B. On June 6 an action brought by the assignor against one H. was dismissed with costs amounting to £218. On June 11 the assignee, Mr. G., advanced money to the assignor for the purpose of E her action against Lady B. On July 7 that action was heard and resulted in a verdict for the assignor for £200 damages and judgment was entered for her for that sum and costs. On July 8, H. instituted garnishee proceedings against Lady B. to attach the amount of the damages recovered by the assignor in satisfaction of the costs due to him in respect of the first action. In these proceedings the assignee claimed to be entitled to those damages by virtue of F the assignment of May 21.

Held: the facts that the assignee took no proceeding to call in the debt already owing to him by the assignor and that he had advanced the assignor a large sum to enable her to pursue her action against Lady B. constituted a good consideration for the assignment; the assignment was an assignment, not of a G bare cause of action, but of the fruits of an action in which the assignee had no right to interfere and so no element of maintenance or champerty existed; it was an assignment of property, not of a mere expectancy; apart from the rules of bankruptcy a person might pay his debts in any order he pleased and charge his property as he wished as security for paying those debts, and so the covenant was not void under 13 Eliz., c. 5 [see now Law of Property Act, 1925, H s. 172], as being covinous; and, therefore, the assignment was valid and the assignee was entitled to succeed.

Notes. Considered: *Wells* v. *Wells* (1914), 30 T.L.R. 437; *German* v. *Yates* (1915), 32 T.L.R. 52; *Hambleton* v. *Brown*, [1917] 2 K.B. 93; *Hosack* v. *Robins* (1917), 61 Sol. Jo. 267; *Ellis* v. *Torrington*, [1918–19] All E.R.Rep. 1132; *Re* I *Lloyd's Furniture Palace, Evans* v. *The Co.*, [1925] All E.R.Rep. 439; *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 1 All E.R. 404. Referred to: *Re Cozens, Green* v. *Brisley*, [1913] 2 Ch. 478; *County Hotel and Wine Co.* v. *London and North Western Railway*, [1918] 2 K.B. 251; *Denny's Trustee* v. *Denny and Warr*, [1919] 1 K.B. 583; *Bob Guiness, Ltd.* v. *Salomonsen*, [1948] 2 K.B. 42.

As to equitable assignments of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 492 et seq.; and for cases see 8 DIGEST (Repl.) 573 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291; 78 L.J.Ch. 120; 100 L.T. 34; 25 T.L.R. 81; 12 Digest (Repl.) 239, *1793*.

(2) *Alliance Bank, Ltd.* v. *Broom* (1864), 2 Drew. & Sm. 289; 5 New Rep. 69; 34 L.J.Ch. 256; 11 L.T. 332; 10 Jur. N.S. 1121; 13 W.R. 127; 62 E.R. 631; 12 Digest (Repl.) 216, *1556*.

(3) *Fullerton* v. *Provincial Bank of Ireland*, [1903] A.C. 309; 72 L.J.P.C. 79; 89 L.T. 79; 52 W.R. 238, H.L.; 12 Digest (Repl.) 215, *1547*.

(4) *Oldershaw* v. *King* (1857), 2 H. & N. 517; 27 L.J.Ex. 120; 29 L.T.O.S. 364; 3 Jur.N.S. 1152; 5 W.R. 753; 157 E.R. 213, Ex. Ch.; 12 Digest (Repl.) 215, *1546*.

(5) *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; 55 L.J.Ch. 801; 54 L.T. 582; 34 W.R. 669, C.A.; 12 Digest (Repl.) 226, *1681*.

(6) *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697; 72 L.J.Ch. 218; 87 L.T. 714; 51 W.R. 315; 47 Sol. Jo. 255; 8 Digest (Repl.) 629, *661*.

(7) *Torkington* v. *Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; reversed, [1903] 1 K.B. 644, C.A.; 8 Digest (Repl.) 556, *98*.

(8) *Sprye* v. *Porter* (1856), 7 E. & B. 58; 26 L.J.Q.B. 64; 28 L.T.O.S. 229; 21 J.P. 55; 3 Jur. N.S. 330; 5 W.R. 81; 1 Digest (Repl.) 86, *654*.

(9) *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; 65 L.J.Ch. 656; 74 L.T. 585; 12 T.L.R. 412; 12 Digest (Repl.) 124, *742*.

(10) *Davis* v. *Freethy* (1890), 24 Q.B.D. 519; 59 L.J.Q.B. 318, C.A.; 8 Digest (Repl.) 609, *510*.

(11) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; reversing sub nom. *Official Receiver* v. *Tailby* (1886), 18 Q.B.D. 25, C.A.; 42 Digest 429, *23*.

Also referred to in argument:

Cole v. *Eley*, [1894] 2 Q.B. 350; 63 L.J.Q.B. 682; 70 L.T. 892; 42 W.R. 561; 10 T.L.R. 515; 38 Sol. Jo. 533, C.A.; 8 Digest (Repl.) 605, *478*.

Holbird v. *Anderson* (1793), 5 Term. Rep. 235; 101 E.R. 132; 25 Digest 204, *418*.

Re Bamford, Ex parte Games (1879), 12 Ch.D. 314; 40 L.T. 789; 27 W.R. 744, C.A.; 5 Digest (Repl.) 972, *7834*.

Edmunds v. *Edmunds*, [1904] P. 362; 73 L.J.P. 97; 91 L.T. 568; 8 Digest (Repl.) 585, *314*.

Robinson v. *M'Donnell* (1818), 2 B. & Ald. 134; Holt, N.P. 612 n; 106 E.R. 316; 25 Digest 209, *443*.

Anderson v. *Radcliffe and Walker* (1860), 29 L.J.Q.B. 128; sub nom. *Radcliffe* v. *Anderson* (1860), E.B. & E. 819; 1 L.T. 487; 6 Jur. N.S. 578; 8 W.R. 283; 120 E.R. 715, Ex. Ch.; 1 Digest (Repl.) 85, *644*.

Re Barker's Estate, Jones v. *Bygott, Bygott* v. *Hellard* (1875), 44 L.J.Ch. 487; 23 W.R. 944; 25 Digest 232, *593*.

Maskelyne and Cook v. *Smith*, [1903] 1 K.B. 671; 72 L.J.K.B. 237; 88 L.T. 148; 51 W.R. 371; 19 T.L.R. 270; 47 Sol. Jo. 317; 10 Mans. 121, C.A.; 25 Digest 205, *425*.

Stanley v. *Jones* (1831), 7 Bing. 369; 5 Moo. & P. 193; 9 L.J.O.S.C.P. 51; 131 E.R. 143; 1 Digest (Repl.) 85, *645*.

Re Attorneys & Solicitors Act, 1870 (1875), 1 Ch.D. 573; 45 L.J.Ch. 47; 24 W.R. 38; 42 Digest 130, *1245*.

May v. *Lane* (1894), 64 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132; 14 R. 149, C.A.; 8 Digest (Repl.) 556, *97*.

Prosser v. *Edmonds* (1835), 1 Y. & C. Ex. 481; 160 E.R. 196; 8 Digest (Repl.) 552, *71*.

Hill v. *Boyle* (1867), L.R. 4 Eq. 260; 1 Digest (Repl.) 92, *683.*

Re Wilson, Ex parte Vine (1878), 8 Ch.D. 364; 47 L.J.Bcy. 116; 38 L.T. 730; 26 W.R. 582, C.A.; 5 Digest (Repl.) 727, *6296.*

King v. *Victoria Insurance Co., Ltd.*, [1896] A.C. 250; 65 L.J.P.C. 38; 74 L.T. 206; 44 W.R. 592; 12 T.L.R. 285, P.C.; 8 Digest (Repl.) 558, *109.*

Dickinson (*Dickenson*) v. *Burrell, Stourton* v. *Burrell* (1866), L.R. 1 Eq. 337; 35 Beav. 257; 35 L.J.Ch. 371; 13 L.T. 660; 12 Jur.N.S. 199; 14 W.R. 412; 1 Digest (Repl.) 95, *704.*

Dawson v. *Great Northern and City Rail. Co.*, [1904] 1 K.B. 277; 73 L.J.K.B. 174; 68 J.P. 214; 90 L.T. 20; 20 T.L.R. 87; reversed [1905] 1 K.B. 260; 74 L.J.K.B. 190; 69 J.P. 29; 92 L.T. 137; 21 T.L.R. 114, C.A.; 8 Digest (Repl.) 558, *114.*

Appeal by Edward Maxwell Glegg, assignee of a debt alleged to be due to his wife, Florence Elizabeth Glegg, the judgment debtor, from a decision of the Divisional Court (Lord Coleridge and Hamilton, JJ.).

In 1910 Mrs. Glegg was indebted to her husband in a large sum of money, and had divested herself of her property for the benefit of her husband and other creditors, retaining only the equity of redemption thereof. She brought an action for false representation against Mr. Hay, and a further action for slander against Lady Bromley, and in the early part of 1910 both actions were pending. On May 21, 1910, before either action had been tried, she executed a deed of assignment to her husband, by which, after reciting that her indebtedness to him could not then be precisely ascertained, and that he had requested her to give him further security for the sums owing to him, and that she had agreed to do so, it was witnessed that in pursuance of the agreement, and in consideration of the sums so owing to him, she assigned to him:

> "All that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley*, or under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the said action or otherwise howsoever, under or by reason of the same, to hold the same . . . subject to redemption on payment of all moneys due to him."

On June 6 Mrs. Glegg's action against Mr. Hay came on for hearing, and, the plaintiff not appearing, the action was dismissed with costs amounting to £218. On June 11 Mr. Glegg advanced money to her for the purpose of her action against Lady Bromley, and on July 7 that action was heard and resulted in a verdict for Mrs. Glegg for £200 and costs. On July 8 Mr. Hay instituted garnishee proceedings against Lady Bromley to attach this amount in satisfaction of the costs due to him in respect of the action brought by Mrs. Glegg against him. In these proceedings Mr. Glegg claimed to be entitled to the damages recovered by his wife by virtue of the assignment of May 21. The judgment creditor contended that the assignment was void under 13 Eliz., c. 5. Master Chitty found (i) that the assignment was entered into by Mrs. Glegg with the deliberate intention of preferring her husband as a creditor and of defeating the claims of Mr. Hay; (ii) that the assignment was a valid one as being of valuable consideration—i.e., the antecedent debt; and (iii) that the assignment was not an assignment of a mere chose in action incapable of being assigned, but was an assignment of the fruits of a judgment debt as and when recovered. He, therefore, held that the assignment was not void under 13 Eliz., c. 5, and gave judgment for Mr. Glegg. On appeal the Divisional Court (Lord Coleridge and Hamilton, JJ.) reversed the decision of the master and directed that judgment be entered for the judgment creditor, Hay. They held that an antecedent debt was not of itself valuable consideration under 13 Eliz., c. 5, for a security given by the debtor and that the rule that in garnishee proceedings a judgment creditor could not stand in a better position than his judgment debtor

A did not preclude the judgment creditor from asserting that an assignment given by the judgment debtor was void within 13 Eliz., c. 5. Mr. Glegg appealed.

Shearman, K.C., and *Cababé* for Mr. Glegg.
Holman Gregory, K.C., and *Page* for the judgment creditor.

B **VAUGHAN WILLIAMS, L.J.**—The judgment creditor, Mr. Hay, seeks to attach a debt alleged to be due from Lady Bromley to Mrs. Glegg, the judgment debtor. Mr. Glegg, the husband of Mrs. Glegg, the judgment debtor, resists the attachment on the ground that the debt sought to be attached was before the date of the garnishee proceedings assigned by a deed of May 21 by Mrs. Glegg to Mr. Glegg for good consideration; that the judgment creditor stands exactly in the shoes of C the judgment debtor; and that, if the judgment debtor cannot impugn the deed as between herself as assignor and her husband as assignee, neither can the judgment creditor. In the Divisional Court LORD COLERIDGE, J., agreed that this is good law, at all events in a case where the assignment is not voluntary, but for good consideration, which, in my opinion, is the case here. HAMILTON, J., affirmed this general rule, but said that it would not apply if the judgment creditor could in an D independent action get a declaration to have the deed declared to be void upon general principles that he was a defeated and delayed creditor within the meaning of 13 Eliz., c. 5 [repealed by Law of Property Act, 1925, s. 172 of which replaces it.]

Before I leave that part of the question I wish to say a word or two upon the decisions. The first decision to which I am going to call attention is the decision of PARKER, J., in *Wigan* v. *English and Scottish Law Life Assurance Association* (1). E In the early part of his judgment PARKER, J., affirms a proposition with which I think everybody agrees—that is, that the mere existence of a debt is not good consideration in itself. You expect the assignment to be connected with some benefit or advantage which accrues to the assignor. PARKER, J., goes on to consider whether in that case there was good consideration or not. This is what he says ([1909] 1 Ch. at p. 297):

F "It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt."

I entirely agree with that proposition.

G "If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time."

The judgment of PARKER, J., was very largely founded upon *Alliance Bank, Ltd.* v. *Broom* (2), which was affirmed in very definite words by the House of Lords H in *Fullerton* v. *Provincial Bank of Ireland* (3). LORD MACNAGHTEN says ([1903] A.C. at p. 313):

"My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance I for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it."

That proposition seems to me to be established by *Alliance Bank, Ltd.* v. *Broom* (2) which was referred to by LORD LINDLEY, in *Fullerton's Case* (3) and by other cases, among which I may mention *Oldershaw* v. *King* (4), with the observations on that case and on *Alliance Bank, Ltd.* v. *Broom* (2), by BOWEN, L.J., in *Miles* v. *New Zealand Alford Estate Co.* (5) (32 Ch.D. at p. 289), and I may add that the proposition seems to be good sense.

I infer from all those cases not only that there must be a good consideration, but that you ought to arrive at the conclusion that the act done, when it is done, was done in pursuance of the agreement made upon the assignment of the security. That is based largely upon a decision of KINDERSLEY, V.-C., in *Alliance Bank, Ltd.* v. *Broom* (2), to which I have already referred. For myself, if it had not been for the authoritative explanation given in *Fullerton* v. *Provincial Bank of Ireland* (3) I should have doubted whether the Vice-Chancellor did mean to say that it was essential to the good consideration in those cases that you should infer in any way that the agreement to give the security was a part of that which was contracted for. I should have thought, speaking for myself, that his words tolerably plainly showed that he meant to include even a case where you could not say that it was originally contracted for at all, but where the assignor in fact took some benefit or other, not necessarily a benefit contracted for by the contract, but actually took a benefit, and that was a sufficient addition to make it good consideration. There is one passage in the Vice-Chancellor's judgment to which I should like to refer. He bases his judgment on this proposition, that the circumstances necessarily involved the benefit to the debtor of a certain amount of forbearance which he would not have derived if he had not written the letter of Sept. 19, 1864, in answer to the plaintiffs' request for security of the debt due on loan account. The Vice-Chancellor said (2 Drew. & S.M. at p. 292):

> "It appears to me that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance."

Then he says that, although it was to be inferred that if on the application for security being made the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt and would have taken steps to enforce it, although, as KINDERSLEY, V.C., states, it is true that at any time after the promise—that is, the promise contained in the debtor's letter of Sept. 19, 1864—the creditor might have insisted on payment of his debt and brought an action. I do not know that I am justified in wasting time in saying these words about what strikes me is the true meaning of the Vice-Chancellor. A meaning has been put upon it in the House of Lords in the case to which I have referred, and also by PARKER, J., and other judges in the same way. But, taking these decisions into consideration, I entirely agree with the conclusion that one ought only to connect the forbearance, or whatever else there might be, with the document of charge, and if you do that there is a good consideration. The answer to this is the same as the answer to a similar proposition by LORD COLERIDGE, J. The judgment creditor could not obtain such a declaration because, in my opinion, the assignment was for good consideration. I think this part of the judgment is based upon the assumption that there was no good consideration express or implied for the assignment.

I will now deal with the question whether there was good consideration. I think there was. The words of the deed of May 21, 1910, run thus:

> "Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sums so owing to him, the said Edward Maxwell Glegg as aforesaid, as she the said Florence Elizabeth Glegg doth hereby admit and acknowledge, she the said F. E. Glegg doth hereby assign unto the said E. M. Glegg all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley*, or under or by virtue of any verdict, compromise, or agreement which she may obtain or to which she may become party in or consequent upon the said action

A or otherwise howsoever, under or by reason of the same to hold the same subject to a redemption on payment of all moneys due to him."

The recitals recite a now pending action in the King's Bench Division of the High Court wherein F. E. Glegg, the wife, is the plaintiff and Lady Bromley is the defendant, being an action for damages against the defendant for slander, and continue:

B "And whereas the said Maxwell Glegg has requested the said Florence Elizabeth Glegg to give him such further security for the said sum so owing to him under certain indentures of Oct. 19, 1901, Jan. 24, 1906, Mar. 1, 1906, and Nov. 28, 1906."

It appears from the affidavits, and indeed it is not disputed, that subsequent to the C execution of the assignment Mr. Glegg did in fact advance his wife a large sum of money to enable her to pursue her action against Lady Bromley. I think that these advances coupled with the fact that Mr. Glegg took no proceedings to call in the existing debt from his wife to him constitute a good consideration for the assignment, and that the consideration for the assignment is not merely an existing debt, but the consideration which I have just recited.

D There are some further matters which I have to consider. First, it is said that the consideration for the assignment was a cause of action, and that the cause of action was a tort—namely, a slander. I think that all that was assigned was the fruits of an action. I know of no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on E the action being carried on, in fact the result of a compromise is actually included as a subject-matter of the assignment. There is, in my opinion, nothing resembling maintenance or champerty in the deed of assignment. The second point is this. It has been said that this is an assignment of an expectancy within the meaning of the rule laid down in *Re Ellenborough Towry Law* v. *Burne* (6). I think this was an assignment of property, and not of an expectancy. It is the assignment of F property in the shape of fruits of an action. Nor do I find anything in *Torkington* v. *Magee* (7) to prevent Mr. Glegg enforcing this assignment of the fruits of this action. Finally, I may say I have taken it for granted throughout my judgment that mere preference of one creditor over another does not bring the case within the statute of 13 Eliz., even though the parties may have been minded to defeat a particular creditor.

G Upon these grounds I think that the judgment of the Divisional Court was wrong, and that the judgment of MASTER CHITTY should be restored—that is to say, the result will be that this debt which has been sought to be attached by Mr. Hay as being a debt which was due to his judgment debtor cannot so be attached. I think I have already said that Mr. Hay stands exactly in the shoes of the judgment debtor, and that if as between her and the assignee, Mr. Glegg, she could not have H questioned his right as against her to this debt, so neither can Mr. Hay assert anything which Mrs. Glegg, his judgment debtor, could have been prevented from asserting.

FLETCHER MOULTON, L.J.—In this case we have to decide between the claims of Mr. Hay and Mr. Glegg to a certain sum of money recovered by Mrs. I Glegg from Lady Bromley in an action for slander. Mr. Hay bases his claim on a garnishee order garnisheeing this debt. Mr. Glegg bases his claim on an assignment anterior to the garnishee order, anterior also to the date at which Mr. Hay became a creditor at all, by which this debt was assigned or a covenant was given by Mrs. Glegg to assign it to Mr. Glegg by way of security for a large sum of money owing by her to him. Mr. Glegg's deed is, as I have said, anterior to anything on which Mr. Hay can base a claim, but on behalf of Mr. Hay it is said that that deed is void under the statute 13 Eliz. as being covinous—that is to say, fraudulent—intended to defeat creditors.

I propose to decide this point first because, as I can do so on the facts of the case, I shall be saved the trouble of inquiring into some difficult legal points which would arise if the deed were in fact one of those to which the statute of Elizabeth relates. In my opinion, the sole object of the deed, and its sole effect, was to transfer to Mr. Glegg by way of charge the future amounts therein referred to. It was a deliberate attempt to prefer Mr. Glegg to any creditors that might hereafter arise. I am not sure whether there were any creditors to whom he was preferred at the date at which the deed was actually made. It is well-settled law that apart from the rules of bankruptcy a person may pay his debts in any order he pleases, and may charge his property as he will as security for paying those debts. The covinous assignments referred to in 13 Eliz. are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out-and-out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute. As I think, the facts prove that this assignment comes under that class, I am satisfied that there is nothing whatever to be made of the suggestion that this was void in any way under the statute of Elizabeth. The consequence of that is that we have here a valid assignment of property which might accrue in the future by Mrs. Glegg to her husband by way of charge. I am using the word "valid" there only in view of the statute of Elizabeth, and I mean, therefore, by it an assignment that is not invalidated by that statute.

Counsel who have argued most ably on behalf of Mr. Hay raised two further difficulties. They said this was an assignment of future property. Before the Judicature Act, such an assignment would not be recognised in law. The parties would have had to go to equity to get it enforced, and equity would not enforce such an assignment if it was voluntary. Therefore, there must have been some good consideration for it before it would have had any operation before the Judicature Act, and the same effect must be given to it now. I am not disposed to disagree with them in their view of the law. I think that an assignment of future property does require to be something more than a mere voluntary assignment, a gift, in order that it may have legal operation. But there are two things to be remarked with regard to this particular assignment. In the first place, it is an assignment by way of charge to a person who was a real creditor for a large sum of money, and, secondly, there is no doubt whatever that there was at this time not only this large debt in existence, but that it was gradually being paid off by Mr. Glegg out of the revenues of his wife's property which had been assigned to him, and which he was managing for the benefit of himself and his mortgagees. Under these circumstances we find that the wife by this assignment adds to the security for the repayment of those debts, and when we look at the assignment we find (as I shall show in detail directly) that this purports to be done in answer to the request for further security from the husband. Be that as it may, she assigns this to her husband and it becomes part of the property which secures the large debt she then owed. Several cases, the most striking of which is the one which has been already referred to by the President of this court—namely, *Wigan* v. *English and Scottish Law Life Assurance Association* (1)—establish that the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security. If there has been pressure, and in response to that pressure the further assignment is made, that suffices. But the cases also show that even if there has not been pressure, but there has been a further assignment and that it is known to the creditor who has the power to put pressure upon the debtor that a further consideration has been given, the law will if it possibly can realise that the fact that the security has been increased is likely to have influenced the creditor and made him more forbearing. I go so far as to say that in the absence of strong evidence to the contrary I should presume that the increase of the security would be responded to by an increase of forbearance on the part of the creditor. Those cases, such as the one I have just mentioned, where the existence of an antecedent debt has been held not to be good consideration for a voluntary increase of the security, are cases where that voluntary increase of

A the security was not known to the creditor, and, therefore, could not possibly have influenced him in the way of forbearance. That feature is entirely absent here, and seeing that there was this heavy debt and that the assignment of future property which would come in the way of cash would automatically operate in reducing the amount of the balance due on the mortgagee's accounts, I have come to the conclusion that we ought to hold that there was a good consideration here. I B am not uninfluenced by the fact that after this increase in the security we find further advances made by the creditor to the debtor. I do not think for a moment they were stipulated for, but I think they indicate that which the courts would naturally expect—namely, that an increase of security would produce an increase of forbearance. I am, therefore, of opinion that the objection to this assignment that there was no good consideration for it fails.

C But a last point was made and urged with very great ability. It was said that this which was assigned to the husband was really a cause of action for personal wrong. What was assigned to him was that which would come from an action of slander brought by Mrs. Glegg against Lady Bromley, and it was urged that such an interest was incapable of being validly assigned. For this purpose it seems to me that we ought to look carefully at the language of the deed, because Mr. Hay, by D virtue of his garnishee order, stands exactly in the position of Mrs. Glegg herself. Mr. Hay cannot succeed unless Mrs. Glegg was in such a position that she could have taken the money and refused to give it to her husband. If she could, then she was the beneficial owner of it, and Mr. Hay has taken her place. If, on the other hand, that which had passed between Mr. and Mrs. Glegg was such that she E could not keep it herself, then Mr. Hay cannot make good his claim to it. The relevant words in the assignment which commences by referring to the assignment of all the debts and securities being given, and all the previous history of the matter, are these:

> "And whereas the said Edward Maxwell Glegg has requested the said Florence Elizabeth Glegg to give him such further security for the said sums so owing F to him under the said indentures of Oct. 19, 1901, Jan. 24, 1906, Mar. 1, 1906, and Nov. 28, 1906, as is hereinafter contained, which she has agreed to do."

That recital we must take for our purposes as being true.

> "Now, this indenture witnesseth that in pursuance of the said agreement and in consideration of the sums so owing to him the said Edward Maxwell Glegg G as aforesaid, as she the said Florence Elizabeth Glegg doth hereby admit and acknowledge, she the said F. E. Glegg doth hereby assign unto the said E. M. Glegg all that the interest, sum of money, or premises to which she is or may become entitled under or by virtue of the said action of *Glegg* v. *Bromley*, or under or by virtue of any verdict, compromise, or agreement which she may obtain, or to which she may become party in or consequent upon the said action H or otherwise howsoever, under or by reason of the same . . ."

We are all agreed that you cannot assign a cause of action for a personal wrong, and I am not sure that some of the words here might not bear a meaning which would cover that, but if that was so the only effect would be that they would be inoperative because there is nothing in the way of maintenance or champerty in this assignment at all. It is intended clearly to assign the fruits in the action I so that whatever benefit comes from the action shall go to Mr. Glegg by way of further security, but there is nothing which gives him the right to intervene in the action, or which is in any way against public policy. So I do not trouble myself to consider whether there are any words which may be such that they could not be supported. What I see clearly is that these words do assign whatever sum of money comes as the fruit of the action, and, that being so, I can see no valid legal reason why an assignment of property so defined should not be valid, provided the assignment is such that it is a good assignment in respect of property arising in the future. I think that a sum of money coming into the possession of Mrs. Glegg, or

to which she establishes her rights so that it is the same as if it came into her possession, is property, and is property that is assignable whatever its source is, and I decline to make any difference with regard to money by reason of the source from which it comes. I think we must look upon it as property becoming the property of Mrs. Glegg in the future, clearly assigned by the words of this deed, and that being so, seeing that I think this deed was for good consideration, I am of opinion that these proceeds did under the assignment pass to Mr. Glegg, and that his title prevails over that of Mr. Hay.

PARKER, J.—I also am of opinion that this appeal ought to succeed. In the first place, I think that according to the true construction of the assignment in question the subject-matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action. It is, I think, necessary to bear this distinction in mind, particularly in view of the course taken by the argument of counsel for the judgment creditor. Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings; in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on this point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule. It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the court, property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass. It is clear, therefore, that no question of maintenance can ever arise.

Thus, in the present case, as I construe the assignment, the assignor remains at liberty to proceed or not with the slander action as she may think fit. The assignee has no right and is under no duty to interfere. The assignment, therefore, is open to no objection on the ground of maintenance, nor is it open to any objection on the ground of champerty. But champerty, after all, is only a particular form of maintenance. This appears to be reasonably clear from such cases as *Sprye* v. *Porter* (8) and *Rees* v. *De Bernardy* (9). Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty. This doctrine is well established by *Davis* v. *Freethy* (10). I can find no trace in the authorities of any distinction having been drawn in this respect between actions based on personal tort and other actions, nor do I see why on principle there should be any such distinction. I am of opinion, therefore, that there is nothing to void this assignment on the ground of public policy.

For every equitable assignment, however, there must be consideration. If there be no consideration, there can be no equitable assignment. This appears from *Tailby* v. *Official Receiver* (11) and *Re Ellenborough* (6). The question whether in this case there was or was not consideration for the equitable assignment was certainly

before the master, and it was argued. As far as I can gather by his notes *Re Ellenborough* (6) was quoted to him, and the master decided that there was consideration distinguishing *Wigan* v. *English and Scottish Law Life Assurance Association* (1). The ratio decidendi of that case was clearly that there could have been no forbearance or alteration of position on the part of the mortgagee on the strength of the new security because he had no notice of it whatever, and it is precisely on that ground the master distinguished *Wigan* v. *English and Scottish Law Life Assurance Association* (1) from the case which was before him. In other words, in my opinion, the master came to the conclusion that there was consideration because the assignee was aware of the assignment and acted or forbore to act upon the faith of it, and this, according to the authorities, is sufficient consideration.

I see no reason myself to differ from this conclusion. I think that where a creditor asks for and obtains a security for an existing debt, the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security, and I cannot think that this inference is rebutted by the fact that the reason why he asks for the further security is his desire to obtain a benefit for himself at the expense of another creditor who may shortly be in a position to take the subject-matter of the proposed security in execution. The court below appears to have adopted the master's finding that the assignment was a valid and operative assignment at any rate as against the assignor, a finding which involved the existence of consideration, but at the same time they held that as against the judgment creditor the assignment was void under 13 Eliz., c. 5, on the ground that it was a voluntary assignment. If the assignment was operative at all, it can only have been on the ground that it was not voluntary, but that there was good consideration for it.

The only remaining point is, I think, that which was argued under the statute 13 Eliz., c. 5. The scheme of that statute is this. By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void as against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand, the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it was not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso, it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent. In the present case it is quite unnecessary to consider the proviso, for everyone is agreed, and I think it is clear on the evidence, that if there was any fraudulent intention, the assignee had notice of it. The question, therefore, is really a question which reduces itself to this. Does a debtor who gives his creditor security with the intention of preferring him to other creditors or another creditor, and consequently defeating or delaying such other creditors or creditor, have an illegal intention within the meaning of the statute? In my opinion, it is well decided that he has not, and as far as I can gather no distinction has ever been drawn in the cases between a preference given for fresh security and a preference given without any fresh security. As a matter of fact, it is unnecessary for the purposes of this case to consider that point, for, as I have said before, if the assignment is good in any way at all, it must be because there was consideration.

Appeal allowed.

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[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]